

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

**CHAPTER FIFTEEN**  
**GOVERNMENT PROCUREMENT**

ARTICLE 15.1 : SCOPE AND COVERAGE

*Application of Chapter*

1. This Chapter applies to any measure regarding a procuring entity's procurement of goods, services or any combination thereof that is covered by this Chapter.
2. This Chapter applies to procurement:
  - (a) by any contractual means, including purchase, lease or rental, with or without an option to buy, build-operate-transfer contracts and public works concessions contracts; and
  - (b) for which the value, as estimated in accordance with paragraphs 6 and 7, equals or exceeds the relevant threshold specified in Annexes 15-A, 15-B, and 15-C.
3. This Chapter does not apply to:
  - (a) non-contractual agreements or any form of assistance provided by a Party or a government enterprise, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements and sponsorship arrangements;
  - (b) provision of goods or services by or between a procuring entity and a state, territory or local government, including procurement of goods and services by a Party from its own entities;
  - (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) purchases funded by grants and sponsorship payments from persons not listed in Annexes 15-A, 15-B, or 15-C, where the provision of such funds is subject to conditions inconsistent with this Chapter;
  - (e) procurement for the direct purpose of providing foreign assistance;

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

- (f) procurement of research and development services;
- (g) procurement of goods and services (including construction) outside the territory of the procuring party, for consumption outside the territory of the procuring party; and
- (h) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt.

4. (a) The Parties acknowledge and reaffirm the commitments made in the *Memorandum of Agreement Between the Government of Australia and the Government of the United States Concerning Reciprocal Defense Procurement*, dated April 19, 1995 (the “MOA”) and acknowledge that the MOA, and any extension thereof, applies to certain defence procurements that are outside the scope of this Chapter.

- (b) The Parties commit to continue discussions to improve and expand the relationship established by the MOA, recognizing that this Agreement will have no application to, or impact on, the MOA or any of the rights and responsibilities established under the MOA.

*Compliance*

5. Each Party shall ensure that its procuring entities comply with this Chapter in conducting procurement covered by this Chapter.

*Valuation*

6. In estimating the value of a procurement for the purpose of ascertaining whether that procurement is covered by this Chapter, a procuring entity shall:

- (a) neither divide a procurement into separate procurements nor use a particular method for estimating the value of the procurement for the purpose of avoiding the application of this Chapter;
- (b) take into account all forms of remuneration, including any premiums, fees, commissions, interest, other revenue streams that may be provided for under the contract and, where the procurement provides for the possibility of option

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

clauses, the total maximum value of the procurement, inclusive of optional purchases; and

- (c) without prejudice to paragraph 7, where 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, base its calculation on the total maximum value of the procurement over its entire duration.

7. In the case of procurement by lease or rental or procurement that does not specify a total price, the basis for estimating the value of the procurement shall be, with respect to:

- (a) a fixed-term contract,
  - (i) where the term is 12 months or less, the total estimated contract value for the contract's duration, or
  - (ii) where the term exceeds 12 months, the total estimated contract value, including the estimated residual value, or
- (b) a contract for an indefinite period, the estimated monthly instalment multiplied by 48. Where there is doubt as to whether the contract is to be a fixed-term contract, the basis for estimating the value of the procurement described in this subparagraph shall be used.

8. Where the total estimated maximum value of a procurement over its entire duration is not known, the procurement shall be covered by this Chapter.

9. All orders under contracts awarded for procurement covered by this Chapter shall be subject to Articles 15.2.1 and 15.2.2.

**ARTICLE 15.2 : GENERAL PRINCIPLES**

*National Treatment and Non-Discrimination*

1. With respect to any measure and any procurement covered by this Chapter, each Party and each procuring entity, respectively, shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of that Party, treatment no less favourable than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers.

