

CHAPTER 17
GOVERNMENT PROCUREMENT

Article 17.1
Scope

1. This Chapter shall apply to any measure regarding covered procurement.
2. For the purposes of this Chapter, the term "covered procurement" means a government procurement of goods, services or both:
 - (a) by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, build-operate-transfer contracts and public works concession contracts;
 - (b) that is conducted by a procuring entity;
 - (c) where the value of the contracts to be awarded is estimated in accordance with Article 17.5 to be not less than the thresholds specified in Annex 13 (Government Procurement) at the time of publication of a notice in accordance with Article 17.10;
 - (d) subject to the conditions specified in Annex 13 (Government Procurement); and
 - (e) that is not excluded from coverage by this Agreement.
3. This Chapter shall not apply to:
 - (a) procurement of goods and services by a procuring entity from another entity of the same Party, or between a procuring entity of a Party and a regional or local government of that Party;
 - (b) non-contractual agreements or any form of assistance that a Party provides, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, and sponsorship arrangements;

- (c) procurement for the direct purpose of providing international assistance, including development aid;
- (d) procurement of research and development services;
- (e) procurement of goods and services outside the Area of the procuring Party, for consumption outside the Area of the procuring Party;
- (f) public employment contracts;
- (g) procurement conducted under the particular procedure or condition of an international organisation, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Chapter;
- (h) procurement funded by grants and sponsorship payments received from a person other than a procuring entity of a Party;
- (i) the acquisition or rental of land, existing buildings, or other immovable property or rights thereon;
- (j) procurement conducted under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; and
- (k) procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes, derivatives and other securities.

4. Neither Party shall prepare, design or otherwise structure any government procurement contract in order to avoid the obligations under this Chapter.

Article 17.2
Definitions

For the purposes of this Chapter:

- (a) the terms "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;
- (b) the term "conditions for participation" means minimum conditions that potential suppliers must meet in order to participate in a procurement process or for submissions to be considered. This may include a requirement to undertake an accreditation or validation procedure;
- (c) the term "in writing" means any worded or numbered expression that can be read, reproduced, and later communicated. This may include electronically transmitted and stored information;
- (d) the term "limited tendering" means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;
- (e) the term "multi-use list" means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that a Party intends to use more than once;
- (f) the term "open tendering" means a procurement method whereby all interested suppliers may submit a tender;

- (g) the term "procuring entity" means an entity covered in Annex 13 (Government Procurement);
- (h) the term "publish" means to disseminate information in an electronic or paper medium that is available widely and is readily accessible to the general public;
- (i) the term "selective tendering" means a procurement method whereby those suppliers invited to do so by the procuring entity may submit a tender;
- (j) the term "services" includes construction services unless otherwise specified; and
- (k) the term "supplier" means a person that provides or could provide goods or services to a procuring entity.

Article 17.3

National Treatment and Non-Discrimination

1. With respect to any measure regarding covered procurement, each Party shall accord, immediately and unconditionally, to the goods, services and suppliers of the other Party, treatment no less favourable than that it accords to domestic goods, services and suppliers.

2. With respect to any measure regarding covered procurement, a Party shall not:

- (a) treat a locally-established supplier less favourably than another locally-established supplier on the basis of the degree of foreign affiliation or ownership; or
- (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.

3. This Article shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than measures governing covered procurement.

4. Each Party shall ensure that its procuring entities comply with this Chapter in conducting covered procurements.

5. For greater certainty, all orders under contracts awarded for covered procurement shall be subject to paragraphs 1 and 2.

Article 17.4 Rules of Origin

For the purposes of covered procurement, neither Party shall apply rules of origin to goods or services that are different from the rules of origin the Party applies in the normal course of trade to those goods or services.

Article 17.5 Valuation of Contracts

1. In estimating the value of a procurement for the purposes of ascertaining whether it is a covered procurement under this Chapter:

- (a) valuation shall take into account all forms of remuneration, including any premiums, fees, commissions, interest and other revenue streams that may be provided for under the contract;
- (b) the selection of the valuation method by a procuring entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Chapter; and

- (c) in cases where an intended procurement specifies the need for or provides for the possibility of option clauses, the basis for valuation shall be the maximum total value of the procurement, inclusive of optional purchases.

