

PART IV
GOVERNMENT PROCUREMENT
CHAPTER 15
GOVERNMENT PROCUREMENT

Article 15.1: Definitions

For purposes of this Chapter:

entity means an entity of a Party covered in Annex 15.1;

government procurement means the process by which a government, through any contractual means, 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;

offsets means those conditions imposed or considered by an 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;

open tendering procedures means those procedures whereby any interested supplier may submit a tender;

privatisation means a process by means of which a public entity is no longer subject to government control, whether by public tender of the shares of that entity or otherwise, as contemplated in the respective Party's legislation in force;

public works concession and **build-operate-transfer contract** means a contract of the same type as the public works procurement contract, except for the fact that the remuneration for the works to be carried out consists either solely of the right to exploit the construction or in such a right together with a payment;

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

technical specifications means a specification, which lays down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for

their production and requirements relating to conformity assessment procedures prescribed by procuring entities; and

tenderer means a supplier who has submitted a tender.

Article 15.2: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement by an entity, by any contractual means, including purchase and rental or lease, with or without an option to buy, subject to the conditions specified in Annexes 15.1 and 15.2. For purposes of this Chapter, public works concession and build-operate-transfer contracts shall be considered as procurement.

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, fiscal incentives, subsidies, guarantees, cooperative agreements, government provision of goods and services to persons or to state, regional or local governments, and purchases for the direct purpose of providing foreign assistance;

(b) purchases funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with the provisions of this Chapter;

(c) hiring of government employees and hiring of entities' other long-term staff and personnel, and related employment measures; and

(d) financial services.

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

Article 15.3: National Treatment and Non-Discrimination

1. Each Party shall ensure that the procurement of its entities covered by this Chapter takes place in a transparent, reasonable and non-discriminatory manner, treating any supplier of either Party equally and ensuring the principle of open and effective competition.

2. With respect to any laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each Party shall grant the goods, services and suppliers of the other Party a treatment no less favourable than that accorded by it to domestic goods, services and suppliers.

3. With respect to any laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each Party shall ensure:

(a) that its entities do not treat a locally-established supplier less favourably than any other locally-established supplier on the basis of the degree of foreign affiliation to, or ownership by, a person of the other Party; and

(b) that its 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.

4. This Article shall not apply to measures concerning customs duties or other charges of any kind imposed on, or in connection with importation, the method of levying such duties and charges, other import regulations, including restrictions and formalities, nor to measures affecting trade in services other than measures specifically governing procurement covered by this Chapter.

Article 15.4: Prohibition of Offsets

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

Article 15.5: Transparency

1. Each Party shall promptly publish any law, regulation, judicial decision and administrative ruling of general application and procedure, including standard contract clauses, regarding procurement covered by this Chapter, in the appropriate publications, including officially designated electronic media.

2. Each Party shall promptly publish in the same manner as in paragraph 1 any modification to such measures therein.

Article 15.6: Tendering Procedures

1. Entities shall award their public contracts by *open tendering* procedures according to their respective domestic procedures, in compliance with this Chapter and in a non-discriminatory manner.

2. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers, entities shall be allowed to award contracts by means other than an open tendering procedure in the following circumstances and subject to the following conditions, where applicable:

(a) in the absence of tenders that conform to the essential requirements in the tender documentation provided in a prior tendering procedure, including any conditions for participation, provided that the requirements of the initial procurement are not substantially modified in the contract as awarded;

(b) where, for works of art, or for reasons connected with the protection of exclusive rights, such as patents, copyrights or proprietary information 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) 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 quoted goods purchased on a commodity market and for purchases of goods made under exceptionally advantageous conditions, which only arise in the very short term in the case of unusual disposals, and not for routine purchases from regular suppliers;

(e) when an 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;

(f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein, provided that the total value of contracts awarded for additional construction services does not exceed 50 per cent of the amount of the main contract; or

(g) insofar as it 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 under an open tendering procedure and the use of such procedure would result in serious injury to the entity, the entity's program responsibilities or the responsible Party. This exception may not be used as a result of a lack of advance planning or concerns relating to the amount of funds available to an entity within a particular period of time.

3. The Parties shall ensure that, whenever it is necessary for entities to resort to a procedure other than open tendering procedures based on the circumstances set forth in paragraph 2, the

entities shall maintain a record or prepare a written report providing specific justification for the contract.

Article 15.7: Conditions for Suppliers' Participation in Procurement

1. Where an entity requires suppliers to satisfy registration, qualification, or any other requirements or conditions before being permitted to participate in a procurement, each Party shall ensure that a notice inviting suppliers to apply for registration, qualification or demonstration of the suppliers' satisfaction of any other conditions for participation is published sufficiently in advance for interested suppliers to prepare and submit responsive applications and for entities to evaluate and make their determinations based on such applications.

2. Each Party shall ensure that any conditions for participation in a procurement are limited to those that are essential to ensure that the potential supplier has the legal, technical and financial abilities to fulfill the requirements and technical specifications of the procurement and that qualification decisions are based solely on the conditions for participation that have been specified in advance in notices or tender documentation.