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

2. With respect to any measure and any procurement covered by this Chapter, a procuring entity of a Party may not:

- (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; nor
- (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

*Procurement Methods*

3. A procuring entity shall conduct procurement covered by this Chapter in a manner that is consistent with this Chapter, and, except where specifically provided otherwise in this Chapter, is fair and transparent. A procuring entity may use:

- (a) open tendering procedures;
- (b) selective tendering procedures, in accordance with Article 15.7.6; and
- (c) limited tendering procedures, in accordance with Article 15.8.

*Rules of Origin*

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

*Offsets*

5. With regard to procurement covered by this Chapter, a procuring entity may not seek, take account of, impose or enforce offsets in the qualification and selection of suppliers, goods or services, in the evaluation of tenders or in the award of contracts, prior to or in the course of a procurement process.

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

*Measures Not Specific to Procurement*

6. 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 or formalities, and measures affecting trade in services other than measures governing procurement covered by this Chapter.

*Non-Disclosure of Information*

7. Nothing in this Chapter shall be construed as requiring a Party or a procuring entity to disclose, furnish or allow access to confidential information furnished by a person where such disclosure might prejudice fair competition between suppliers, without the authorization of the person that furnished the information.

**ARTICLE 15.3 : PUBLICATION OF PROCUREMENT INFORMATION**

1. Each Party shall promptly publish the following information relating to procurement covered by this Chapter, and any changes or additions to this information, in electronic or paper media that are widely disseminated and remain readily accessible to the public:

- (a) procurement laws, regulations, procedures and policy guidelines; and
- (b) judicial decisions and administrative rulings of general application.

2. Each Party shall, on request, provide an explanation relating to such information to the other Party.

**ARTICLE 15.4 : PUBLICATION OF NOTICE OF INTENDED PROCUREMENT**

1. For each procurement covered by this Chapter, except in the circumstances described in Articles 15.7.7(a) and (d) and 8, a procuring entity shall publish a notice inviting interested suppliers to submit tenders (“notice of intended procurement”) or, where appropriate, applications for participation in a procurement. The notice shall be published in electronic or paper media that are widely disseminated and remain readily accessible to the public for the entire period established for tendering.

2. A procuring entity shall include the following information in each notice of intended procurement:

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

- (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement;
- (b) a description of the procurement and any conditions for participation; and
- (c) the address and the time limit for the submission of tenders and, where appropriate, any time limit for the submission of an application for participation in a procurement, and the time frame for the delivery of goods or services.

*Notice of Planned Procurement*

3. Each Party shall encourage its procuring entities to publish as early as possible in each fiscal year a notice regarding each procuring entity's procurement plans. The notice should include the subject matter of any planned procurement and the estimated date of the publication of the notice of intended procurement. Where the notice is published in accordance with Article 15.5.3(a), a procuring entity may apply Article 15.5.3 for the purpose of establishing shorter time limits for tendering for procurements covered by this Chapter.

**ARTICLE 15.5 : TIME LIMITS**

1. A procuring entity shall prescribe time limits for the tendering process that allow suppliers adequate time to submit applications or requests to participate in a procurement, pursuant to Article 15.7.7(b) and (c), and prepare and submit responsive tenders, taking into account the nature and complexity of the procurement.
2. Except as provided for in paragraphs 3 and 4, a procuring entity shall provide that the final date for the submission of tenders shall not be less than 30 days:
  - (a) from the date on which the notice of intended procurement is published; or
  - (b) where the entity has used selective tendering, from the date on which the entity invites suppliers to submit tenders.
3. Under the following circumstances, a procuring entity may establish a time limit for tendering that is shorter than 30 days, provided that such time limit is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than ten days prior to the final date for the submission of tenders:

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

- (a) where the procuring entity published a separate notice, including a notice of planned procurement under Article 15.4.3 at least 30 days and not more than 12 months in advance, and such separate notice contains: a description of the procurement; the time limits for the submission of tenders or, where appropriate, applications for participation in a procurement and the address from which documents relating to the procurement may be obtained;
- (b) where the procuring entity procures commercial goods or services;
- (c) in the case of second or subsequent publication of notices for procurement of a recurring nature; or
- (d) where a state of urgency duly substantiated by the procuring entity renders impracticable the time limits specified in paragraph 1.

