



## Caribbean Regional Negotiating Machinery

### **Understanding the Nature and Scope of the Public Procurement Chapter of the CARIFORUM-EC Economic Partnership Agreement (EPA)**

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#### **INTRODUCTION**

The Caribbean Regional Negotiating Machinery (CRNM) has noted some misunderstandings and misinterpretation of the negotiated text in Chapter 3, *Public Procurement*, of the EPA. Recognizing that, with the exception of the Dominican Republic, this is the first agreement on Public Procurement that the majority of the CARIFORUM (CF) region has undertaken, it is critical that the provisions are accurately interpreted and clearly understood. This brief therefore seeks to provide a detailed explanation of the key points of the Chapter as well as any implications these may have for regional integration processes that are planned and/or currently underway.

#### **THE NEGOTIATED PUBLIC PROCUREMENT COMMITMENTS**

There appears to be a serious misinterpretation of the negotiated Public Procurement commitments contained in Title IV (*Trade Related Issues*), Chapter 3 (*Public Procurement*) of the EPA, in particular sections of Articles 167 and 170, 171 and 174, as they pertain to perceived rights of market access and consequent implications for the planned CSME Government Procurement regime. In addition, there have been queries about the need for thresholds as well as concerns regarding the relevant negotiating mandate. These concerns are addressed, in detail, below.

##### *Article 167 Scope*

*The provisions of this Chapter apply only to those procuring entities listed in Annex 6 and in respect of procurements above the thresholds set out in that Annex.*

*The Parties and the Signatory CARIFORUM States shall ensure that the procurement of their procuring entities covered by this Chapter takes place in a transparent manner according to the provisions of this Chapter and the Annexes pertaining thereto, treating any eligible supplier of either the Signatory CARIFORUM States or the EC Party equally in accordance with the principle of open and effective competition.*

**Legal Assessment and Explanatory Detail:** These provisions, being the core of the scope article, determine the precise nature of the obligations specified in the entire chapter. It is therefore important that these provisions be interpreted in their proper context and in line with the mandate given to the CARIFORUM Negotiators by the CARIFORUM Heads of Government.

The effect of paragraph 1 is to specifically address the commitment contained in the chapter to the Signatory CARIFORUM States with respect only to the procurement activities carried out by the entities specified in Annex I within the threshold limits also therein specified.<sup>1</sup> By itself, this provision is not determinative of the issue of whether market access commitments are contained in the Chapter as it references the need to closely examine the ensuing provisions.

It is paragraph 2 which gives the clear indication that the Chapter is not intended to be one containing substantive market access commitments. In this regard, the most telling elements in the provision are found in the following language. “*The Parties and the Signatory CARIFORUM States shall ensure that the procurement of their procuring entities covered by this Chapter takes place in a transparent manner **according to the provisions of this Chapter.***” The highlighted portion in particular indicates that the ensuing provisions serve only to further define the extent of the transparency obligation.

This paragraph, in effect therefore, binds the CARIFORUM States to carry out their procurement activities (within the scope of paragraph 1 above) according to the rules of transparency set out in the entire Chapter. It also binds CARIFORUM States to ensuring equal treatment with regards to open and effective competition for **eligible** suppliers. The text does not attempt to determine who is eligible for participation in the procurement activities of CARIFORUM States. That determination lies solely within the discretion of the procuring entity and/or State concerned. In practical terms, if a procuring entity offered for coverage under the EPA carries out procurement of goods with value exceeding 164,753 Euro, then that entity must follow the transparency rules of Chapter 3. However, eligibility to participate in the procurement exercise, i.e., whether open to European suppliers, American suppliers, CARICOM suppliers, or restricted to national, or even further – to a specific locale within the territory of the procuring State, is **solely and entirely up to the procuring State.** Once eligibility has been determined, then all of the eligible suppliers (determined pursuant to criteria that is set by the procuring State or entity) must be treated equally in accordance with the principle of open and effective competition. This is very different from an automatic eligibility to participate, which is what market access effectively dictates.