2. In the case of procurement by lease, rental, or hire purchase of goods or services, or procurement for which a total price is not specified, the basis for valuation shall be:

- (a) in the case of a fixed-term contract:
 - (i) where the term of the contract is 12 months or less, the total estimated maximum value for its duration; or
 - (ii) where the term of the contract exceeds 12 months, the total estimated maximum value, including any estimated residual value;
- (b) where the contract is for an indefinite period, the estimated monthly instalment multiplied by 48; and
- (c) where it is not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

Article 17.6 Prohibition of Offsets

With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset. The term "offset" means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar actions or requirements.

Article 17.7
Technical Specifications

1. Technical specifications shall not be prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to trade between the Parties.

2. Requirements relating to conformity assessment procedures shall not be prescribed with a view to, or with the effect of, creating unnecessary obstacles to trade between the Parties.

3. For the purposes of this Article, the term "technical specification" means a tendering requirement that sets out:

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

4. Technical specifications prescribed by procuring entities shall, where appropriate:

- (a) be specified in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) be based on international standards, where such exist; otherwise, on national technical regulations, recognised national standards, or building codes.

5. There shall be no requirement or reference to a particular trademark or trade name, patent, copyright, design or type, specific origin or producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that 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, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

Article 17.8 Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its procuring entities are applied in a non-discriminatory and transparent manner that is consistent with this Chapter.

2. A procuring entity shall use open, selective or limited tendering procedures.

Article 17.9 Conditions for Participation

1. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of the other Party than to domestic suppliers.

2. A Party and its procuring entities may establish a multi-use list, provided that the procuring entity or other government agency 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 procuring entity or other government agency will use to verify a supplier's satisfaction of the conditions; and
- (c) the name and address of the procuring entity or other government agency and other information necessary to contact the entity and obtain all relevant documents relating to the list.

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

4. Nothing in this Article shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

5. For greater certainty, a procuring entity may allow suppliers who have not yet qualified to tender in an intended procurement to participate in that procurement, provided that there is sufficient time to complete the qualification procedure.

Article 17.10
Notice of Procurement

1. In an open tendering procedure and, where appropriate, a selective tendering procedure, a procuring entity shall publish a notice inviting interested suppliers to submit tenders (hereinafter referred to as "notice of procurement") or application for participation in a procurement, in such a way as to be readily accessible to any interested supplier of the other Party for the entire period established for tendering.
2. The information in each notice of procurement shall include a description of the intended procurement, any conditions that suppliers must fulfil to participate in the procurement, the name of the procuring entity, the address where all documents relating to the procurement may be obtained, and the time-limits for submission of tenders.
3. Procuring entities are encouraged to publish, prior to or as early as possible in the fiscal year, a notice regarding their future procurement plans (hereinafter referred to as "notice of planned procurement"). The notice of planned procurement should include the subject matter of each procurement and the planned date of the publication of the notice of procurement or commencement of the related tender procedure.

Article 17.11
Selective Tendering

1. 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, taking due account of the efficient operation of the procurement system and market conditions. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.
2. For greater certainty, a procuring entity applying selective tendering may use a list of qualified suppliers or a multi-use list established in accordance with Article 17.9.

Article 17.12
Time-Limits for Tendering

1. Each Party shall ensure that:

- (a) any prescribed time-limit is adequate to allow suppliers to prepare and submit tenders before the closing of the tendering procedures; and
- (b) in determining any such time-limit, its procuring entities, consistent with their own reasonable needs, take into account such factors as the date of publication of the tender notice, the complexity of the intended procurement and the extent of subcontracting anticipated.

2. For each covered procurement, the final date and time for submission of tenders determined by the procuring entity shall be the same for all suppliers participating in the tendering procedure. For greater certainty, this requirement shall also apply where:

- (a) as a result of a need to amend information provided to suppliers during the procurement process, the procuring entity extends the time-limits for qualification or tendering procedures; or
- (b) negotiations are terminated and suppliers may submit new tenders.

Article 17.13
Tender Documentation

1. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders, including all criteria that the procuring entity will consider in awarding the contract.

2. A procuring entity shall respond promptly to any reasonable request for relevant information, including a request for explanations relating to tender documentation, submitted by a supplier participating in the tendering procedure.

3. Information relating to a specific procurement shall not be provided in a manner which would have the effect of giving a potential supplier or group of potential suppliers an advantage over competitors.