4. When a procuring entity publishes a notice of intended procurement in accordance with Article 15.4 in an electronic medium, or, in the case of selective tendering, issues an invitation to tender via an electronic medium and provides, to the extent practicable, the tender documentation via an electronic medium, the procuring entity may reduce the time limit for submission of a tender by up to five days. The use of this provision, however, shall in no case result in the reduction of either time limit to less than ten days from the date on which the notice of intended procurement is published.

5. Where a procuring entity intends to limit the submission of tenders to all suppliers that the entity has determined have satisfied the conditions for participation, except where a notice of a multi-use list has been readily accessible in electronic form for a reasonable period of time, the entity shall include in an invitation to tender, the time limit for submitting applications. Any conditions for participation in a tendering procedure shall be published in adequate time to enable interested suppliers of the other Party to initiate and, to the extent that it is compatible with the efficient operation of the procurement process, complete the registration and qualification procedures within the time period allowed for tendering.

6. A procuring entity shall require all participating suppliers to submit tenders in accordance with a common deadline. For greater certainty, this requirement also applies where:

- (a) as a result of a need to amend information provided to suppliers during the procurement process, the procuring entity extends the time limit for qualification or tendering procedures; or

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

- (b) negotiations are terminated and suppliers may submit new tenders.

**ARTICLE 15.6 : INFORMATION ON INTENDED PROCUREMENTS**

*Tender Documentation*

1. A procuring entity shall promptly provide, on request, to any supplier participating in a procurement, tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

- (a) the procurement, including the nature, scope and, where known, the quantity of the goods or services to be procured and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings or instructional materials;
- (b) any conditions for participation, including any financial guarantees, information and documents that suppliers are required to submit;
- (c) all criteria to be considered in the awarding of the contract;
- (d) where there will be a public opening of tenders, the date, time and place for the opening of tenders; and
- (e) any other terms or conditions relevant to the evaluation of tenders.

2. A procuring entity shall promptly reply to any reasonable request for relevant information by a supplier participating in the procurement, provided that the procuring entity shall not make available information with regard to a specific procurement in a manner that would give a supplier or a group of suppliers an advantage over its competitors in the procurement.

*Technical Specifications*

3. A procuring entity may not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to trade between the Parties.



**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

4. In prescribing the technical specifications for the good or service being procured, a procuring entity shall:
  - (a) specify the technical specifications, wherever appropriate, in terms of performance and functional requirements, rather than design or descriptive characteristics; and
  - (b) base the technical specifications on international standards, where such exist and are applicable to the procuring entity, except where the use of an international standard would fail to meet the procuring entity's program requirements or would impose more burdens than the use of a recognized national standard.
  
5. A procuring entity may not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.
  
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 the procurement.
  
7. Notwithstanding Paragraph 6, a procuring entity may:
  - (a) conduct market research in developing specifications for a particular procurement; or
  - (b) allow a supplier that has been engaged to provide design or consulting services to participate in procurements related to such services, provided it would not give the supplier an unfair advantage over other suppliers.
  
8. For greater certainty, this Article is not intended to preclude a procuring entity from preparing, adopting or applying technical specifications to promote the conservation of natural resources and the environment.

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

*Modifications*

9. Where, during the course of a procurement, a procuring entity modifies the criteria or technical requirements set out in a notice or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit all such modifications or amended or re-issued notice or tender documentation:
- (a) to all the suppliers that are participating at the time the information is amended, if known, and in all other cases, in the same manner as the original information; and
  - (b) in adequate time to allow such suppliers to modify and re-submit their initial tenders, as appropriate.