This is supported by the definition of “eligible supplier” contained in Article 166 which reads: “*eligible supplier means a supplier who is allowed to participate in the public procurement opportunities of a Party or Signatory CARIFORUM State, in accordance with domestic law and without prejudice to the provisions of this Chapter.*”

*Article 167.1 - Supporting the creation of regional procurement markets*

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<sup>1</sup> Euro 164,753 (goods and services) and Euro 6,909,014 (works). It is to be further noted that owing to the novelty of this area for many CARIFORUM Member States, CARIFORUM succeeded in obtaining the highest thresholds in existing bilateral trade agreements. In addition, we successfully limited our procuring entity coverage to Central Government only, despite the EC’s wider coverage.

1. *The Parties recognize the economic importance of establishing competitive regional procurement markets.*

**Explanatory Detail:** This paragraph is a political statement, carrying no substantive obligation.

2. (a) *With respect to any measure regarding covered procurement, each Signatory CARIFORUM State, including its procuring entities, shall endeavour not to treat a supplier established in any CARIFORUM State less favourably than another locally established supplier.*

**Explanatory Detail:** In practical terms, for CARIFORUM, this paragraph states that with regard to procurements carried out by the Central Government entities listed in Annex I, and with values exceeding 164,753 Euro for goods and services, and 6,909,014 Euro for works, CARIFORUM State (A) will try not to treat a supplier from CARIFORUM State (B) any less favourably than it treats a supplier established in State CARIFORUM (A). This is the exact circumstance that currently obtains, in practice, in the CARIFORUM States. The EPA text does **not** oblige CARIFORUM State (A) to grant market access to CARIFORUM State (B). But CARIFORUM State (A) is free to do so if national laws permit. In practice, therefore, this paragraph means that (i) CARICOM countries will continue to try to move towards the establishment of the CSME Government Procurement regime, and (ii) CARICOM countries and the Dominican Republic will continue to try to move toward completion of the CARICOM-DR Free Trade Agreement, in particular the government procurement protocol. There is no right of market access granted by the text whether in respect of the EU or intra-CARIFORUM.

There have been some questions with regard to the establishment of an EU supplier in a CARIFORUM State, and the application of 2 (a) above in such a circumstance, as regards market access. Let us examine the following scenario.

European Supplier (A) establishes in the Dominican Republic (DR) in accordance with the national laws governing foreign direct investment and establishment, and therefore is no longer a European supplier in accordance with DR law. That supplier is now a bonafide legal person of the DR and, by law, a DR supplier. Supplier (A) is a bonafide legal DR person, irrespective of whether the establishment is in part or in whole owned by European interests. The Government of Barbados offers a tender opportunity which interests Supplier (A). Under the EPA provision at paragraph 2 (a), there is no obligation for the Government of Barbados to treat Supplier (A) in the same manner that it treats Barbadian suppliers. The EPA commitment is that the Government of Barbados should endeavour to do so, which is already satisfied by virtue of the fact that Barbados is party to the CSME efforts underway to first establish a CSME GP regime and second, establish a CARICOM-DR GP regime in accordance with the requirements of the CARICOM-DR Free Trade Agreement.

Further, some persons have queried whether the “endeavour” language is sufficient to prevent our hypothetical DR supplier A from claiming a right to participate in the Government of Barbados’ procurement exercise, based on paragraph 2 (a) of the EPA text.

Let us be clear that one cannot seek to re-define the meaning of the word endeavour. Both in terms of the English language established interpretation as well as “trade-speak,” the term endeavour can in no way imply a substantive obligation which, in this case, would be to confer rights of market access. Trade professionals are very well aware of this long established principle, which is based numerous years of international trade precedent.

(b) *With respect to any measure regarding covered procurement, the EC Party and the Signatory CARIFORUM States, including their procuring entities:*

(i) *shall endeavour not to discriminate against a supplier established in either Party on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of either Party;*

**Explanatory Detail:** This paragraph means that if a European supplier establishes in a CARIFORUM State according to the relevant laws of that State and therefore legally becomes a CARIFORUM local supplier, the Government of that CARIFORUM State, in its procurement activities – having determined eligibility to participate, will **try** to not discriminate against this supplier on the basis that he offers European goods or services. It also means that should the CARIFORUM State, **at its own discretion**, decide to allow EC participation in a particular procurement, the Government will make efforts to not discriminate against the EC supplier on the basis that he offers European goods and/or services for the procurement in question.

