

CHAPTER SEVENTEEN

GOVERNMENT PROCUREMENT

Article 17.1: Definitions

For the purposes of this Chapter:

in writing or **written** means a 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 by which the procuring entity contacts a supplier of its choice and may, in the circumstances set out in Article 17.11(2), choose not to apply Articles 17.6, 17.7, 17.9, 17.10, 17.12 and 17.13;

offsets means a condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, investment, counter-trade, the licensing of technology or similar actions or requirements;

open tendering procedure means a procurement method by which all interested suppliers may submit a tender;

original development includes limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs;

procurement means the process by which a procuring entity obtains the use of or acquires a good or service for a governmental purpose and not with a view to commercial sale or resale, or use in the production or supply of a good or service for commercial sale or resale;

procuring entity means an entity of a Party listed in Annexes 17.1 or 17.2;

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

service includes a construction service, unless otherwise specified;

supplier means a person that has provided, provides or could provide a good or service to a procuring entity; and

technical specification means a tendering requirement that:

- (a) lays down the characteristics of a good or service 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 labeling requirements, as they apply to a good or service.

Article 17.2: Scope and Coverage

1. This Chapter applies to a measure regarding a covered procurement.
2. For the purposes of this Chapter, covered procurement means procurement for a governmental purpose:
 - (a) of a good, service, or both:
 - (i) as specified in each Party's schedules to the annexes of this Chapter; and
 - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of a good or service for commercial sale or resale;

- (b) by a contractual means, including: purchase; lease, rental or hire purchase, with or without an option to buy;
- (c) for which the value, as estimated in accordance with paragraph 6, equals or exceeds the relevant threshold specified in a Party's annexes to this Chapter, at the time of publication of a notice in accordance with Article 17.6;
- (d) by a procuring entity; and
- (e) that is not otherwise excluded from coverage in paragraph 3 or a Party's schedules to the annexes of this Chapter.

3. This Chapter does not apply to:

- (a) the acquisition or rental of land, existing buildings or other immovable property or rights on that property;
- (b) a non-contractual agreement or form of assistance that a Party including a state enterprise provides, such as a grant, loan, equity infusion, fiscal incentive, subsidy, guarantee, or cooperative agreement;
- (c) government provision of a good or service to a person or a sub-national government;
- (d) a purchase for the direct purpose of providing foreign assistance;
- (e) a purchase funded by a grant, loan or other assistance made to a Party or an entity of a Party by a person, international entity, association, international organization, or other State or foreign government if the provision of that assistance is subject to conditions that are inconsistent with this Chapter;

- (f) the procurement of a fiscal agency or depository service, liquidation and management service for a regulated financial institution, or a service related to the sale, redemption and distribution of public debt;
- (g) the procurement of a banking, financial, or specialized service related to:
 - (i) the incurring of public indebtedness, or
 - (ii) public debt management;
- (h) the hiring of a government employee or related employment measure;
- (i) a good or service component of a contract awarded by an entity that is not listed in Annexes 17.1 or 17.2;
- (j) a purchase made under exceptionally advantageous conditions that only arises in the very short term such as an unusual disposal by an enterprise or a disposal of business assets due to liquidation or receivership but not a routine purchase from a regular supplier.

4. If a procuring entity awards a contract that is not covered by this Chapter, this Chapter does not cover a good or service component of that contract.

5. Nothing in this Chapter prevents a Party from developing new procurement policies, procedures or contractual means, provided they are not inconsistent with this Chapter.

Valuation

6. In estimating the value of a procurement in order to ascertain whether it is a procurement covered by this Chapter, a procuring entity shall:
- (a) not divide a procurement into separate procurements or select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Chapter;
 - (b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:
 - (i) premiums, fees, commissions, and interest, and
 - (ii) the estimated maximum total value of the procurement, inclusive of optional purchases, if the procurement provides for the possibility of an options clause; and
 - (c) base its calculation of the total maximum value of the procurement over its entire duration, if the procurement is to be conducted in multiple parts with contracts to be awarded at the same time or over a given period to one or more suppliers.

