

Chapter 10
Government Procurement

Article 143
Scope of Application

1. This Chapter shall apply to any measure adopted or maintained by a Party relating to government procurement by any contractual means, including through such methods as purchase or as lease, rental, or hire purchase, with or without an option to buy:

- (a) by procuring entities specified in Annex 9;
- (b) of goods, services and construction services specified in Annex 9; and
- (c) where the value of the contracts to be awarded is estimated to be not less than the thresholds specified in Annex 9 at the time of publication of a notice of intended procurement.

Note: Measures adopted or maintained by a Party relating to government procurement include those relating to public work concessions contracts.

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

Note: Nothing in this Chapter shall prevent a Party from developing new procurement policies, procedures or contractual means, provided that they are consistent with this Chapter.

Article 144
Definitions

For the purposes of this Chapter:

- (a) The term "government procurement" means procurement for governmental purposes of goods, services, or any combination thereof, not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
- (b) the term "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;
- (c) the term "services" includes construction services, unless otherwise specified;
- (d) the term "standard" means a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines, or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a good, service, process, or production method; and
- (e) the term "supplier" means a person that provides or could provide goods or services to a procuring entity.

Article 145

National Treatment and Non-Discrimination

1. With respect to any measure regarding government procurement covered by this Chapter, each Party shall provide immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering such goods and services, treatment no less favorable than that accorded to domestic goods, services and suppliers.

2. With respect to any measure regarding government procurement covered by this Chapter, each Party shall ensure:

- (a) that its procuring entities do not treat a locally-established supplier less favorably than another locally-established supplier on the basis of the degree of affiliation to, or ownership by, a natural person or an enterprise of the other Party; and
- (b) that its procuring entities do not 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; nor to measures affecting trade in services other than measures regarding government procurement covered by this Chapter.

Article 146 Rules of Origin

A Party shall not apply rules of origin to goods or services imported or supplied for purposes of government procurement covered by this Chapter from the other Party which are different from the rules of origin applied by the former Party in the normal course of trade.

Note: Rules of origin to services applied in the normal course of trade shall be understood in accordance with subparagraphs (f) and (g) of Article XXVIII of the GATS.

Article 147 Valuation of Contracts

In determining the value of contracts for the purposes of implementing this Chapter:

- (a) valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable;

- (b) the selection of 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 option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

Article 148 Prohibition of Offsets

1. Each Party shall ensure that its procuring entities do not, in the qualification and selection of suppliers, goods or services, or in the evaluation of tenders and the award of contracts, impose, seek or consider offsets.

2. For the purposes of this Article, offsets means conditions considered, sought or imposed by a procuring entity prior to or in the course of its procurement process that encourage local development or improve its Party's balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements.

Article 149 Technical Specifications

1. Technical specifications laying down the characteristics of the goods or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, 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. Any technical specifications prescribed by procuring entities shall, where appropriate:

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

3. Each Party shall ensure that its procuring entities do not prescribe technical specifications that require or refer 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, in such cases, words such as "or equivalent" are included in the tender documentation.

4. Each Party shall ensure that its procuring entities do not seek or accept, in a manner which would have the effect of precluding fair competition, advice which may be used in the preparation or adoption of any technical specifications for a specific procurement from a person that may have a commercial interest in the procurement.

5. For greater certainty, each 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 150 Tendering Procedures

1. Each Party shall ensure that its procuring entities award their contracts by tendering procedures in accordance with its laws and regulations, in compliance with this Chapter.

2. Each Party shall ensure that its procuring entities do not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

3. Each Party shall ensure that its procuring entities conduct procurement in a transparent and impartial manner that:

- (a) is consistent with this Chapter;
- (b) avoids conflicts of interest; and
- (c) prevents corrupt practices.

Article 151
Qualification of Suppliers

1. In the process of qualifying suppliers, each Party shall ensure that its procuring entities do not discriminate against suppliers of the other Party. Qualification procedures shall be consistent with the following:

- (a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;
- (b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the potential supplier's capability to fulfill the contract in question;
- (c) 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 favorable to suppliers of the other Party than to domestic suppliers. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the Area of the Party of the procuring entity, taking due account of the legal relationship between the supply organizations;

- (d) 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;
- (e) a Party, including its procuring entities, shall not adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of the other Party in its procurement;
- (f) procuring entities shall base their determination on the conditions specified in advance in notices or tender documentation;
- (g) procuring entities may require relevant prior experience where essential to meet requirements of the procurement;
- (h) procuring entities shall recognize as qualified suppliers such suppliers of the other Party who meet the conditions for participation in a particular intended procurement and shall allow them to participate in the procurement. Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;
- (i) procuring entities may maintain permanent lists of qualified suppliers. The entities shall ensure:
 - (i) that suppliers may apply for qualification at any time; and
 - (ii) that all qualified suppliers so requesting are included in the lists within a reasonably short time;

- (j) if, after publication of the notice of intended procurement under paragraph 1 of Article 152, a supplier not yet qualified requests to participate in an intended procurement, the Party or the procuring entity shall endeavor to promptly start procedures for qualification;
- (k) any supplier having requested to become a qualified supplier shall be advised by the procuring entities concerned of the decision in this regard. Where a procuring entity rejects an application for qualification or ceases to recognize a supplier as qualified, that entity shall, on request of the supplier, promptly provide a written explanation; and
- (l) each Party shall ensure that:
 - (i) each procuring entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and
 - (ii) efforts be made to minimize differences in qualification procedures between procuring entities.

