

CHAPTER NINE GOVERNMENT PROCUREMENT

ARTICLE 9.1: SCOPE AND COVERAGE

Application of Chapter

1. This Chapter applies to any measure regarding covered procurement.
2. For purposes of this Chapter, **covered procurement** means a procurement of goods, services, or both:
 - (a) by any contractual means, including purchase, rental, or lease, with or without an option to buy; build-operate-transfer contracts; and public works concessions contracts;
 - (b) for which the value, as estimated in accordance with paragraphs 6 and 7, as appropriate, equals or exceeds the relevant threshold specified in Annex 9;
 - (c) that is conducted by a procuring entity; and
 - (d) that is not excluded from coverage by this Agreement.
3. For greater certainty relating to the procurement of digital products as defined in Article 14.5 (Definitions):
 - (a) covered procurement includes the procurement of digital products; and
 - (b) no provision of any other Chapter shall be construed as imposing obligations on a Party with respect to the procurement of digital products.
4. This Chapter does not apply to:
 - (a) non-contractual agreements or any form of assistance that a Party or a government enterprise provides, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, and government provision of goods or services to persons or to state, regional, or local governments;
 - (b) purchases funded by international grants, loans, or other international assistance, where the provision of such assistance is subject to conditions inconsistent with this Chapter;
 - (c) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
 - (d) procurement for the direct purpose of providing foreign assistance; and
 - (e) procurement outside the territory of the Party for consumption outside the territory of the procuring Party.

Compliance

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

Valuation

6. In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, 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 clauses, the total maximum value of the procurement, inclusive of optional purchases; and
- (c) without prejudice to paragraph 6, 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 of 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 installment multiplied by 48. Where there is doubt as to whether the contract is to be a fixed-term contract, a procuring entity shall use the basis for estimating the value of the procurement described in this subparagraph.

ARTICLE 9.2: GENERAL PRINCIPLES

National Treatment and Non-Discrimination

1. With respect to any measure covered by this Chapter, each Party, including its procuring entities, 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 a Party, treatment no less favorable than the most favorable treatment the Party or the procuring entity accords to domestic goods, services, and suppliers.

2. 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.

Rules of Origin

3. 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

4. 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, before or in the course of a covered procurement.

Measures Not Specific to Procurement

5. Paragraphs 1 and 2 do 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 covered procurement.

ARTICLE 9.3: PUBLICATION OF PROCUREMENT MEASURES

1. Each Party shall promptly publish laws, regulations, judicial decisions, administrative rulings of general application, and procedures regarding covered procurement, and any changes to such measures, in officially designated electronic or paper media that are widely disseminated and remain readily accessible to the public.

2. Each Party shall, on request of the other Party, promptly provide an explanation relating to any such measure to the requesting Party.

ARTICLE 9.4: PUBLICATION OF NOTICE OF INTENDED PROCUREMENT AND NOTICE OF PLANNED PROCUREMENT

Notice of Intended Procurement

1. For each covered procurement, a procuring entity shall publish a notice inviting interested suppliers to submit tenders (“notice of intended procurement”) or, where appropriate, applications for participation in the procurement. The notice shall be published in an electronic or paper medium that is widely disseminated and 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:

- (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, including the nature, scope, and, where quantifiable, the quantity of the goods or services to be procured and any conditions for participation;
- (c) the time frame for the delivery of goods or services;
- (d) the procurement method that will be used;
- (e) 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

- (f) an indication that the procurement is covered by this Chapter.

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 the 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 9.5.2(a), a procuring entity may apply Article 9.5.3 for the purpose of establishing shorter time limits for tendering for covered procurements.

ARTICLE 9.5: TIME LIMITS FOR TENDERING PROCESS

1. A procuring entity shall prescribe time limits for tendering that allow suppliers sufficient time to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement. Except as provided for in paragraphs 2 and 3, a procuring entity shall provide no less than 40 days from the date of publication of a notice of intended procurement to the deadline for submission of tenders.