Article 17.3: Security and General Exceptions

1. This Chapter does not prevent a Party from taking an action or not disclosing information that it considers necessary for the protection of its essential security interests relating to procurement:
- (a) of arms, ammunition or war materials;
 - (b) indispensable for national security; or
 - (c) for national defence purposes.

2. Provided that a measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against a Party if the same conditions prevail, or a disguised restriction on trade between the Parties, a Party may adopt or maintain a measure:

- (a) necessary to protect public morals, order or safety;
- (b) including an environmental measure, necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to a good or service of a person with a disability, a philanthropic institution or prison labour.

Article 17.4: General Principles

National Treatment and Non-Discrimination

1. With respect to a measure regarding a covered procurement, each Party, including its procuring entities, shall accord to a good or service of the other Party, and to a supplier of the other Party of that good or service, treatment no less favourable than the most favourable treatment the Party or entity accords to a domestic good, service or supplier.

2. With respect to a measure regarding a covered procurement, a Party, including its procuring entities, may not:

- (a) treat a locally established supplier less favourably 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 good or service offered by that supplier for a particular procurement is a good or service of the other Party.

Rules of Origin

3. With regard to the procurement of a good covered by this Chapter, each Party shall apply the rules of origin that it applies to that good in the normal course of trade.

Offsets

4. Subject to this Chapter, a Party, including its procuring entities, shall not seek, take account of, or impose offsets at a stage of a procurement process.

Measures Not Specific to Procurement

5. This Article does not apply to:

- (a) a measure regarding a customs duty or other charge imposed on or in connection with, importation, or regarding the method of levying that duty or charge;
- (b) another import regulation, including a restriction or formality; or
- (c) a measure affecting trade in a service, other than a measure specifically governing procurement covered by this Chapter.

Article 17.5: Information on the Procurement Process

1. Each Party shall promptly:

- (a) publish a law, regulation, or modification to those measures; and
- (b) make publicly available a judicial decision, administrative ruling of general application, or a procedure,

specifically governing procurement covered by this Chapter.

2. At the request of a Party, the other Party shall provide it with a copy of a judicial decision or administrative ruling of general application or procedure.

Article 17.6: Publication of Notices

Notice of Intended Procurement

1. Unless otherwise provided in Article 17.11(2), a procuring entity shall, for each procurement covered by this Chapter, publish a notice of intended procurement that remains readily accessible to the public inviting suppliers to submit tenders. A procuring entity shall publish the notice in publications that are widely disseminated and remain readily accessible to the public.

2. Each notice of intended procurement shall include:

- (a) an indication that the procurement is covered by this Chapter;
- (b) a description of the intended procurement;
- (c) a list of the conditions that a supplier must fulfill to participate in the procurement process;
- (d) the name of the procuring entity;
- (e) the address where documents relating to the procurement process may be obtained;
- (f) if applicable, the cost for obtaining the tender documentation;
- (g) the time limits for submission of tenders;
- (h) the address for submission of tenders; and
- (i) the timeframe for delivery of the good or service to be 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 that procuring entity's future procurement plans.

Article 17.7: Conditions for Participation

1. If a procuring entity requires a supplier to satisfy a registration, qualification, or other requirement or condition for participation in order to participate in a procurement process, the procuring entity shall publish a notice inviting suppliers to apply for registration, qualification or demonstration of suppliers' satisfaction of any other conditions for participation. The procuring entity shall publish the notice sufficiently in advance to provide interested suppliers sufficient time to prepare and submit applications and to provide the procuring entity with sufficient time to evaluate and make its determinations based on those applications. The procuring entity may establish a final date for the submission of requests for participation, provided that date allows suppliers a reasonable time to prepare and submit such requests, taking into account the nature and complexity of the procurement.

2. In establishing the conditions for participation, a procuring entity shall:
- (a) limit the conditions for participation in a covered procurement to those that are essential to ensure that the supplier has the legal and financial capacity and the technical ability to fulfill the requirements and technical specifications of the procurement;
 - (b) refrain from imposing the condition that, in order for a supplier to participate in a procurement process, the supplier has:
 - (i) previously been awarded a contract by a procuring entity of a Party, or
 - (ii) prior experience in the territory of that Party.