Again, let us examine this clause using our hypothetical DR supplier (A). The Government of Jamaica offers a tender opportunity for the purchase of goods. The Government of Jamaica, in accordance with the relevant laws of Jamaica decides to open the procurement opportunity. DR supplier (A) submits a tender offering to supply European-made goods. The Government of Jamaica will now evaluate all the tenders received on the basis of the specifications contained in the tender document, and determine the “lowest qualified tender” which will win the contract. There is no bearing on whether the goods are European, American or Chinese. If a European Supplier in France submits a tender, the same analysis would apply. If the Government of Jamaica, in accordance with Jamaica laws, determines that the EU supplier is eligible to participate in its procurement opportunity, the EPA commitment means that the Government will try not to discriminate against the EU supplier on the basis that he offers European goods.

Nothing in this paragraph confers a right on an EU or CF supplier to access the market of any CF State. The paragraph addresses considerations that arise **after** the eligibility decision has been determined by the procuring State. If a CF government decides that, in accordance with national laws, policy or the nature of the particular procurement, an EU supplier or CF supplier is eligible to participate in the procurement opportunity, then the EPA commitment requires the Government to try not to discriminate against these suppliers on the basis that they offer European goods. There is no obligation to not discriminate, and more importantly, there is absolutely no bearing on the right to access the market of any CF State.

(ii) *shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory CARIFORUM State or of the EC Party.*

**Explanatory Detail:** In practice, this paragraph means that if a CARIFORUM or European supplier establishes in a CARIFORUM State according to the relevant laws of establishment, and therefore becomes a local supplier of that State, the Government, in its procurement activities, will not treat this supplier less favourably than other local suppliers on the basis of the degree of foreign ownership or affiliation. This is the same circumstance that currently prevails in the CF States. The premise of the paragraph is that no country, would wish to discriminate against itself

in this manner, as all CF States want to encourage FDI. Again, there is no right of market access obligation contained in this paragraph.

It should also be noted that the specific references to “covered procurement” in paragraphs 2 (a) and (b), mean that on a proper contextual interpretation, the non-discrimination obligation in favour of both other CARIFORUM States and the EC applies only to those procurements in respect of which there is an obligation to abide by the negotiated transparency rules. The true nature of the provision therefore is not one connoting a right of market access but rather, one frowning upon discrimination in the administration of a procurement process in respect of which eligibility criteria have been determined by a CARIFORUM State.

The concern has also been raised that paragraph 2 (b) (ii) undermines Article 32 of the Revised Treaty of Chaguaramas (Revised Treaty). Article 32 of the Revised Treaty is headed “Prohibition of New Restrictions on the Right of Establishment” and in order to ensure the proper achievement of the objectives of the internal market, mandates that CSME Member States must accord rights of establishment to all entities who meet the criteria of a community national. With respect to companies, the qualifying criteria are set out in paragraph 5 (c) of Article 32 of the Revised Treaty. Article 32 is meant therefore to assure automatic preferential treatment to community nationals without the need for any further intra-regional legal instruments or bilateral arrangements. But it does not have the effect of denying national treatment or rights of establishment to other entities who do not meet the “community national” criteria of the provision, for example, by way of percentage foreign ownership. Such other entities can receive rights of establishment pursuant to the terms of bilateral arrangements such as the EPA. This decision is solely within the discretion of the CSME Member States. It should be noted that during the discussion of this text in the Technical Working Group meetings (i.e., CF regional consultation), no country objected to the text. The sole reservation was placed by the Government of Trinidad & Tobago, which was subsequently withdrawn after review of the relevant national law, which the representative stated did not allow the Government to discriminate against itself in this regard.