2. Under the following circumstances, a procuring entity may establish a time limit for tendering that is less than 40 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 10 days:

- (a) where the procuring entity has published a separate notice, including a notice of planned procurement under Article 9.4.3, at least 40 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 entity procures commercial goods or services, except that the entity may not rely on this provision if it requires suppliers to satisfy conditions for participation; or
- (c) in duly substantiated cases of extreme urgency brought about by events unforeseeable by the procuring entity, such that a 40-day deadline would result in serious adverse consequences to the procuring entity or the relevant Party.

3. When a procuring entity publishes a notice of intended procurement in accordance with Article 9.4 in an electronic medium, the procuring entity may reduce the time limit for submission of a tender or an application for participation in a procurement by up to five days. In no case shall the procuring entity reduce the time limit to less than 10 days from the date on which the notice of intended procurement is published.

4. 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
- (b) negotiations are concluded and the procuring entity permits suppliers to submit new tenders.

ARTICLE 9.6: INFORMATION ON INTENDED PROCUREMENTS

Tender Documentation

1. A procuring entity shall provide to interested suppliers 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 quantifiable, 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, and the relative importance of such criteria;
- (d) the date, time, and place for the opening of tenders; and
- (e) any other terms or conditions, including terms of payment relating to the procurement.

2. A procuring entity shall promptly:

- (a) provide, on request, the tender documentation to a supplier participating in the procurement; and
- (b) reply to any reasonable request for relevant information by a supplier participating in the covered procurement, provided that such information does not give that supplier 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.

4. In prescribing the technical specifications for the good or service being procured, a procuring entity shall:

- (a) specify the technical specification, wherever appropriate, in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) base the technical specification 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 may 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 covered procurement from a person that may have a commercial interest in the procurement.

7. 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 or to protect the environment.

Modifications

8. If, during the course of covered 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 tenders, as appropriate.

ARTICLE 9.7: CONDITIONS FOR PARTICIPATION

General Requirements

1. Where a procuring entity of a Party requires suppliers to satisfy conditions for participation, the entity shall, subject to the other provisions of this Chapter:

- (a) limit any conditions for participation in a covered procurement to those that are essential to ensure that a supplier has the legal, commercial, technical, and financial abilities to fulfill the requirements and technical specifications of the procurement;
- (b) evaluate the financial, commercial, and technical abilities of a supplier on the basis of its global business activities, including both its activities in the territory of the other Party, as well as its activities, if any, in the territory of the Party conducting the procurement, and may not impose the condition that, in order for a supplier to participate in a covered 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) 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
- (d) allow all suppliers that satisfy the conditions for participation to participate in the procurement.

2. Nothing in this Article shall preclude a procuring entity from excluding a supplier from a procurement 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.

3. Where a procuring entity requires suppliers to satisfy conditions for participation, the entity shall publish a notice inviting suppliers to apply for participation. The entity shall publish the notice sufficiently in advance to provide interested suppliers adequate time to prepare and submit responsive applications and for the entity to evaluate and make its determination based on such applications.

Multi-Use Lists

4. A procuring entity may establish a multi-use list provided that the entity annually publishes in a paper or electronic medium, 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 or services that may be procured using the list;
- (b) the conditions for participation to be satisfied by suppliers and the methods that the procuring entity will use to verify a supplier's satisfaction of the conditions;
- (c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list;
- (d) the date on which use of the list will terminate, or where a date is not provided, an indication of the method by which advance notice will be given of the termination of use of the list;
- (e) any deadlines for submission of applications for inclusion on the list; and
- (f) an indication that the list may be used for procurement covered by this Chapter.

5. A procuring entity that maintains a multi-use list shall allow suppliers to apply at any time for inclusion on the list and shall include on the list all suppliers that apply and satisfy the conditions for participation within a reasonably short time after a supplier applies.

Information on Procuring Entity Decisions

6. Where a supplier applies for participation in a covered procurement, or for inclusion on a multi-use list, a procuring entity shall promptly advise such supplier of its decision with respect to its application.