3. To assess whether a supplier satisfies the conditions for participation, a procuring entity shall:

- (a) evaluate the financial capacity and technical ability of a supplier on the basis of that supplier's business activity inside and outside the territory of the Party of the procuring entity;
- (b) recognize as qualified the suppliers of the other Party that satisfy the conditions for participation; and
- (c) base its evaluation solely on the conditions for participation that the procuring entity has specified in advance in its notices or tender documentation.

List of Suppliers

4. A procuring entity may establish or maintain a publicly available list of suppliers qualified to participate in a procurement process. If a procuring entity requires a supplier to qualify for a list as a condition for participation in a procurement process, and a supplier that has not yet qualified applies for inclusion in the list, the procuring entity shall promptly start the qualification procedures and shall allow the supplier to submit a tender, if it is determined to be a qualifying supplier, provided there is sufficient time to fulfill the conditions for participation within the time period established for tendering.

Information on Procuring Entity Decisions

5. A procuring entity shall promptly inform a supplier that applies for participation in a procurement process or for inclusion on a list of suppliers of the procuring entity's decision with respect to the application.

6. If a procuring entity:

- (a) rejects a supplier's application for participation in a procurement process or an application for inclusion on a list of suppliers; or

- (b) ceases to recognize a supplier as qualified,

the procuring entity shall promptly inform the supplier of its decision and, at the request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

- 7. A procuring entity may exclude a supplier from a procurement process on grounds such as bankruptcy or false declarations.

Article 17.8: Technical Specifications

- 1. A procuring entity may not prepare, adopt or apply a technical specification with the purpose or the effect of creating an unnecessary obstacle to trade between the Parties.

- 2. In prescribing a technical specification for a good or service being procured, a procuring entity, shall, if appropriate:

- (a) specify the technical specification in terms of a performance requirement rather than a design or descriptive characteristic; and
- (b) base the technical specification on an international standard, if one exists; otherwise, base the technical specification on a national technical regulation, recognized national standard or building code.

- 3. A procuring entity shall not prescribe a technical specification requiring or referring to a particular trademark or trade name, patent, design, type, specific origin, or producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirement, provided that, in those cases, the procuring entity includes words such as “or equivalent” in the tender documentation.

- 4. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used to prepare or adopt a technical specification for a specific procurement from a person that may have a commercial interest in that procurement.

5. For greater certainty, this Article does not preclude a procuring entity from preparing, adopting, or applying a technical specification to promote the conservation of natural resources.

Article 17.9: Tender Documentation

1. A procuring entity shall make available to interested suppliers tender documentation that includes the information necessary for a supplier to prepare and submit a responsive tender. The documentation shall include the evaluation criteria that the procuring entity intends to use to award the contract, including the cost factors and the weights or, if appropriate, the relative values, that the procuring entity will assign to the criteria in evaluating tenders.

2. A procuring entity may make available the tender documentation required by paragraph 1 by publishing that documentation by electronic means accessible to interested suppliers. If a procuring entity does not publish tender documentation by electronic means accessible to interested suppliers, it shall promptly make the documentation available at the request of a supplier.

Modifications

3. If, in the course of a procurement process, a procuring entity modifies the criteria referred to in paragraph 1, it shall transmit the amended tender documentation in writing:

- (a) to all suppliers that are participating in the procurement process at the time the criteria are modified, if the procuring entity knows the identities of those suppliers, and in all other cases, in the same manner as the original documentation was made available; and
- (b) in adequate time to allow those suppliers to modify or submit amended tenders, as appropriate.

Article 17.10: Time Limits for the Submission of Tenders

1. A procuring entity shall provide suppliers sufficient time to submit applications to participate in a procurement and to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement.

Deadlines

2. Except as provided for in paragraphs 3 and 4, a procuring entity shall establish that the final date for the submission of tenders is not less than 40 days from the date on which the notice of intended procurement is published.

3. If domestic law allows, a procuring entity may reduce by 5 days the time limit established under paragraph 2 for the submission of tenders, for each one of the following circumstances:

- (a) the notice of intended procurement is published by electronic means;
- (b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- (c) the procuring entity accepts tenders by electronic means.