4. Where, prior to the award of a contract, a procuring entity modifies the criteria or requirements set out in the notice of procurement or tender documentation provided to participating suppliers, or amends or re-issues a notice or tender documentation, it shall transmit in writing all such modifications or amended or re-issued notice or tender documentation:

- (a) to all suppliers that are participating at the time of the modification, amendment or re-issuance, where such suppliers are known to the entity, and in all other cases, in the same manner as the original information was made available; and
- (b) in adequate time to allow such suppliers to modify and re-submit amended tenders, as appropriate.

Article 17.14

Submission, Receipt and Opening of Tenders and Awarding of Contracts

1. A procuring entity shall receive, open and treat all tenders in accordance with procedures that guarantee the fairness and impartiality of the procurement process.

2. A procuring entity shall treat all tenders in confidence to the extent permitted by the laws and regulations of the Party. In particular, it shall not provide information to particular suppliers that might prejudice fair competition between suppliers.

3. A procuring entity shall not penalise 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 an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunity to all participating suppliers.

5. To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notice of procurement or tender documentation.

6. A contract may only be awarded to a supplier that the procuring entity has determined to have complied with the conditions for participation. If a procuring entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that the tenderer can comply with the conditions for participation and is capable of fulfilling the terms of the contract.

7. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the criteria and requirements specified in the notices and tender documentation, has submitted:

- (a) the most advantageous, best value or overall greatest value tender; or
- (b) where price is the sole criterion, the lowest price.

8. A procuring entity shall not use option clauses, cancel a procurement or modify awarded contracts in order to avoid the obligations under this Chapter.

Article 17.15
Limited Tendering

1. A procuring entity may use limited tendering, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination against the suppliers of the other Party or protection to domestic producers or suppliers. When a procuring entity applies limited tendering, it may choose, according to the nature of the procurement, not to apply Articles 17.7 through 17.14.

2. Subject to paragraph 1, a procuring entity may use limited tendering only under the following conditions:

- (a) on condition that the requirements of the initial tender are not substantially modified in the contract as awarded:
 - (i) no tenders were submitted or no suppliers requested participation;
 - (ii) all tenders submitted have been collusive;
 - (iii) no tenders were submitted that conform to the essential requirements in the tender documentation; or
 - (iv) no suppliers satisfied the conditions for participation;
- (b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- (c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable or unforeseen by the procuring entity, the goods or services could not be obtained in time by means of open or selective tendering procedures;

- (d) for additional deliveries by the original supplier of goods or services, or its authorised representative, that were not included in the initial procurement where a change of supplier for such additional goods or services:
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations; or
 - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (e) when 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 for, a particular contract for research, experiment, study or original development;

Note: Original development of a first good or service may include 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.
- (f) for goods purchased on a commodity market;
- (g) for purchases made under exceptionally advantageous conditions which only arise in the very short term such as from unsolicited innovative proposals, unusual disposals, or disposal of assets of businesses in liquidation, bankruptcy or receivership and not routine purchases from regular suppliers;

- (h) in the case of contracts awarded to the winner of a design contest provided that the contest has been organised in a manner which is consistent with the principles of this Chapter and the contest is judged by an independent jury with a view to design contracts being awarded to the winner; or
- (i) 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 open tendering or selective tendering in accordance with this Chapter and for which the procuring 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 those construction services.

3. Procuring entities shall prepare a report in writing on each contract awarded under this Article. Each report shall contain the name of the procuring entity, value and kind of goods or services procured, and a statement of the conditions in this Article which prevailed.

Article 17.16 Post-Award Information

1. Each Party, including its procuring entities shall publish a notice no later than 72 days after the award of each contract for a covered procurement. Such notice shall contain:

- (a) a description of the goods or services procured, which may include quantity;
- (b) the name and address of the entity awarding the contract;
- (c) the contract date or the date of award;
- (d) the name and address of the contracted supplier or winning tenderer;

- (e) the value of the contract or the value of the winning award or the highest and the lowest offer taken into account in the award of the contract; and
- (f) the procurement method used.

2. A procuring entity shall promptly inform suppliers that have submitted tenders of the contract award decision. Subject to Article 17.18, a procuring entity shall, on request, provide an unsuccessful supplier with the reasons why the procuring entity did not select its tender.