7. Where a procuring entity rejects an application for participation in a covered procurement or for inclusion on a multi-use list or ceases to recognize a supplier as having satisfied the conditions for participation, the entity shall promptly inform the supplier and, on request of such supplier, promptly provide the supplier a written explanation of the reasons for its decision.

ARTICLE 9.8: TENDERING PROCEDURES

1. A procuring entity shall conduct procurement covered by this Agreement in a manner that is consistent with this Chapter, and, except where specifically provided otherwise in this Chapter, in a transparent and impartial manner and shall permit any interested supplier to submit a tender.

2. Provided that the tendering procedure is not used to avoid competition, 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 9.4 through 9.7, paragraph 1 and paragraphs 3 through 7 of Article 9.9 in the following circumstances:

- (a) where, in response to a prior notice of intended procurement or invitation to tender,
 - (i) no tenders were submitted;
 - (ii) no tenders were submitted that conform to the essential requirements in the tender documentation; or
 - (iii) no suppliers satisfied the conditions for participation;and the entity does not substantially modify the essential requirements of the procurement or 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 because:
 - (i) the requirement is for a work of art;
 - (ii) the procuring entity is obligated to protect patents, copyrights, or other exclusive rights, or proprietary information; or
 - (iii) there is an absence of competition for technical reasons;
- (c) for additional deliveries of goods or services by the original supplier 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 that do not meet requirements of interchangeability with existing equipment, software, services, or installations;
- (d) for goods purchased on a commodity market;
- (e) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study, or original development. When such a contract has been fulfilled, subsequent procurements of goods or services shall be subject to this Chapter; or
- (f) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time under procedures consistent with Articles 9.4 through 9.7, paragraph 1 and paragraphs 3 through 7 of Article 9.9, and the use of such procedures would result in serious injury to the procuring entity or the relevant Party.

3. For each contract awarded under paragraph 2, a procuring entity shall prepare a written report that includes the name of the procuring entity, the value and kind of goods or services procured, and a statement indicating the circumstances and conditions described in paragraph 2 that justify the use of a limited tendering procedure.

ARTICLE 9.9: TREATMENT OF TENDERS AND AWARDING OF CONTRACTS

Receipt and Opening of Tenders

1. A procuring entity or relevant authority shall receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process.
2. A procuring entity or relevant authority shall treat tenders in confidence. In particular, it shall not provide information to particular suppliers that might prejudice fair competition between suppliers.
3. In the event of a delay in the opening of a tender, a procuring entity or relevant authority shall not penalize any supplier whose tender is submitted by 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 or relevant authority provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity or relevant authority shall provide the same opportunities to all participating suppliers.

Awarding of Contracts

5. A procuring entity or relevant authority shall require that, in order to be considered for award, a tender:
 - (a) be submitted in writing by a supplier that satisfies the conditions, if any, for participation; and
 - (b) at the time of opening, conform to the essential requirements and evaluation criteria specified in the notices and tender documentation.
6. Unless a procuring entity or relevant authority determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the entity or authority has determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender determined to be the most advantageous solely on the basis of the requirements and evaluation criteria set out in the notices and tender documentation.
7. A procuring entity or relevant authority may not cancel a procurement, nor terminate or modify a contract it has awarded, in a manner that circumvents the obligations of this Chapter.

Information Provided to Suppliers

8. A procuring entity shall promptly inform suppliers that have submitted tenders of its contract award decision. Subject to Article 9.13, a procuring entity, on request of a supplier whose tender was not selected for award, shall provide the supplier the reasons for not selecting its tender.

Publication of Award Information

9. Not later than 60 days after the award of a contract for a covered procurement, a procuring entity or relevant authority shall publish a notice in an officially designated publication, which 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;
- (d) the name and address of the successful supplier;
- (e) the contract value; and
- (f) the procurement method used and, in cases where a procedure has been used pursuant to Article 9.8.2, a description of the circumstances justifying the procedure used unless such justification was included in the notice of intended procurement.