3. Entities shall be allowed to establish a publicly available list of suppliers qualified to participate in procurements. Where an entity requires suppliers to qualify for such a list before being permitted to participate in a procurement, and a supplier that has not previously satisfied such requirements or conditions submits an application, the entity shall promptly start the relevant procedures and shall allow such supplier to participate in the procurement, provided there is sufficient time to complete the procedures within the time period established for tendering.

4. Entities shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by an entity of that Party or that the supplier has prior work experience in the territory of that Party.

Article 15.8: Publication of Advance Notices

1. For each contract covered by this Chapter, entities shall publish in advance a notice inviting interested suppliers to submit tenders for that contract, except as provided for in Article 15.6.2.

2. The information in each advance 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 entity, the address where all documents relating to the procurement may be obtained and the time limits for submission of tenders.

3. Entities shall publish the notices in a timely manner through means which offer the widest possible and non-discriminatory access to the interested suppliers of the Parties. These means shall be accessible free of charge through a single point of access specified in Annex 15.2.

Article 15.9: Tender Documentation

1. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders.

2. Where contracting entities do not offer free direct access to the entire tender documents and any supporting documents by electronic means, entities shall make promptly available the tender documentation at the request of any supplier of the Parties.

Article 15.10: Time-Limits

1. Time-limits established by the entities during a procurement process shall be sufficiently long to enable suppliers to prepare and submit responsive tenders, in relation to the nature and complexity of the procurement.

2. Notwithstanding paragraph 1, entities shall establish no less than ten days between the date on which the advance notice of intended procurement is published and the final date for the submission of tenders.

Article 15.11: Technical Specifications

1. Technical specifications shall be set out in the notices, tender documents or additional documents.

2. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specifications with a view to, or with the effect of, creating unnecessary obstacles to trade between the Parties.

3. Technical specifications prescribed by entities shall:

(a) be in terms of performance and functional requirements, rather than design or descriptive characteristics; and

(b) be based on international standards, where they exist or, in absence of such standards, on national technical regulations³, recognised national standards⁴ or building codes.

4. Paragraph 3 does not apply when the entity may objectively demonstrate that the use of technical specifications referred to in that paragraph would be ineffective or inappropriate for the fulfillment of the legitimate objectives pursued.

5. In all cases, entities shall consider bids which do not comply with the technical specifications but meet the essential requirements thereof and are fit for the purpose intended. The reference to technical specifications in the tender documents must include words such as "or equivalent".

6. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words, such as "or equivalent", are included in the tender documentation.

7. The tenderer shall have the burden of proof to demonstrate that its bid meets the essential requirements.

Article 15.12: Awarding of Contracts

1. To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be submitted by a tenderer who complies with the conditions for participation.

2. Unless an entity determines that it is not in the public interest to award a contract, entities shall award the contract to the tenderer who has been 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 forth in the tender documentation.

3. Each Party shall ensure that its entities provide for effective dissemination of the results of government procurement processes.

Article 15.13: Bid Challenges

1. Entities shall accord impartial and timely consideration to any complaints from suppliers regarding an alleged breach of this Chapter in the context of a procurement procedure.

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 procurements in which they have, or have had, an interest.

3. Challenges shall be heard by an impartial and independent reviewing authority. A reviewing authority which is not a court shall either be subject to judicial review or shall have procedural guarantees similar to those of a court.

4. Challenge procedures shall provide for, if appropriate, correction of the breach of this Chapter or, in the absence of such correction, compensation for the loss or damages suffered, which may be limited to costs for tender preparation and protest.

Article 15.14: Information Technology and Cooperation

1. The Parties shall, to the extent possible, endeavour to use electronic means of communication to permit efficient dissemination of information on government procurement, particularly as regards tender opportunities offered by entities, while respecting the principles of transparency and non-discrimination.

2. The Parties shall endeavour to provide each other with technical cooperation and assistance through the development of training programs with a view to achieving a better understanding of their respective government procurement systems and statistics, as well as a better access to their respective markets.

Article 15.15: Modifications to Coverage

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

(a) notifies the other Party of the modification; and

(b) provides the other Party, within 30 days following the date of such notification, appropriate compensatory adjustments to its coverage in order to maintain a level of coverage comparable to that existing prior to the modification.

2. Notwithstanding subparagraph 1(b), no compensatory adjustments shall be provided to the other Party where the modification by a Party of its coverage under this Chapter concerns:

(a) rectifications of a purely formal nature and minor amendments to Annex 15.1; or

(b) one or more covered entities on which government control or influence has been effectively eliminated as a result of privatisation.

3. Where appropriate, the Commission shall by decision modify the relevant Annex to reflect the modification notified by the Party concerned.

Article 15.16: Further Negotiations

In the case that either Party offers, in the future, a non-Party additional advantages with regard to the government procurement market access coverage agreed under this Chapter, it shall agree, upon request of the other Party, to enter into negotiations with a view to extending coverage under this Chapter on a reciprocal basis.

Article 15.17: Government Procurement Working Group

Upon request of a Party, the Parties shall convene a Government Procurement Working Group to address issues related to the implementation of this Chapter. Such issues may include:

- (a) bilateral cooperation relating to the development and use of electronic communications in government procurement systems;
- (b) exchange of statistics and other information needed for monitoring procurement conducted by the Parties and the results of the application of this Chapter; and
- (c) exploration of potential interest in further negotiations aimed at further broadening of the scope of market access commitments under this Chapter.