**ARTICLE 15.7 : TENDERING PROCEDURES**

*Conditions for Participation*

1. A Party or procuring entity shall limit any conditions for participation in a procurement to those that ensure that a supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement.
2. In assessing whether a supplier satisfies the conditions for participation, a procuring entity:
- (a) shall evaluate the financial, commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity;
  - (b) may not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of that Party or that the supplier has prior work experience in the territory of that Party;
  - (c) shall base its determination of whether a supplier has satisfied the conditions for participation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation; and

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

- (d) may require relevant prior experience where essential to meet the requirements of the procurement.
3. Nothing in this Article shall preclude the exclusion of a supplier on grounds such as:
- (a) bankruptcy;
  - (b) false declarations; or
  - (c) significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

*Multi-Use Lists*

4. A Party or a procuring entity may establish a multi-use list provided that the Party or procuring entity annually publishes or otherwise makes available continuously in electronic form a notice inviting interested suppliers to apply for inclusion on the list. The notice shall include:
- (a) a description of the goods and services, or categories thereof, for which the list may be used;
  - (b) the conditions for participation to be satisfied by suppliers and the methods that the Party or procuring entity will use to verify a supplier's satisfaction of the conditions;
  - (c) the name and address of the Party or procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list; and
  - (d) any deadlines for submission of applications for inclusion on that list.

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

5. A Party or procuring entity that maintains a multi-use list shall include on the list all suppliers that satisfy the conditions for participation within a reasonably short time.

*Selective Tendering*

6. To ensure optimum effective competition under selective tendering procedures, procuring entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of the other Party that is consistent with the efficient operation of the procurement system.

7. A procuring entity applying selective tendering procedures shall use, in accordance with paragraph 6:

- (a) a multi-use list provided such a list is compiled in accordance with the provisions of this Chapter and is appropriate to the type of procurement being undertaken;
- (b) a list of suppliers that have responded to a notice inviting suppliers to submit applications for participation in a procurement;
- (c) a list of suppliers that have responded to a notice requesting all interested suppliers to express their interest in the procurement, provided that the procuring entity:
  - (i) publishes a notice requesting any interested supplier to submit an expression of its interest in the procurement and any information requested in the notice; the notice may be the notice of planned procurement under Article 15.4.3 where that notice invited suppliers to express their interest in the procurement; and
  - (ii) sends an invitation to submit tenders to all the suppliers that expressed an interest in the procurement, unless it has stated in the notice that it may limit the suppliers that it will invite, in accordance with paragraph 8; or
- (d) a list of all the suppliers that have been granted a license or that have been determined by the appropriate agency, authority or organization to comply with specific legal requirements that exist independent of the procurement process, provided that:
  - (i) the requirement for a license or compliance with specific legal

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

requirements is essential to the conduct of the procurement;

- (ii) the complete list of all such suppliers is maintained by the appropriate agency, authority or organization and is available to the procuring entity; and
- (iii) the entity invites all the suppliers on the list to submit tenders in the procurement.

8. Provided that relevant requirements and criteria have been specified in advance in a notice or tender documentation, a procuring entity, in determining the suppliers that will be invited to tender, under paragraph 7(b) and (c) may:

- (a) in assessing technical ability, assess the extent to which the supplier proposals or responses meet the technical and performance specifications of the procurement; or
- (b) limit the number of suppliers that it invites to tender based on the rating of the supplier proposals or responses.

9. A procuring entity shall apply the time limits set out in Article 15.5 for responses to the notices in paragraph 7(b) and (c).

*Information on Procuring Entity Decisions*

10. Where a supplier applies for participation in a procurement including in accordance with paragraph 7(b) or (c), or for inclusion on a list referred to in paragraph 4, a procuring entity shall promptly advise such supplier of its decision with respect to its application.