Provision of Information to Other Party

10. On request of the other Party, a Party shall provide pertinent information on the tender and evaluation procedures used in the conduct of a covered procurement sufficient to demonstrate that the particular procurement was conducted fairly, impartially, and in accordance with this Chapter. Such information shall include information on the characteristics and relative advantages of the successful tender and on the contract price.

Maintenance of Records

11. A procuring entity or relevant authority shall maintain reports and records of tendering procedures relating to covered procurements, including the reports required by paragraph 3 of Article 9.8, for at least three years after the date a contract is awarded.

ARTICLE 9.10: ENSURING INTEGRITY IN PROCUREMENT PRACTICES

Each Party shall adopt or maintain procedures to declare ineligible for participation in the Party's procurements, either indefinitely or for a specified time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to procurement. On request of the other Party, a Party shall identify the suppliers determined to be ineligible under these procedures, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action.

ARTICLE 9.11: DOMESTIC REVIEW OF SUPPLIER CHALLENGES

1. Each Party shall provide timely, effective, transparent, and predictable means for a supplier to challenge the conduct of a covered procurement, without prejudice to that supplier's participation in ongoing or future procurement activities. Each Party shall ensure that its review procedures are made publicly available in writing and are timely, transparent, effective, and consistent with the principle of due process.

2. Each Party shall establish or designate at least one impartial authority that is independent of the procuring entity that is the subject of the challenge to receive and review challenges that suppliers submit in connection with any covered procurement.

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 authorize the authority that it establishes or designates under paragraph 2 to take prompt interim measures, pending the resolution of a challenge, to preserve the opportunity to correct potential breaches of this Chapter, including the suspension of the award of a contract or the performance of a contract already awarded. However, in deciding whether to apply an interim measure, each Party may take into account any overriding adverse consequences to the public interest if an interim measure

were taken.

5. Each Party shall ensure that the authority that it establishes or designates under paragraph 2 conducts its review in accordance with the following:

- (a) a supplier shall be allowed sufficient time to prepare and submit a written challenge, which in no case shall be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier;
- (b) the procuring entity shall respond in writing to the supplier's challenge and provide all relevant documents to the authority;
- (c) the supplier that initiates the challenge shall be provided an opportunity to reply to the procuring entity's response before the authority makes a decision on the challenge; and
- (d) the authority shall promptly provide decisions relating to a supplier's challenge in writing, with an explanation of the grounds for each decision.

ARTICLE 9.12: 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 the other Party does not object in writing within 30 days after the notification; and
- (b) within 30 days after notifying the other Party, offers acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing before the modification, 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 Annex to this Chapter, provided that it notifies the other Party in writing and that the other Party does not object in writing within 30 days after the notification. A Party that makes such a rectification or minor amendment need not provide compensatory adjustments to the other Party.

3. A Party need not provide compensatory adjustments where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence. Where the Parties do not agree that 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 continued coverage under this Chapter.

4. The Joint Committee established under Chapter 19 (Administration of the Agreement) shall adopt any agreed modification, technical rectification, or minor amendment made in accordance with paragraph 1 or 2.

ARTICLE 9.13: NON-DISCLOSURE OF INFORMATION

1. A Party, including its procuring entities, shall not disclose information that is designated as confidential or that is by nature confidential, without the authorization of the persons providing the information. This includes information the disclosure of which would prejudice legitimate commercial interests of a particular person or might prejudice fair competition between suppliers.

2. Nothing in this Chapter shall be construed to require a Party, including its procuring entities, to provide confidential information the disclosure of which would:

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

ARTICLE 9.14: EXCEPTIONS

1. Provided 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 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; or
- (d) relating to goods or services of handicapped persons, of philanthropic institutions, or of prison labor.

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

ARTICLE 9.15: DEFINITIONS

For purposes of this Chapter:

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 to the supplier, for a specified period, temporary ownership of or a right to control and operate, and demand payment for the use of, such works for the duration of the contract;

commercial goods and services means goods and services of a type 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;

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

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;

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;

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;

procurement official means any person who performs procurement functions;

procuring entity means an entity listed in Annex 9;

relevant authority means any authority authorized by a Party to conduct any aspect of a procurement;

services includes construction services, unless otherwise specified;

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

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
 - (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 labeling requirements, as they apply to a good or service.

