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CHAPTER NINE
GOVERNMENT PROCUREMENT

ARTICLE 9.1: SCOPE AND COVERAGE

Application of Chapter

1. This Chapter applies to any measure adopted or maintained by a Party relating to procurement by a procuring entity:
 - (a) by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts and public works concession contracts; and
 - (b) where the value is estimated, in accordance with paragraph 4, to equal or exceed the relevant threshold specified in the Annexes.
2. This Chapter does not apply to:
 - (a) non-contractual agreements or any form of assistance provided by a Party or a state enterprise, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements and government provision of goods and services to persons or to state, regional or local governments;
 - (b) purchases funded entirely or partially by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with this Chapter; and
 - (c) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt.

Compliance

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

Valuation

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

Draft
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March 31, 2004

- (a) may not prepare, design or otherwise structure or divide a procurement, in any stage of a procurement, in order to avoid the application of this Chapter; and
- (b) shall 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.

ARTICLE 9.2: GENERAL PRINCIPLES

National Treatment and Non-Discrimination

1. With respect to any measure covered by this Chapter, each Party shall accord to the goods and services of the other Party, and to the suppliers of the other Party of such goods and services, treatment no less favorable than the most favorable treatment the Party or entity accords to its own goods, services and suppliers.
2. With respect to any measure covered by this Chapter, neither Party may:
 - (a) treat a locally established supplier less favorably than another locally established supplier on the basis of 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.

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. With regard to procurement covered by this Chapter, a procuring entity may not seek, take account of, or impose offsets in any stage of a procurement.

Measures Not Specific to Procurement

Draft
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March 31, 2004

5. Paragraphs 1 and 2 do not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties or charges, other import regulations, including restrictions and formalities, or measures affecting trade in services other than measures specifically governing procurement covered by this Chapter.

ARTICLE 9.3: PUBLICATION OF PROCUREMENT MEASURES

Each Party shall promptly publish:

- (a) any law, regulation, judicial decision, administrative ruling of general application and procedure specifically governing procurement covered by this Chapter in officially designated electronic or paper media that are widely disseminated and readily accessible to the public; and
- (b) all changes to such measures in the same manner as the original publication.

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

Notice of Intended Procurement

1. For each procurement covered by this Chapter, a procuring entity shall publish in advance a notice inviting interested suppliers to submit tenders (“notice of intended procurement”) in an electronic or paper media that is widely available and remains readily accessible to the public for the entire time period established for tendering for the relevant procurement.

2. Each notice of intended procurement shall include a description of the intended procurement, any conditions of participation that a supplier must satisfy in order to participate in the procurement, the name of the procuring entity, the address where all documents relating to the procurement may be obtained, the time limits for submission of tenders and the dates or periods for delivery of the goods or services being procured.

Notice of Planned Procurement

3. Each Party shall encourage its entities to publish as early as possible in each fiscal year a notice regarding each entity’s planned procurement. The notice should include the subject matter of any planned procurement and the estimated date of the publication of the notice of intended procurement.

ARTICLE 9.5: TIME LIMITS FOR TENDERING PROCESS

Draft
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March 31, 2004

1. A procuring entity shall prescribe time limits for the tendering process 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 paragraph 3, a procuring entity shall provide no less than 40 days from the date on which the notice of intended procurement is published to the final date for submission of tenders.
2. Where a procuring entity requires suppliers to satisfy conditions for participation in order to participate in a procurement, the entity shall provide no less than 25 days from the date on which the notice of intended procurement is published to the final date for submission of applications for participation and no less than 40 days from the date of issuance of the invitation to tender to the final date for submission of tenders.
3. Notwithstanding paragraph 1, a procuring entity may establish a time period of less than 40 days, provided that the time period is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than ten days:
 - (a) where the 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 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 procuring entity may not rely on this provision if it requires suppliers to satisfy conditions for participation, in accordance with Article 9.8; or
 - (c) where, for duly substantiated reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the use of a 40-day time limit would result in serious injury to the procuring entity or the relevant Party.

ARTICLE 9.6: INFORMATION ON INTENDED PROCUREMENT

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

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

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, including all cost factors, 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.
2. A procuring entity shall promptly:
- (a) provide, upon request, the tender documentation to any supplier participating in the procurement; and
 - (b) reply to any reasonable request for relevant information by a supplier participating in the procurement, provided that such information does not give that supplier an advantage over its competitors in the procurement.