2. Nothing in paragraph 1 shall preclude the exclusion of any supplier on grounds such as bankruptcy, liquidation or insolvency, or false declarations relating to a procurement, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Chapter.

Article 152 Notice of Intended Procurement

1. For each case of intended procurement, each Party shall ensure that its procuring entities make publicly available in advance in the appropriate publication listed in Annex 9, a notice of intended procurement inviting interested suppliers to participate in that procurement, except as provided for in Article 157.

2. The information in each notice of intended procurement shall include a description of the intended procurement, any conditions that suppliers must fulfill 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. Each Party shall endeavor to ensure that its procuring entities make publicly available notices of intended procurement in a timely manner through means which offer the widest possible and non-discriminatory access to interested suppliers. These means may be accessible free of charge, through a single electronic point of access.

4. If, after making publicly available a notice of intended procurement in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notice or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be made publicly available in the same manner as the original notice. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned, in adequate time to permit the suppliers to consider such information and to respond to it.

Article 153 Notice of Planned Procurement

Procuring entities are encouraged to publish in the appropriate paper or electronic medium, 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 the procurement and the planned date of the publication of the notice of intended procurement.

Article 154 Time-Limits for Tendering

Each Party shall ensure that:

- (a) any prescribed time-limit is adequate to allow suppliers of the other Party as well as domestic 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 complexity of the intended procurement, the extent of subcontracting anticipated, the normal time for transmitting tenders by mail from foreign as well as domestic points and the delays in making publicly available notices of procurement.

Article 155
Tender Documentation

1. Tender documentation provided to suppliers shall contain all information necessary to permit them to prepare and submit responsive tenders.
2. Each Party shall ensure that its procuring entities make tender documentation accessible, or, upon request, forward the tender documentation, to any supplier participating in the tendering procedure, and reply promptly to any reasonable request for explanations relating thereto.
3. Each Party shall ensure that its procuring entities reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

Article 156
Awarding of Contracts

1. To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notice of intended procurement or tender documentation and be from a supplier which complies with the conditions for participation. If a procuring entity has received a tender abnormally lower or exceptionally more advantageous than other tenders submitted, it may enquire with the tenderer to ensure that the tenderer can comply with the conditions of participation and be capable of fulfilling the terms of the contract.

2. Unless in the public interest a procuring entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or determined to be the most advantageous in terms of the specific evaluation criteria set forth in the notice of intended procurement or tender documentation.

Article 157
Limited Tendering

1. Articles 151 through 156 need not apply in the following conditions, provided that the tendering procedure under this Article is not used by procuring entities of a Party 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:

- (a) in the absence of tenders in response to the tender pursuant to Articles 151 through 156, or when the tenders submitted have been collusive in accordance with the laws and regulations of the former Party, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Chapter, on condition that the requirements of the initial tender are not substantially modified in the contract as awarded;

- (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 by the procuring entity, the goods or services could not be obtained in time by means of the tendering procedures pursuant to Articles 151 through 156;
- (d) for additional deliveries by the original supplier of goods or services 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 procured under the initial procurement; or
 - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (e) when a procuring entity procures prototypes or a first good or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of such goods or services shall be subject to Articles 151 through 156;

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. It does not extend to quantity production or supply to establish commercial viability or to recover research and development costs.

- (f) for goods purchased on a commodity market;
- (g) for purchases made under exceptionally advantageous conditions which only arise in the very short term. This provision is intended to cover unusual disposals by enterprises which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers; and
- (h) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Chapter, notably as regards the publication, in the sense of Article 152, of a notice of intended procurement to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.

2. Each Party shall ensure that, whenever it is necessary for its procuring entities to resort to the tendering procedures under paragraph 1, the entities maintain a record or prepare a written report providing specific justification for such procedures.

Article 158 Transparency of Procurement Information

1. Each Party shall ensure that its procuring entities make publicly available, in an appropriate publication listed in Annex 9, after the award of each contract, information such as:

- (a) the description of the goods or services procured and, where possible, their quantity;
- (b) the name and address of the entity awarding the contract;
- (c) the date of award;
- (d) the name and address of the winning tenderer;
- (e) the value of the winning award; and
- (f) the procurement method used.

2. Each Party shall ensure that its procuring entities, on request from a supplier of either Party, promptly provide information including, when the supplier is an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

3. Where a supplier of a Party is an unsuccessful tenderer, the Party may seek, without prejudice to the provisions under Chapter 15, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. The other Party shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally, this latter information may be disclosed by the former Party provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall be confidential and not be disclosed except after consultation with and agreement of the other Party.