ANNEX 9
SECTION A -- CENTRAL LEVEL GOVERNMENT ENTITIES

1. This Chapter applies to procurement by the entities of the central level government listed in each Party's Schedule to this Section where the value of the procurement is estimated, in accordance with paragraphs 6 and 7 of Article 9.1, to equal or exceed:

- (a) for procurement of goods and services:
 - (i) \$193,000, subject to subparagraph (a)(ii) and to adjustment in accordance with paragraph 3 of Section G (Threshold Adjustment Formula); and
 - (ii) in the case of Oman, for the two-year period following the date of entry into force of this Agreement, \$260,000 which shall not be subject to adjustment; and
- (b) for procurement of construction services:
 - (i) \$8,422,165, subject to subparagraph (b)(ii) and to adjustment in accordance with paragraph 2 of Section G (Threshold Adjustment Formula).

2. Unless otherwise specified in this Section, this Chapter applies to all agencies subordinate to the entities listed in each Party's schedule.

Schedule of the Sultanate of Oman

- 1. Ministry of Agriculture and Fisheries (*Note 1*)
- 2. Ministry of Awqaf and Religious Affairs (*Note 2*)
- 3. Ministry of Commerce and Industry
- 4. Ministry of Civil Service
- 5. Ministry of Education (*Note 3*)
- 6. Ministry of Foreign Affairs
- 7. Ministry of Higher Education
- 8. Ministry of Housing, Electricity, And Water
- 9. Ministry of Information (*Note 4*)
- 10. Ministry of Heritage and Culture
- 11. Ministry of Finance
- 12. Ministry of Health
- 13. Ministry of Oil and Gas
- 14. Ministry of National Economy
- 15. Ministry of Justice
- 16. Ministry of Legal Affairs
- 17. Ministry of Manpower
- 18. Ministry of Regional Municipalities and Environment and Water Resources
- 19. Ministry of Social Development
- 20. Ministry of Sports Affairs
- 21. Ministry of Tourism
- 22. Ministry of Transport and Communications (*Note 5*)
- 23. Muscat Governorate
- 24. Public Authority for Social Insurance
- 25. Public Authority for Handcraft
- 26. State Audit Institution
- 27. Supreme Committee for Town Planning
- 28. Telecommunications Regulatory Authority
- 29. Sohar Refinery Company

30. High Committee for National Day
31. Oman Refinery Company
32. Public Establishment for Industrial Estates
33. Oman Oil Company

Notes to the Schedule of the Sultanate of Oman

1. Ministry of Agriculture and Fisheries: This Chapter does not cover the procurement of agricultural goods made in furtherance of agricultural support programs or human feeding programs.
2. Ministry of Awqaf and Religious Affairs: This Chapter does not cover the procurement of construction services for buildings intended for religious purposes (CPC 54129). (For a complete listing of the UN Central Product Classification, Version 1.1, see <http://unstats.un.org/unsd/cr/registry/regct.asp?Lg=1>.)
3. Ministry of Education: This Chapter does not cover the procurement of printed materials for educational purposes (CPC 32230).
4. Ministry of Information: This Chapter does not cover the acquisition, development, or production of program distribution services (CPC 84170).
5. Ministry of Transport and Communications: This Chapter does not cover procurement by the Civil Aviation Administration.