Modifications

3. If, during the course of a procurement, a procuring entity modifies the criteria or technical requirements previously set out in the notice or tender documentation provided to participating suppliers, or amends or reissues the notice, the procuring entity shall transmit all such modifications or amended or reissued notice in writing:

- (a) to all the suppliers that are participating at the time the information is modified or amended, if the identities of such suppliers are known, and in all other cases, in the same manner as the original information;
- (b) in sufficient time to allow such suppliers to modify and submit amended tenders, as appropriate; and
- (c) in cases where a notice is reissued, in accordance with the time limits set out in Article 9.5.

ARTICLE 9.7: TECHNICAL SPECIFICATIONS

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

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

2. 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 government-unique standard.
3. 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 or 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.
4. 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 procurement from a person that may have a commercial interest in that procurement.
5. 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.

ARTICLE 9.8: CONDITIONS FOR PARTICIPATION

1. Where an entity requires suppliers to satisfy registration, qualification or any other requirements or conditions for participation ("conditions for participation") in order to participate in a procurement, a procuring entity shall, subject to the other provisions of this Chapter:
 - (a) limit any conditions for participation in a procurement to those that are essential to ensure that the supplier has the legal, technical and financial abilities to fulfill the requirements and technical specifications of the procurement;
 - (b) evaluate a supplier's financial and technical abilities on the basis of its global business activities, including both its activity in the territory of the Party of the supplier, as well as activity, if any, in the territory of the Party of the procuring entity, and may not impose the condition that, in order for a supplier to participate in a procurement, the supplier has

Draft
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March 31, 2004

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 it has specified in advance in notices or tender documentation; and
 - (d) allow all domestic suppliers and suppliers of the other Party 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 bankruptcy or false declarations.
3. Where a procuring entity requires suppliers to satisfy conditions for participation in order to participate in a procurement, 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 with adequate time to prepare and submit responsive applications and for the entity to evaluate and make its determination on such applications.
4. A procuring entity may establish publicly available lists of suppliers that satisfy the conditions for participation. Where a procuring entity requires suppliers to qualify for such a list as a condition for participation in a procurement, and a supplier that has not yet qualified applies for inclusion on the list, the entity shall promptly initiate the relevant procedures for qualifying the supplier. The entity shall allow the supplier to participate in the procurement, provided that the entity determines that the supplier satisfies the conditions for participation and that there is sufficient time to complete the procedures within the time period established for tendering.
5. A procuring entity shall promptly communicate to any supplier that has applied for participation its decision on whether that supplier has satisfied the conditions for participation. Where a procuring entity rejects an application for participation or ceases to recognize a supplier as having satisfied the conditions for participation, the entity shall promptly inform the supplier and, on request of the supplier, promptly provide a written explanation of the reasons for its decision.

ARTICLE 9.9: TENDERING PROCEDURES

1. Subject to paragraph 2, a procuring entity shall award contracts by means of open tendering procedures, in the course of which any interested supplier may submit a tender.
2. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers or in a manner that discriminates against suppliers of the other

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

Party, a procuring entity may award contracts by means other than open tendering procedures in the following circumstances, where applicable:

- (a) where no tenders that conform to the essential requirements in the tender documentation were submitted in response to a notice of intended procurement, or where no suppliers that satisfied the conditions for participation applied to participate in a procurement, provided that the essential requirements of the procurement are not substantially modified;
- (b) where, for works of art, or for reasons connected with the protection of exclusive intellectual property rights, such as patents or copyrights, or proprietary information or where there is an 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) for additional deliveries 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 entity to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services, or installations;
- (d) for goods purchased on a commodity market;
- (e) where an 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 contracts have been fulfilled, subsequent procurements of goods or services shall be subject to Articles 9.2 through 9.10; or
- (f) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time by means of an open tendering procedure and the use of an open tendering procedure would result in serious injury to the entity, the entity's program responsibilities or the Party.

3. For each contract awarded under paragraph 2, a procuring entity shall prepare a report in writing 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 justified the use of a procedure other than open tendering procedures.

ARTICLE 9.10: AWARDING OF CONTRACTS

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

1. A procuring entity shall require that in order to be considered for award, a tender must be submitted in writing and must, at the time it is submitted:
 - (a) conform to the essential requirements of the tender documentation and evaluation criteria specified in the notices and tender documentation; and
 - (b) be submitted by a supplier that has satisfied the conditions for participation.
2. Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity had determined to be fully capable of undertaking the contract and whose tender is determined to be the most advantageous in terms of the requirements and evaluation criteria set out in the tender documentation.
3. No procuring entity may cancel a procurement, or terminate or modify awarded contracts in a manner that circumvents this Chapter.