11. Where a procuring entity rejects an application for participation in a procurement, including in accordance with paragraph 7(b) or (c), inclusion on a list, referred to in paragraph 4 or ceases to recognize a supplier as having satisfied the conditions for participation, the procuring entity shall promptly inform the supplier and, on request of such supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

ARTICLE 15. 8 : LIMITED TENDERING

1. Provided that it does not use this provision for the purpose of avoiding competition or to protect domestic suppliers or in a manner that discriminates against suppliers of the other Party, a procuring entity may contact a supplier or suppliers of its choice and may choose not to apply Articles 15.3 through 7, 15.9.1, and 15.9.3 thorough 7 in any of the following circumstances:

- (a) provided that the essential requirements of the procurement are not substantially modified:
  - (i) where no tenders that conform to the essential requirements in the tender documentation were submitted; or
  - (ii) where no tenders were submitted or no suppliers satisfied the conditions for participation;
- (b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for the following reasons:
  - (i) the requirement is for works of art;
  - (ii) the protection of patents, copyrights or other exclusive rights, or proprietary information; or
  - (iii) due to an absence of competition for technical reasons;
- (c) for additional deliveries of goods or services by the original supplier or authorized representative 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;
- (d) for goods purchased on a commodity market;
- (e) where a procuring entity procures a prototype or a first good or service that is intended for limited trial or that is developed at its request in the course of, and

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

for, a particular contract for research, experiment, study or original development;

- (f) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseen by the procuring entity, the goods or services could not be obtained in time under tendering procedures consistent with Articles 15.3 through 7;
- (g) for new construction services consisting of the repetition of similar construction services that conform to a basic project for which an initial contract was awarded following use of open tendering or selective tendering in accordance with this Chapter and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for new such construction services;
- (h) for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy or receivership and not for routine purchases from regular suppliers;
- (i) in the case of a contract awarded to the winner of a design contest provided that:
  - (i) the contest has been organized in a manner that is consistent with this Chapter
  - (ii) the contest is judged by an independent jury with a view to a design contract being awarded to the winner.

2. For each contract awarded under paragraph 1, a procuring entity shall prepare a report in writing that includes:

- (a) the name of the procuring entity;
- (b) the value and kind of goods or services procured; and
- (c) a statement indicating the circumstances and conditions described in paragraph 1 that justified the use of a procedure other than open or selective tendering procedures.

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

ARTICLE 15.9 : TREATMENT OF TENDERS AND AWARDING OF CONTRACTS

*Receipt and Opening of Tenders*

1. A procuring entity shall receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process.
2. A procuring entity shall treat tenders in confidence. In particular, it shall not provide information to particular suppliers that might prejudice fair competition between suppliers.
3. A procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
4. Where a procuring entity provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunities to all participating suppliers.

*Awarding of Contracts*

5. To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation.
6. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award a contract to the supplier that the entity has determined satisfies the conditions for participation and is fully capable of undertaking the contract and whose tender is determined to be:
  - (a) the lowest price or,
  - (b) the best value or the most advantageous,

in accordance with the essential requirements and evaluation criteria specified in the notices and tender documentation.

7. A procuring entity may not cancel a procurement, nor terminate or modify awarded contracts so as to circumvent the requirements of this Chapter.



**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

*Information Provided to Suppliers*

8. A procuring entity shall promptly inform suppliers that have submitted tenders of the contract award decisions. Subject to Article 15.2.7 (Non-disclosure of Information), a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons that the entity did not select its tender.

*Publication of Award Information*

9. Not later than 60 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in an officially designated publication that may be in an electronic or paper medium. The notice shall include at least the following information about the contract:

- (a) the name and address of the procuring entity;
- (b) a description of the goods or services procured;
- (c) the date of award or the contract date;
- (d) the contract value;
- (e) the name and address of the successful supplier; and
- (f) the procurement method used.

*Provision of Information to Other Party*

10. On request of the other Party a Party shall provide such information on the tender and evaluation procedures used in the conduct of a procurement sufficient to demonstrate that a given procurement was conducted fairly, impartially and in accordance with this Chapter. Such information shall, to the extent necessary and without disclosing confidential information, include information on the characteristics and relative advantages of the successful tender and on the contract price.

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

*Maintenance of Records*

11. A procuring entity shall maintain records and reports of tendering procedures relating to procurement covered by this Chapter, including the reports provided for in Article 15.8, and shall retain such records and reports for a period of at least three years from the award of a contract.