Schedule of the United States

1. American Battle Monuments Commission
2. Commission on Civil Rights
3. Commodity Futures Trading Commission
4. Consumer Product Safety Commission
5. Broadcasting Board of Governors
6. Corporation for National and Community Service
7. Department of Agriculture (*Note 1*)
8. Department of Commerce (*Note 2*)
9. Department of Education
10. Department of Energy (*Note 3*)
11. Department of Health and Human Services
12. Department of Housing and Urban Development
13. Department of the Interior, including the Bureau of Reclamation
14. Department of Justice
15. Department of Labor
16. Department of State
17. Department of Transportation (*Note 4*)
18. Department of the Treasury
19. Department of Veterans Affairs
20. Environmental Protection Agency
21. Equal Employment Opportunity Commission
22. Executive Office of the President
23. Export-Import Bank of the United States
24. Farm Credit Administration
25. Federal Communications Commission
26. Federal Deposit Insurance Corporation
27. Federal Housing Finance Board
28. Federal Maritime Commission
29. Federal Mediation and Conciliation Service
30. Federal Trade Commission
31. General Services Administration (*Note 5*)
32. Merit Systems Protection Board

33. National Aeronautics and Space Administration
34. National Archives and Records Administration
35. National Credit Union Administration
36. National Labor Relations Board
37. National Mediation Board
38. National Science Foundation
39. National Transportation Safety Board
40. Nuclear Regulatory Commission
41. Office of Personnel Management
42. Office of Thrift Supervision
43. Overseas Private Investment Corporation
44. Peace Corps
45. Railroad Retirement Board
46. Securities and Exchange Commission
47. Selective Service System
48. Smithsonian Institution
49. United States Agency for International Development (*Note 6*)
50. United States International Trade Commission

Notes to the Schedule of the United States

1. Department of Agriculture: This Chapter does not cover the procurement of agricultural goods made in furtherance of agricultural support programs or human feeding programs.
2. Department of Commerce: This Chapter does not cover shipbuilding activities of the U.S. National Oceanic and Atmospheric Administration (NOAA).
3. Department of Energy: This Chapter does not cover national security procurements in support of safeguarding nuclear materials or technology and entered into under the authority of the Atomic Energy Act, or oil purchases related to the Strategic Petroleum Reserve.
4. Department of Transportation: This Chapter does not cover procurement by the Federal Aviation Administration.
5. General Services Administration: This Chapter does not cover the procurement of goods in the following FSC categories:

FSC 51	Hand Tools
FSC 52	Measuring Tools
FSC 7340	Cutlery and Flatware
6. United States Agency for International Development: This Chapter does not cover procurement for the direct purpose of providing foreign assistance.

SECTION B -- OTHER COVERED ENTITIES

1. This Chapter applies to procurement by the other covered entities listed in each Party's Schedule to this Section where the value of the procurement is estimated, in accordance with paragraphs 6 and 7 of Article 9.1, to equal or exceed:
 - (a) for the procurement of goods and services:
 - (i) of List A entities, \$250,000, which shall not be subject to adjustment; or

- (ii) of List B entities, \$593,000, subject to adjustment in accordance with paragraph 3 of Section G (Threshold Adjustment Formula); and
- (b) for the procurement of construction services for List A and List B entities, \$10,366,227, subject to adjustment in accordance with paragraph 2 of Section G (Threshold Adjustment Formula).

Schedule of the Sultanate of Oman

List A:

1. Oman Gas Company
2. Oman Housing Bank
3. Oman Development Bank
4. Capital Market Authority/Muscat Securities Market
5. Sultan Qaboos University

Schedule of the United States

List A:

1. Tennessee Valley Authority
2. Bonneville Power Administration
3. Western Area Power Administration
4. Southeastern Power Administration
5. Southwestern Power Administration
6. St. Lawrence Seaway Development Corporation

List B:

1. Rural Utilities Service (*Note 1*)

Notes to the Schedule of the United States

1. The Rural Utilities Service agrees to:
 - (a) waive federal buy national requirements imposed as conditions of funding for all power generation projects; and
 - (b) apply procurement procedures equivalent to the procedures in the WTO Agreement on Government Procurement and national treatment to funded projects exceeding the thresholds specified above.

For greater certainty, this Chapter does not apply to any other aspect of procurement by the Rural Utilities Service, including any restrictions the Rural Utilities Service places on financing for telecommunications projects.