3. A procuring entity shall maintain documentation and reports relating to the conduct of procurements covered by this Chapter, including reports required by paragraph 3 of Article 17.15, for a period of at least three years after the date it awards a contract.

Article 17.17 Information on the Procurement System

1. Each Party shall promptly publish its procurement laws, regulations, procedures and policy guidelines relating to covered procurements, and any changes or additions thereto.
2. Each Party shall promptly reply to any request from the other Party for an explanation of any matter relating to its procurement laws, regulations, procedures and policy guidelines.

Article 17.18 Non-Disclosure of Information

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

Article 17.19
Challenge Procedure

1. In the event of a complaint by a supplier that there has been a breach of measures implementing the obligations of this Chapter in the context of a covered procurement, 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 impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

2. Each Party shall maintain at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review, in a non-discriminatory, timely, transparent and effective manner, complaints that suppliers submit, in accordance with the Party's laws, regulations and procedures, relating to a covered procurement.

3. Each Party shall make information on complaint mechanisms generally available.

Article 17.20
Exceptions

1. Further to Article 1.10 (General Provisions - Security Exceptions), nothing in this Chapter shall be construed to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests relating to government procurement indispensable for national security or for national defence purposes.

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

- (a) necessary to protect public morals, order or safety;

- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to goods or services of handicapped persons, of philanthropic or not-for-profit institutions or of prison labour.

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

Article 17.21 Ensuring Integrity in Procurement Processes

1. Each Party shall ensure that criminal or administrative penalties exist to prevent corruption in its government procurement.
2. Procuring entities shall conduct covered procurement in a transparent and impartial manner which:
 - (a) eliminates any conflicts of interest for persons administering a tendering procedure wherever possible; or
 - (b) for situations where it is not possible to fully eliminate such conflicts, prevent such interests from influencing procedures or decisions made in the course of a procurement.

Article 17.22 Rectifications or Modifications

1. A Party shall notify the other Party in writing of any proposed rectification or modification of its Part to Annex 13 (Government Procurement) (any of which is hereinafter referred to in this Article as "modification"). Notification may include, where necessary to maintain a level of coverage comparable to that existing prior to the modification, an offer of compensatory adjustment.

2. Proposed modifications shall become effective provided the other Party does not object in writing to the modifying Party within 45 days after the date of notification.

3. A Party need not provide compensatory adjustments to the other Party where a proposed modification is of a purely formal or minor nature to its Part to Annex 13 (Government Procurement), such as:

- (a) changes in the name of a procuring entity;
- (b) merger of one or more procuring entities;
- (c) the separation of a procuring entity into two or more entities that are all added to the list of procuring entities in the same Section of Annex 13 (Government Procurement); and
- (d) changes in website references.

4. Where the Parties do not agree on the proposed modification, the objecting Party may request further information with a view to clarifying the proposed modification or may request that an offer of compensation be made where the objecting Party considers that compensation is necessary to maintain a level of coverage comparable to that existing prior to the modification. The Parties shall make every attempt to resolve the objection through consultations.

5. Where the Parties resolve the objection through consultations, the Parties shall notify the contact points provided under Article 1.14 (General Provisions - Communications) of the agreed modifications.

6. Neither Party shall undertake modifications to avoid the obligations of this Chapter.

Article 17.23
Privatisation of Procuring Entities

When government control over a procuring entity specified in Annex 13 (Government Procurement) has been effectively eliminated, notwithstanding that the government may possess holding thereof or appoint members of the board of directors thereto, this Chapter shall no longer apply to that entity and compensation need not be proposed. A Party shall notify the other Party of the name of such entity before elimination of government control or as soon as possible thereafter. Notification shall include evidence of such elimination.

Article 17.24
Further Negotiation

In the event that after the entry into force of this Agreement a Party offers a non-Party additional advantages of binding access to its government procurement market beyond what the other Party has been provided with under this Chapter, the former Party shall, on request of the other Party, enter into negotiations with the other Party with a view to extending those advantages to the other Party on a reciprocal basis.

Article 17.25
Cooperation

1. Each Party shall reply to any request from the other Party for an explanation of any matter relating to the application of this Chapter, including matters related to its procurement laws, regulations and policy guidelines.
2. Each Party shall use the contact point referred in Article 1.14 (General Provisions - Communications) for any request made pursuant to this Article.
3. The Joint Committee shall have responsibility for reviewing the implementation and operation of this Chapter.