4. A procuring entity may establish a time limit of less than 40 days for suppliers to submit tenders, but not less than 10 days, if:

- (a) the procuring entity publishes a separate notice at least 40 days and not more than 12 months before the final date for the submission of tenders that contains a description of the procurement, the approximate time limits for the submission of tenders or, if applicable, conditions for participation in a procurement process, and the address from which documents relating to the procurement may be obtained;
- (b) there is a second or subsequent publication of a notice for procurement of a recurring nature;

- (c) the procuring entity procures a commercial good or service that is sold or offered for sale to, and customarily purchased and used by, a non-governmental buyer for a non-governmental purpose; or
- (d) a state of urgency duly substantiated by the procuring entity renders the time periods specified in paragraph 2, or, if applicable, paragraph 3, impracticable.

Article 17.11: Limited Tendering

1. Subject to paragraph 2, a procuring entity shall award a contract by means of open tendering procedures.

2. Provided that a procuring entity does not use this paragraph to avoid competition among suppliers or to protect domestic suppliers, the procuring entity may award a contract by limited tendering or other equivalent tendering procedures if:

- (a) the requirements of the tendering documentation are not substantially modified and:
 - (i) no tenders were submitted or no suppliers applied to participate in a procurement,
 - (ii) the tenders submitted were collusive, or
 - (iii) no tenders conforming to the essential requirements of the tender documentation, including any conditions for participation, provided in a prior tendering procedure were submitted;
- (b) a good or service being procured can be supplied only by a particular supplier and a reasonable alternative or substitute does not exist because:
 - (i) the good or service is a work of art,

- (ii) the good or service is protected by a patent, copyright or other exclusive intellectual property right, or
 - (iii) there is an absence of competition for technical reasons;
- (c) for additional deliveries by the original supplier of a good or service that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services or installations, a change of supplier would compel the procuring entity to procure a good or service not meeting requirements of interchangeability with existing equipment, software, services, or installations procured under the initial procurement;
- (d) the good is purchased on a commodity market;
- (e) 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;
- (f) an additional construction service that was not included in the initial contract but that is within the objectives of the original tender documentation has become necessary, due to unforeseeable circumstances, to complete the construction service described in the original tender documentation. However, the total value of the contracts awarded for additional construction services may not exceed 50% of the total amount of the initial contract;
- (g) to the extent that it is strictly necessary, for reasons of urgency brought about by events unforeseeable by the procuring entity, the good or service cannot be obtained in time using an open tendering procedure;

- (h) a contract is awarded to a winner of an architectural design contest, provided that:
 - (i) the contest was organized in a manner that is consistent with the principles of this Chapter, including regarding the publication of an invitation to suitably qualified suppliers to participate in the contest, and
 - (ii) the participants are judged by an independent jury with a view to the design contract being awarded to the winner; or
- (i) a procuring entity needs to procure a consulting service regarding matters of a confidential nature, the disclosure of which can reasonably be expected to compromise government confidences, cause economic disruption or otherwise be contrary to the public interest.

3. A procuring entity shall maintain a record or prepare a written report for each contract awarded under paragraph 2 in a manner consistent with Article 17.13(3). The record or report shall indicate the circumstances and conditions described in paragraph 2 that justify the use of limited tendering.

Article 17.12: Awarding of Contracts

1. To be considered for award, a tender shall be submitted in writing by a supplier that has satisfied the conditions for participation and shall, at the time it is submitted, conform to the essential requirements of the tender documentation.

2. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the procuring entity determines is fully able to undertake the contract and, based on the requirements and evaluation criteria set out in the tender documentation, submits the most advantageous tender.

Article 17.13: Information on Awarded Contracts

Information Provided to Suppliers

1. A procuring entity shall promptly inform suppliers that submit tenders of the procuring entity's contract award decision. Subject to Article 17.14, a procuring entity shall, on request, provide an unsuccessful supplier with the reasons why the procuring entity did not select that supplier's tender and the relative advantages of the successful supplier's tender.