2. With respect to procurement by entities listed in this Annex, this Chapter does not apply to restrictions attached to Federal funds for airport projects.

SECTION C -- GOODS

This Chapter applies to all goods procured by the entities listed in Sections A and B, subject to the Notes to the respective Sections and the General Notes.

SECTION D -- SERVICES

This Chapter applies to all services procured by the entities listed in Sections A and B, subject to the Notes to the respective Sections, the General Notes, and the Notes to this Section, except for the services excluded in the Schedules of each Party.

Schedule of the Sultanate of Oman

This Chapter does not cover the procurement of the following services:

- A. Research and Development: All Classes (CPC 81)
- B. Printing of revenue stamps, bank notes, and religious material
- C. Telecommunications Services, Information Processing, and Telecommunications Network Management Services (CPC 84110, CPC 84121, CPC 8414, and CPC 8415)
- D. Utilities: All Classes (CPC 69)
- E. Transportation, Travel, and Relocation Services: All Classes (CPC 661 for transport of people and CPC 662 for transport of freight)
- F. Arbitration and Conciliation Services (CPC 82191)
- G. Financial Intermediation Services, except Investment Banking, Insurance Services, and Pension Services, and Investment Banking Services (CPC 71100)

The scope of these services, other than item B, shall be determined in accordance with the U.N. Central Product Classification, Version 1.1.

Schedule of the United States

This Chapter does not cover the procurement of the following services, as elaborated in the Common Classification System (*For complete listing of the Common Classification System, see <http://www.sice.oas.org/trade/nafta/chap-105.asp>.*)

- A. Research and Development
All classes
- D. Information Processing and Related Telecommunications Services

D304 ADP Telecommunications and Transmission Services, except for those services classified as “enhanced or value-added services.” For the purposes of this provision, the procurement of “ADP Telecommunications and Transmission Services” does not include the ownership or furnishing of facilities for the transmission of voice or data services.

D305 ADP Teleprocessing and Timesharing Services

D316 Telecommunications Network Management Services

D317 Automated News Services, Data Services or Other Information Services

D399 Other ADP and Telecommunications Services

- J. Maintenance, Repair, Modification, Rebuilding and Installation of Goods/Equipment
 - J019 Maintenance, Repair, Modification, Rebuilding and Installation of Equipment Related to Ships
 - J998 Non-nuclear Ship Repair
- M. Operation of Government-Owned Facilities
 - All Classes, with respect to all facilities of the Department of Energy and the National Aeronautics and Space Administration; and
 - M180 Research and Development, with respect to any procuring entity listed in Section A or B
- S. Utilities: All Classes
- V. Transportation, Travel and Relocation Services: All Classes except V503 Travel Agent Services

Note to the Schedule of the United States

- 1. This Chapter does not cover the procurement of services purchased in support of military forces outside the United States.

SECTION E -- CONSTRUCTION SERVICES

This Chapter applies to all construction services procured by the entities listed in Sections A and B, subject to the Notes to the respective Sections, the General Notes, and the Note to this Section, except for the construction services excluded in the Schedules of each Party.

Schedule of the United States

This Chapter does not cover the procurement of dredging services.

Note to Section E

“Buy national” requirements on articles, supplies, or materials acquired for use in construction services contracts covered by the Chapter shall not apply to goods of either Party.

SECTION F -- GENERAL NOTES

Schedule of the Sultanate of Oman

- 1. The Sultanate of Oman Government reserves the right to maintain its existing preference program established under Sultani Decree 1/79, Article 21, and its successor programs to promote the development of its small and medium enterprises. “Small and medium enterprises” are defined in “A Glance at Industry in Oman,” as published by the Directorate General of Industry, Ministry of Commerce and Industry.
- 2. This Chapter does not apply to procurements by a government entity of a good or service obtained or acquired from another government entity.
- 3. This Chapter does not apply to procurements undertaken by a covered entity on behalf of a non-covered entity.

4. Where a contract is to be awarded by an entity that is not listed in Section A or B, this Chapter shall not be construed to cover any good or service component of that contract.
5. This Chapter does not apply to the procurement of transportation services that form a part of, or are incidental to, a procurement contract.