Information Provided to Suppliers

4. Subject to Article 9.15, a procuring entity shall promptly inform suppliers that have submitted tenders of its contract award decision, and on request of a supplier, shall provide a supplier whose tender was not selected for award the reasons for not selecting its tender and the relative advantages of the tender selected.

Publication of Award Information

5. Promptly after awarding a contract in a procurement covered by this Chapter, a procuring entity shall publish a notice that includes at least the following information about the award:
 - (a) the name of the entity;
 - (b) a description of the goods or services procured;
 - (c) the name of the supplier awarded the contract;
 - (d) the value of the contract award; and
 - (e) where the entity did not use open tendering procedures, an indication of the circumstances justifying the procedure used.

Maintenance of Records

6. A procuring entity shall maintain records and reports relating to tendering procedures and contract awards in procurements covered by this Chapter, including the

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

records and reports provided for in Article 9.3, according to the practices of each Party, and for a minimum of three years from the date of the award of a contract.

ARTICLE 9.11: ENSURING INTEGRITY IN PROCUREMENT PRACTICES

1. Further to Article 18.5 (Anti-Corruption), each Party shall establish and maintain systems to declare ineligible for participation in the Party's procurements, either indefinitely or for a stated period of time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to procurement. On the request of the other Party, a Party shall identify the suppliers determined to be ineligible under these systems, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action.

ARTICLE 9.12: DOMESTIC REVIEW OF SUPPLIER CHALLENGES

1. Each Party shall permit a supplier to challenge the conduct of a procurement covered by this Chapter, without prejudice to that supplier's participation in ongoing or future procurement activities. Each Party shall ensure that its review procedures are made generally available in writing, and are timely, transparent, effective and consistent with due process principles.

2. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent from its procuring entities, to receive and review challenges that suppliers submit in connection with any procurement covered by this Chapter.

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 authorities that it establishes or designates under paragraph 2 to take prompt interim measures, pending the resolution of a challenge, to ensure that the party complies with its measures implementing this Chapter and to preserve the supplier's opportunity to participate in the procurement, including by suspending the contract award or the performance of a contract that has already been 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 a Party decides not to apply an interim measure, it shall provide a written explanation of the grounds for its decision.

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

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

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

ARTICLE 9.13: MODIFICATIONS AND RECTIFICATIONS TO COVERAGE

1. Either Party may modify its coverage under this Chapter provided that it:
 - (a) notifies the other Party in writing and that Party does not object in writing within 30 days of the notification; and
 - (b) offers within 30 days acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification, where necessary as provided for in paragraph 3.
2. Either Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Annexes, provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days of the notification. A Party that makes such a rectification or minor amendment need not provide compensatory adjustments.
3. A Party need not provide compensatory adjustments in those circumstances where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence. 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. Where the Parties are in agreement on the proposed modification, rectification or minor amendment, the Joint Commission shall modify the relevant Annex to reflect the agreement.

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

ARTICLE 9.14: NON-DISCLOSURE OF INFORMATION

1. No Party, procuring entity or review authority, referred to in Article 9.12, may disclose confidential information, designated as confidential, without the authorization of the persons providing the information. Procuring entities shall treat tenders in confidence. In particular, they shall not provide information to other suppliers where doing so might prejudice fair competition between suppliers.

2. Nothing in this Chapter shall prevent the Parties or their procuring entities from withholding the release of information under this Chapter where release might:

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

ARTICLE 9.15: 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 9.16: DEFINITIONS

For purposes of this Chapter:

build-operate-transfer contract and **public works concession contract** means any contractual arrangement, the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities or other

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

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 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;

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

days mean calendar days;

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.

international standard means a standard that is developed in a manner consistent with the decisions of the WTO Committee on Technical Barriers to Trade, as elaborated in "Decisions and Recommendations adopted by the Committee since 1 January 1995", G/TBT/1/Rev.8, 23 May 2002, Section IX ("Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement");

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

procurement means the process by which a procuring entity obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale;

procurement official means any person who performs procurement functions;

procuring entity means an entity listed in Annexes 9-A-1, 9-A-2 or 9-A-3;

services includes construction services, unless otherwise specified;

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

technical specification means a specification that lays down the characteristics of goods to be procured or their related processes and production methods, or the characteristics of

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 31, 2004

services to be procured or their related operating methods, including the applicable administrative provisions, and a requirement relating to conformity assessment procedures that an entity prescribes. A technical specification may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements, as they apply to a good, process, service or production or operating method.