**ARTICLE 15.10 : ENSURING INTEGRITY IN PROCUREMENT PRACTICES**

1. Each Party shall ensure that criminal or administrative penalties exist to sanction:
  - (a) a procurement official of that Party who solicits or accepts, directly or indirectly, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of that procurement official's procurement functions;
  - (b) any person who offers or grants, directly or indirectly, to a procurement official of that Party, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of his or her procurement functions; and
  - (c) any person intentionally offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign procurement official, for that foreign procurement official or a third party, in order that the foreign procurement official act or refrain from acting in relation to the performance of procurement duties, in order to obtain or retain business or other improper advantage.

**ARTICLE 15.11 : DOMESTIC REVIEW OF SUPPLIER CHALLENGES**

1. In the event of a complaint by a supplier that there has been a breach of a Party's measures implementing this Chapter in the context of a procurement in which the supplier has or had an interest, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord timely and impartial consideration to any such complaint.
2. Each Party shall maintain at least one impartial administrative or judicial authority that is independent from its procuring entities to receive and review challenges that suppliers

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

submit in accordance with domestic law relating to the application by a procuring entity of a Party's measures implementing this Chapter in connection with a procurement covered by this Chapter, without prejudice to the supplier's participation in ongoing or future procurement activities. Each Party shall ensure that its review procedures are consistent with due process principles.

3. Where a body other than an authority referred to in paragraph 2 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity that is the subject of the challenge.

4. Each Party shall ensure that the authorities referred to in paragraph 2 have the power to take prompt interim measures, pending the resolution of a challenge, to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter. Such interim measures may include, where appropriate, suspending the contract award or the performance of a contract that has already been awarded.

5. Each Party shall ensure that its review procedures are conducted in accordance with the following:

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

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

ARTICLE 15.12 : 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 Parties where the same conditions prevail, or a disguised restriction on international trade, 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; and
- (d) relating to the goods or services of handicapped persons, of philanthropic or not for profit institutions or of prison labour.

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

ARTICLE 15.13 : MODIFICATIONS AND RECTIFICATIONS TO COVERAGE

1. Either Party may modify its coverage under this Chapter provided that it:

- (a) notifies the other Party in writing and that Party does not object in writing within 30 days of the notification; and
- (b) offers within 30 days acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification, where necessary, except as provided in paragraphs 2 and 3.

2. Either Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Annexes, provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days of the notification. A Party that makes such a rectification or minor amendment need not provide compensatory adjustments.

3. A Party need not provide compensatory adjustments in those circumstances where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence in respect of procurement by that entity. Where

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

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 procuring entity's status under this Chapter.

4. Where the Parties are in agreement on the proposed modification, rectification or minor amendment, the Joint Commission shall modify the relevant Annex to reflect such agreement.

**ARTICLE 15.14 : COOPERATION**

1. The Parties recognize their shared interest in promoting international liberalization of government procurement markets in the context of the rules-based international trading system, including in the WTO and the Asia Pacific Economic Cooperation ("APEC").

2. Not later than 24 months from the date of entry into force of this Agreement, and biennially thereafter, the Parties shall review the operation and implementation of this Chapter.

**ARTICLE 15.15 : DEFINITIONS**

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

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

3. **conditions for participation** means registration, qualification and other pre-requisites for participation in a procurement;

4. **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.

5. **measure** includes any guidelines;

6. **multi-use list** means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once.

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

8. **open tendering** means a procurement method where all interested suppliers may submit a tender;

9. **procurement official** means any person who performs procurement functions;

10. **procuring entity** means an entity listed in Annexes 15-A, 15-B and 15-C;

11. **selective tendering** means a procurement method where the procuring entity determines the suppliers that it will invite to submit tenders;

12. **services** includes construction services, unless otherwise specified;

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

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

(a) sets out the characteristics of:

(i) goods to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production; or

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY**  
**MARCH 1, 2004**

- (ii) services to be procured, or the processes or methods for their provision, including any applicable administrative provisions; or
- (b) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.