Publication of Award Information

2. Promptly after awarding a contract, a procuring entity shall publish a notice that includes the following information about the contract award:

- (a) the name of the procuring entity;
- (b) a description of the good or service procured;
- (c) the name of the supplier awarded the contract;
- (d) the value of the contract award; and
- (e) if the procuring entity used limited tendering procedures, an indication of the circumstances justifying the use of those procedures.

Maintenance of Records

3. A procuring entity shall maintain records and reports of tendering procedures and contract awards, including the records and reports provided for in Article 17.11(3), and shall retain those records and reports for a period of at least 3 years after the award of a contract.

Article 17.14: Non-Disclosure of Information

1. A Party, including its procuring entities, administrative authorities, and judicial authorities, may not disclose confidential information that would prejudice the legitimate commercial interests of a particular person or that could prejudice fair competition between suppliers, without the formal authorization of the person that provided the information to the Party.

2. A Party, including its procuring entities, is not required under this Chapter to release confidential information if the release:

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

Article 17.15: Domestic Review Procedures

1. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent from its procuring entities to:

- (a) receive and review a challenge submitted by a supplier relating to the obligations of this Chapter; and
- (b) make appropriate findings and recommendations.

2. Each Party shall ensure that an authority it establishes or designates under paragraph 1 provides a supplier with:
 - (a) sufficient time to prepare and submit a written challenge, which may not 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;
 - (b) the opportunity to review relevant documents and be heard by the authority in a timely manner;
 - (c) the opportunity to reply to the procuring entity's written response to the supplier's challenge; and
 - (d) a decision or recommendation relating to a challenge with an explanation of the basis for each decision or recommendation that is promptly delivered in writing.

3. Each Party shall ensure that an authority it establishes or designates under paragraph 1 may take a prompt interim measure to preserve the supplier's opportunity to participate in the procurement process, including the suspension of the procurement process. The procedures for taking an interim measure may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether an interim measure should be applied.

4. Each Party shall ensure that its review procedures are made generally available in writing and that those procedures are timely, transparent, effective, and consistent with the principle of due process.

5. Each Party shall ensure that a document related to a supplier's challenge of a procurement process is available to the authority established or designated under paragraph 1.

6. A procuring entity shall respond in writing to a supplier's challenge.

7. Each Party shall ensure that a supplier's challenge is reviewed in a manner that does not prejudice that supplier's participation in an ongoing or future procurement process.

8. If a body other than an authority established or designated under paragraph 1 initially reviews a supplier's 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 whose procurement process is the subject of the challenge.

Article 17.16: Modifications and Rectifications to Coverage

1. A Party may make technical rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to the Annexes to this Chapter, provided that it notifies the other Party in writing and that the other Party does not object in writing within 30 days of receipt of the notification. A Party is not required to provide compensatory adjustments to the other Party for these technical rectifications or minor amendments.

2. A Party may modify its coverage under this Chapter if it:

- (a) notifies the other Party in writing and the other Party does not object in writing within 30 days of receipt of the notification; and
- (b) offers acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification within 30 days of notifying the other Party.

3. Notwithstanding paragraph 2(b), a Party is not required to provide compensatory adjustments if the proposed modification covers a procuring entity on which the Parties decide that the Party has effectively eliminated its control or influence.

4. If a Party disputes that government control or influence has been effectively eliminated, the objecting Party may request further information or discussions with a view to clarifying the nature of any government control or influence and jointly determining the procuring entity's status under this Chapter.

5. If the Parties at the Commission agree to the proposed modification, rectification, or minor amendment, or if a Party has not objected within 30 days under paragraphs 1 or 2(a), they shall give effect to the agreement by promptly modifying the relevant Annex according to national legislation.

6. If a Party does object within 30 days under paragraphs 1 or 2(a), or does not accept the compensatory adjustment offered under paragraph 2(b), then the change to coverage proposed by the other Party under that paragraph does not take effect.

Article 17.17: Updating Provision

In the interest of promoting the modernization of procurement systems and ensuring consistency with the procedural obligations of the Parties' other trade agreements relating to procurement, if one Party enters into another international agreement that updates procurement procedures and practices, then, at the request of either Party, the Parties shall consider whether they should modify this Chapter.