3. *Subject to paragraph 4 below, each Party, including its procuring entities, shall with respect to any measure regarding covered procurement, accord to the goods and services of the other Party and to suppliers of the other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.*

4. *The Parties shall not be required to provide the treatment envisaged in paragraph 3 unless a decision by the Joint CARIFORUM-EC Council to this effect is taken. That decision may specify to which procurements by each Party the treatment envisaged in paragraph 3 would apply, and under which conditions.*

**Explanatory Detail.** Paragraphs 3-4 above constitute a straightforward built-in agenda, whereby pursuant to a future decision of the CF-EU Joint Ministerial Council, if and when such a decision should arise, CF and the EU will negotiate market access commitments. That there is a built-in agenda facilitating the possibility to negotiate to market commitments at some point in the future, is itself a clear indication that the current provisions of the Chapter do not confer and are not intended to confer market access rights.

Queries have also been raised with respect to Article 170, and the obligation contained therein to “invite suppliers” in light of the fact that suppliers are defined in Article 166 as being from both the EC and CARIFORUM. The relevant Article is reproduced below.

*Article 170*

***Selective tendering***

1. *Whenever selective tendering procedures are employed, procuring entities shall:*
  - (a) *Publish a notice of intended procurement;*
  - (b) *In the notice of intended procurement invite eligible suppliers to submit a request for participation;*
  - (c) *Select the suppliers to participate in the selective tendering procedure in a fair manner; and*

*Indicate the time limit for submitting requests for participation.*

**Explanatory Detail:** The Selective Tendering method includes the publication of a notice of intended procurement inviting interested and **eligible** suppliers to submit a request for participation. Such a notice would necessarily include eligibility criteria, which – again – is determined solely at the discretion of the State concerned. There is no obligation for a CARIFORUM State to grant access to European or any other CARIFORUM State(s). The definition of who constitutes an eligible supplier, as contained in Article 166, states: *"eligible supplier" means a supplier who is allowed to participate in the public procurement opportunities of a Party or Signatory CARIFORUM State, in accordance with domestic law and without prejudice to the provisions of this Chapter.*

Other concerns and queries raised, as well as additional misunderstandings are addressed below.

**Extent of Detail of the Chapter**

It should be recognized that CF and the EC negotiators agreed that the EPA should reflect international standard and best practices, as far as practicable, as regards transparency-related rules in public procurement. CF felt that in such a circumstance, CSME States would not be prejudiced having already committed to adopting such standards for the CSME regime. Additionally, the DR would also not be prejudiced having adopted similar standards as a result of the CAFTA. Indeed, several of the CSME Member States already operate according to these practices. At the onset of substantive negotiations both Sides in a TNG proposed and discussed and agreed on elements to be negotiated as part of the Chapter, and throughout the negotiating process CF and the EC both made a number of proposals. The CF Member States in Technical Working Group (TWG) meetings discussed and agreed on CF proposals, and alternative proposals prior to putting anything on the formal negotiating table with the EC. As a result, the Chapter contains far less detail than the EC would have liked, because CF adamantly refused to include certain elements or sub-elements that the CF negotiators perceived to have a substantive

bearing on market access although the elements themselves may have been transparency-related.

### **The Necessity for Thresholds**

There must be a threshold, for efficiency purposes, below which the provisions of the Chapter would not apply. Otherwise, procuring entities would find themselves bound to fulfilling all of the requirements of the chapter in order to execute relatively small value procurements, for example, to purchase a box of #10 pencils. The threshold is a safeguard that tries to ensure that the cost of the procurement process does not exceed the value of the goods or services being procured. The absence of thresholds in the EPA Chapter would effectively negate the purpose of employing transparency and tendering methods - which is to assist in achieving value for money objectives.

### **Article 174, Qualification of Suppliers seems to confer rights of access to CF markets on EU suppliers.**

It is always important in reading the text to keep in mind that the entire chapter is subject to Article 167 which defines the scope of all of the commitments to be undertaken. It is also important to understand certain basic terms and expressions in Public Procurement. In this regard, qualification addresses the capacity to perform a particular contract, while eligibility refers to the right to access the market. These are two different and distinct elements of the procurement process, where eligibility is a necessary pre-requisite for qualification, as no supplier will expend his efforts and monies to qualify for a procurement opportunity in which he is not eligible to participate.