Schedule of the United States

1. This Chapter does not apply to set asides on behalf of small or minority businesses. Set-asides include any form of preference, such as the exclusive right to provide a good or service and price preferences.
2. Where a contract is to be awarded by an entity that is not listed in Section A or B, this Chapter shall not be construed to cover any good or service component of that contract.
3. This Chapter does not apply to the procurement of transportation services that form a part of, or are incidental to, a procurement contract.

Section G -- THRESHOLD ADJUSTMENT FORMULA

1. The thresholds shall be adjusted at two-year intervals with each adjustment taking effect on January 1, with the first adjustment taking effect on January 1, 2008.
2. With regard to the construction services thresholds referred to in Section A, paragraph (1)(b)(i), and in Section B, paragraph 1(b), the United States shall calculate the U.S. dollar value for the threshold every two years, based on the U.S. inflation rate measured by the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics, using the two-year period that ends on October 31 in the year prior to the adjustment taking effect, and using the following formula:

$$T_0 \times (1 + \Pi_i) = T_1$$

T_0 = threshold value at base period

Π_i = accumulated U.S. inflation rate for the “i”th two year-period

T_1 = new threshold value.

3. The thresholds in Section A, subparagraph 1(a)(i), and in Section B, subparagraph (a)(ii), are conversions into U.S. dollars of the thresholds listed in the U.S. Appendix to the WTO Agreement on Government Procurement, which are set out in Special Drawing Rights (SDRs) and listed below. Every two years, the United States shall calculate adjustments of these thresholds based on an average of the daily conversion rates of the U.S. dollar in terms of SDRs, published by the IMF in its monthly “International Financial Statistics,” for the two-year period preceding October 1 or November 1 of the year before the adjusted thresholds are to take effect:

(a) 130,000 SDRs for goods and services for Section A entities; and

(b) 400,000 SDRs for goods and services for Section B List B entities.

4. The United States shall notify Oman of the adjusted threshold values in December of the year before the adjusted thresholds take effect in January.
5. The Parties shall consult bilaterally if a major change in a national currency vis-à-vis the other currency were to create a significant problem with regard to the application of the Chapter.

January 19, 2006

H.E. Maqbool Bin Ali Sultan
Minister of Commerce and Industry
Ministry of Commerce and Industry
Sultanate of Oman

Dear Mr. Minister:

In connection with the signing on this date of the United States-Oman Free Trade Agreement (the "Agreement"), I have the honor to confirm the following understanding reached by the Governments of the United States of America and the Sultanate of Oman regarding Chapter Nine (Government Procurement) of the Agreement:

In the case of the Sultanate of Oman, the Administrative Judicature Court is the impartial authority for purposes of Article 9.11.2; and the remedies available in, and the procedures applicable to, that court currently satisfy the requirements of Article 9.11.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Agreement.

Sincerely,

Rob Portman

January 19, 2006

The Honorable Robert J. Portman
United States Trade Representative

Dear Ambassador Portman:

I have the honor to acknowledge receipt of your letter of this date, which reads as follows:

"In connection with the signing on this date of the United States-Oman Free Trade Agreement (the "Agreement"), I have the honor to confirm the following understanding reached by the Governments of the United States of America and the Sultanate of Oman regarding Chapter Nine (Government Procurement) of the Agreement:

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I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Agreement."

I have the honor to confirm that my Government shares the understanding expressed in your letter and that your letter and this letter in reply shall constitute an integral part of the Agreement.

Sincerely,



Maqbool Bin Ali Sultan

January 19, 2006

H.E. Maqbool Bin Ali Sultan
Minister of Commerce and Industry
Ministry of Commerce and Industry
Sultanate of Oman

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I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Agreement.

Sincerely,

Rob Portman

Sultanate of Oman
Ministry of Commerce and Industry
Muscat



سلطنة عُمان
وزارة التجارة والصناعة
مسقط

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