Article 159
Challenge Procedures

1. In the event of a complaint by a supplier that there has been a breach of this Chapter in the context of a government 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 provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of this Chapter arising in the context of government procurements in which they have, or have had, an interest.

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

4. Each Party shall ensure that documentation relating to all aspects of the process concerning government procurement covered by this Chapter shall be retained at least for three years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. Challenges shall be heard by an impartial and independent reviewing authority with no interest in the outcome of the government procurement and the members of which are secure from external influence during the term of appointment. A reviewing authority which is not a court shall either be subject to judicial review or shall have procedures which provide at least the following:

- (a) participants can be heard before an opinion is given or a decision is reached;
- (b) participants can be represented and accompanied;

- (c) participants shall have access to all proceedings;
- (d) proceedings can take place in public;
- (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
- (f) witnesses can be presented; and
- (g) documents are disclosed to the reviewing authority.

7. Challenge procedures shall provide for:

- (a) rapid interim measures to correct breaches of this Chapter and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied;
- (b) an assessment and, where appropriate, a decision on the justification of the challenge; and
- (c) where appropriate, correction of breaches of this Chapter or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed within a reasonable time.

Article 160

Use of Electronic Means in Government Procurement

1. The Parties shall seek to provide opportunities for government procurement to be undertaken through the Internet or a comparable computer-based telecommunications network.

2. In order to facilitate commercial opportunities for its suppliers under this Chapter, each Party shall endeavor to adopt or maintain a single electronic portal for access to comprehensive information on government procurement supply opportunities in its Area, and information on measures relating to government procurement shall be available.

3. The Parties shall encourage, to the extent possible, the use of electronic means for the provision of tender documents and the receipt of tenders.

4. The Parties shall endeavor to ensure the adoption of policies and procedures for the use of electronic means in government procurement that:

- (a) protect documentation from unauthorized and undetected alteration; and
- (b) provide appropriate levels of security for data on, and passing through, the procuring entity's network.

Article 161 Exceptions

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

Note: It is understood that subparagraph (b) includes measures to protect the environment.

Article 162 Rectifications or Modifications

1. A Party shall notify the other Party of its rectifications or, in exceptional cases, other modifications relating to Annex 9, along with the information as to the likely consequences of the change for the mutually agreed coverage provided in this Chapter. If the rectifications or other modifications are of a purely formal or minor nature, notwithstanding Article 223, they shall become effective provided that no objection from the other Party has been raised within 30 days. In other cases, the Parties shall consult the proposal and any claim for compensatory adjustments with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Chapter prior to such rectification or other modification. In the event of an agreement between the Parties not being reached, the Party which has received such notification may have recourse to the dispute settlement procedure under Chapter 15.

2. Notwithstanding any other provision of this Chapter, a Party may undertake reorganizations of its procuring entities, including programs through which the procurement of such entities is decentralized or the corresponding government functions cease to be performed by any government entity, whether or not subject to this Chapter. In cases of reorganizations, compensation need not be proposed. Neither Party shall undertake such reorganizations to avoid the obligations of this Chapter.

Article 163
Privatization of Procuring Entities

When government control over a procuring entity specified in Annex 9 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.

Article 164
Denial of Benefits

1. A Party may deny the benefits of this Chapter to an enterprise of the other Party if the enterprise is owned or controlled by persons of a non-Party, and the former Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.

2. Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to a supplier of the other Party that is an enterprise of the other Party, where the denying Party establishes that the enterprise is owned or controlled by persons of a non-Party and has no substantial business activities in the Area of the other Party.

Article 165
Further Negotiation

In the event that after the entry into force of this Agreement a Party offers a non-Party additional advantages of access to its government procurement market beyond what the other Party has been provided with under this Chapter, the former Party shall, upon 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 166
Sub-Committee on Government Procurement

1. For the purposes of the effective implementation and operation of this Chapter, the Parties hereby establish a Sub-Committee on Government Procurement (hereinafter referred to in this Article as "the Sub-Committee").
2. The functions of the Sub-Committee shall be:
 - (a) analyzing available information on each Party's government procurement market, including statistical information;
 - (b) evaluating the effective access of suppliers of a Party to the government procurement market of the other Party covered by this Chapter;
 - (c) monitoring the application of the provisions of this Chapter and providing a forum to identify and address any problems or other issues that may arise;
 - (d) reporting the findings of the Sub-Committee to the Commission; and
 - (e) other functions assigned by the Commission.

3. The Parties shall cooperate, on mutually agreed terms, to increase understanding of their respective government procurement systems, with a view to maximizing for the suppliers of both Parties the access to their respective government procurement markets. For this purpose, each Party shall develop and implement, within one year after the entry into force of this Agreement, concrete measures for the cooperation, which may include training and orientation programs for government personnel or interested suppliers regarding such aspects as how to identify government procurement opportunities and how to participate in the respective government procurement markets. In developing such measures, special attention should be given to Small and Medium Enterprises (SMEs), including micro-enterprises, in each Party.

4. The Sub-Committee shall be composed of government officials of the Parties.

5. The Sub-Committee shall hold meetings at such times and venues or by means, as may be agreed by the Parties.