Article 174 has no bearing on eligibility; it deals solely with capacity to perform a particular contract (e.g., technical competence, financial strength, technological competence, etc.) **after** eligibility has been established. Further recall that the EPA does not seek to prejudice or prescribe eligibility in any way. The eligibility decision remains within the sole discretion of the procuring State.

### **The EPA thresholds pre-emptively deny CSME States the opportunity to revise domestic thresholds and agree on what the CSME levels should be.**

The EPA threshold is a transparency threshold which has no bearing or impact on the market access and process thresholds existing in the Member States and those that may be set for application in the CSME. There seems to be some confusion in the understanding of the function of a market access threshold as opposed to a transparency threshold. The essential function of the EPA transparency threshold, in practice, is that when procuring entities make purchases above a certain value, they must abide by certain publication requirements. This has no bearing on who the procuring entity decides to grant permission to participate in its procurement opportunity, which would be governed by a market access threshold. A CSME State or the Community itself can choose to set its market access thresholds at its discretion and in accordance with its needs. A transparency threshold operates differently from a market access threshold; the former

setting the value above which governments undertake to be transparent in their procurement activities, and the latter setting the value above which governments undertake to grant rights of access to their procurement markets. The one does not impact the other. They require different actions.

**The Limited Tendering Provisions in Article 171 of the EPA undermine the CSME because the EPA rules are the same as those planned for CSME. The EPA rules needed to be more stringent and different in order to be differentiated from the CSME.**

It is always important to clearly understand the facts and issues at hand. Limited tendering is a procurement method that allows the procuring entity to contract directly with a supplier without executing a competitive tender process. The conditions under which limited tendering can be employed as set out in Article 171 of the EPA, are the same as those which are planned for use in the CSME government procurement regime. In the first instance, international standards and best practices dictate what the conditions for use of the limited tendering method of procurement should be. It is these standards that informed the CSME conditions. That the conditions in Article 171 of the EPA are the same as those planned for the CSME was a necessary and deliberate act on the part of the CF negotiators. Consider the hypothetical circumstance wherein the CSME regime allows for the use of limited tendering in the case of contracts awarded to the winner of a design contest, but the EPA being more stringent and does not afford this flexibility. Each time that a CSME State attempted to take advantage of this flexibility it would be in violation of the EPA. In this circumstance it is critical to ensure that the EPA provisions are, at minimum, equal to those which are planned for the CSME in order to safeguard the CSME flexibilities. EPA conditions for limited tendering that are more stringent than those planned for the CSME would undermine the relevant flexibilities in the CSME.

**The Negotiating Mandate was exceeded and/or its Restrictions were ignored**

This is indeed a very serious allegation and is being taken as such by the relevant CF Negotiators.

The need to clearly understand the negotiating mandate is primary and crucial. The mandate was to "exclude market access commitments." That was the CF redline position. This has, somehow has become inter-changeably used with "transparency only," but the two are different things entirely. In the true technical sense, Transparency is not a discipline in procurement. It is an attribute or principle that dictates how you go about carrying out the various GP disciplines including market access. The principle of transparency and being transparent in procurement activities underlies and permeates all of the elements and disciplines in procurement, including market access. It is important therefore to begin to accurately reflect the true CF mandate so that the current misuse of terms does not continue to be inadvertently promulgated.

It is also important to recognize that, irrespective of nomenclature and titles, there can be no agreement where it is possible to have pure transparency only. What would happen to

the fairness provisions, or the due process provisions? How would such an agreement be enforced in the absence of these provisions?

It must also be appreciated that the EPA process was a *negotiation* and there is no negotiation in the world in which any party will obtain precisely what it desires in every respect. The very nature of a negotiation necessarily implies compromise. The Council on Trade and Economic Development (COTED) expressed a desire to exclude the initial European proposal on the paragraphs discussed at Article 167 (which at the time of review by the COTED contained binding rules-based commitments as opposed to the current “endeavour” language) due to market access implications. CARIFORUM negotiators were not successful in getting the paragraphs excised, but remained within the mandate to exclude market access obligations by eventually obtaining EU agreement on the insertion of “endeavour” language, which substantially altered the nature and scope of the original text.

The final negotiating mandate issued November 15, 2007 is reproduced below:

***“THE CARIFORUM COUNCIL:***

***Reiterated*** its decision not to offer market access in relation to Government Procurement;

***Agreed*** that Article 3.1, “Supporting the Creation of Regional Procurement Markets” of the Draft EPA ***be amended to reflect the above decision.***”

It is clear that the CF Negotiators acted in accordance with the negotiating mandate, ensuring (i) that the Chapter did not grant rights of market access, and (ii) that the EC's proposals for paragraphs 3-6 were amended to reflect that there should be no rights of market access granted. In so doing, the pace and content of the Region’s integration agenda were safeguarded and are not negatively affected by negotiated commitments.

**The Necessity for the Chapter**

The importance of this Chapter should not be underestimated. Transparency can only improve the national processes, permitting a greater level of scrutiny and consequently an improvement in compliance with established procedures in the pursuit of value for money objectives. The cooperation provisions in Article 182 have already given rise to the preparation of a document detailing the needs to be addressed in the CF Member States at the regional, sub-regional, and national levels in order to comply with the EPA commitments. The document, which has been approved by the relevant CF and EU authorities, includes activities (as identified by the MS and the relevant regional authorities) in support of establishing the CSME regime, improving national regimes, and a financing proposal for approximately US\$10M in support of undertaking the identified activities. Further, this is the only Government Procurement Agreement in the world that excludes market access commitments. The WTO Working Group on Transparency in Government Procurement (WGTGP) tried unsuccessfully for over six (6) years to create a clear distinction between market access and transparency elements of government

procurement. Their difficulty was compounded by the fact that there are market access elements in transparency and transparency elements in market access. Consequently, an artificial divide is very difficult to create. CARIFORUM's success in this regard is the first of its kind in such negotiations worldwide. The import of this achievement is that in future negotiations, particularly with larger developing and/or developed countries, CF has the benefit of the indisputable precedent that, despite the failure of the WTO's bid, such an agreement is indeed possible.

### **IMPLICATIONS FOR THE PLANNED CSME GOVERNMENT PROCUREMENT REGIME**

The foregoing should have clearly established that, in accordance with the CF Negotiating Mandate, the provisions of the EPA Chapter on Public Procurement do not confer and are not intended to confer rights of market access as between CARIFORUM and the EC, and/or among CARIFORUM States. The key impact that the EPA commitments will have on the CSME regime is in the provision of cooperation and assistance to facilitate the development and implementation of the CSME regime, as well as to improve national processes, as necessary, in order to be in compliance with the CSME regime.

### **GENERAL OBSERVATIONS**

Some of the queries and concerns as well as conclusions drawn indicate an alarming lack of understanding of the basics of public procurement. It is against this background that the CSME States, in particular, are in the midst of the fight for their survival in an ever-increasing global pace of trade liberalization. The time is now to begin to pay much closer attention to this critically important arena of public policy and operations. States are encouraged to focus urgent attention on improving the training, skills and techniques and overall understanding of relevant personnel. This need is more urgent in light of the fact the we are now Party to one government procurement agreement, with another much more comprehensive undertaking coming quickly on its heels. And while the EPA grants transition periods up to a maximum of five (5) years, the planned CSME regime should be underway way before that period is expired.

Further, in a global environment of increasingly scarce resources, government suppliers are going to be looking more and more towards developing country markets for procurement opportunities. As developing countries, therefore, it should be no surprise that we will come under increased pressure from real and potential trading partners to permit them access to our government procurement markets. There is tremendous risk that we will not be able to successfully address and manage these pressures in accordance with our own needs and interests and at our own pace, if we do not quickly and extensively improve our understanding of this subject, both as individual States and collectively as a Region. It is the hope of the CRNM that the relevant authorities will act with dispatch to do so.

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