

TITLE IV

**GOVERNMENT PROCUREMENT**

*Article 136*

**Objective**

In accordance with the provisions of this Title, the Parties shall ensure the effective and reciprocal opening of their government procurement markets.

*Article 137*

**Scope and coverage**

1. This Title applies to any law, regulation, procedure or practice regarding any procurement, by the entities of the Parties, of goods and services including works, subject to the conditions specified by each Party in Annexes XI, XII and XIII.

2. This Title shall not be applicable to:

(a) contracts awarded pursuant to:

(i) an international agreement and intended for the joint implementation or exploitation of a project by the contracting Parties;

(ii) an international agreement relating to the stationing of troops; and

(iii) the particular procedure of an international organisation.

(b) non-contractual agreements or any form of government assistance and procurement made in the framework of assistance or cooperation programmes.

(c) contracts for :

(i) the acquisition or rental of land, existing buildings, or other immovable property or concerning rights thereon;

(ii) the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time.

(iii) arbitration and conciliation services;

(iv) employment contracts; and

(v) research and development services other than those where the benefits accrue exclusively to the entity for its use in the conduct of its own affairs, on condition that the service is wholly remunerated by the entity.

(d) financial services.

3. Public works concessions, as defined in Article 138(i), shall also be subject to this Title, as specified in Annexes XI, XII and XIII.

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

*Article 138*  
**Definitions**

For the purpose of this Title, the following definitions shall apply:

(a) "government procurement" means any type of procurement of goods, services or a combination thereof, including works carried out by public entities of the Parties for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale, unless otherwise specified. It includes procurement by such methods as purchase or lease, or rental or hire purchase, with or without an option to buy;

(b) "entities" means the public entities of the Parties, such as central, sub-central or local government entities, municipalities, public undertakings and all other entities that procure in accordance with the provisions of this Title, as set out in Annexes XI, XII and XIII;

(c) "public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

(i) hold the majority of the undertaking's subscribed capital;

(ii) control the majority of the votes attaching to shares issued by the undertaking; or

(iii) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

(d) "supplier of the Parties" means any natural or legal person or public body or group of such persons of a Party and/or bodies of a Party which can provide goods, services or the execution of works. The term shall cover equally a supplier of goods, a service provider or a contractor;

(e) "legal person" means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(f) "legal person of a Party" means a legal person constituted or otherwise organised under the law of the Community or its Member States or of Chile;

Should such a legal person have only its registered office or central administration in the territory of the Community or Chile, it shall not be considered as a Community or a Chilean legal person respectively, unless it is engaged in substantive business operations in the territory of the Community or Chile respectively.

(g) a natural person means a national of one of the Member States or of Chile according to their respective legislation;

- (h) "tenderer" means a supplier who has submitted a tender;
- (i) "public" works concessions" means a contract of the same type as public works procurement contracts, except for the fact that the remuneration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with a payment;
- (j) "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;
- (k) "in writing or written" means any expression of information in words, numbers or other symbols, including electronic means, that can be read, reproduced and stored;
- (l) "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;
- (m) "privatisation" means a process by means of which government control over an entity is effectively eliminated and is transferred to the private sector;
- (n) "liberalisation" means a process as a result of which an entity enjoys no exclusive or special rights and is exclusively engaged in the provision of goods or services on markets that are subject to effective competition.

*Article 139*

**National treatment and non-discrimination**

1. Each Party shall ensure that the procurement of its entities covered by this Title 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 Title, 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 Title, each Party shall ensure:
  - (a) that its entities do not treat a locally-established supplier less favourably than another 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 Title.

*Article 140*

**Prohibition of offsets and national preferences**

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, nor conditions regarding national preferences such as margins allowing price preference.

*Article 141*

**Valuation rules**

1. Entities shall not split up a procurement, nor use any other method of contract valuation with the intention of evading the application of this Title when determining whether a contract is covered by the disciplines of thereof, subject to the conditions set out in Annexes XI and XII, Appendices 1 to 3.

2. In calculating the value of a contract, an entity shall take into account all forms of remuneration, such as premiums, fees, commissions and interests, as well as the maximum permitted total amount, including option clauses, provided for by the contract.

3. When, due to the nature of the contract, it is not possible to calculate in advance its precise value, entities shall estimate this value on the basis of objective criteria.

*Article 142*

**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 Title in the appropriate publications referred to in Annex XIII, Appendix 2, including officially designated electronic media.

2. Each Party shall promptly publish in the same manner all modifications to such measures.

*Article 143*

**Tendering procedures**

1. Entities shall award their public contracts by open or selective tendering procedures according to their national procedures, in compliance with this Title and in a non-discriminatory manner.

2. For the purposes of this Title:

(a) open tendering procedures are those procedures whereby any interested supplier may submit a tender.

(b) selective tendering procedures are those procedures whereby, consistent with Article 144 and other relevant provisions of this Title, only suppliers satisfying qualification requirements established by the entities are invited to submit a tender.

3. However, in the specific cases and only under the conditions laid down in Article 145, entities may use a procedure other than the open or selective tendering procedures referred to in paragraph 1 of that Article, in which case the entities may choose not to publish a notice of intended procurement, and may consult the suppliers of their choice and negotiate the terms of contract with one or more of these.

4. Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.

*Article 144*  
**Selective tendering**

1. In selective tendering, entities may limit the number of qualified suppliers they will invite to tender, consistent with the efficient operation of the procurement process, provided that they select the maximum number of domestic suppliers and suppliers of the other Party, and that they make the selection in a fair and non-discriminatory manner and on the basis of the criteria indicated in the notice of intended procurement or in tender documents.

2. Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed, under the conditions foreseen in Article 146(7). Any selection shall allow for equitable opportunities for suppliers on the lists.

*Article 145*  
**Other procedures**

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

(a) when no suitable tenders or request to participate have been submitted in response to a prior procurement, on condition that the requirements of the initial procurement are not substantially modified;

(b) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be performed only by a particular supplier and no reasonable alternative or substitute exists;

(c) for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries of goods or services by the original supplier where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment, software or services;

(e) when an entity procures prototypes or a first product 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 services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the services described therein. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract;

(g) for new services consisting of the repetition of similar services and for which the entity has indicated, in the notice concerning the initial service, that tendering procedures other than open or selective might be used in awarding contracts for such new services;

(h) in the case of contracts awarded to the winner of a design contest, provided that the contest has been organised in a manner which is consistent with the principles of this Title; in case of several successful candidates, all successful candidates shall be invited to participate in the negotiations; and

(i) 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.

2. The Parties shall ensure that, whenever it is necessary for entities to resort to a procedure other than the open or selective tendering procedures based on the circumstances set forth in paragraph 1, the entities shall maintain a record or prepare a written report providing specific justification for the contract awarded under that paragraph.

#### *Article 146*

### **Qualification of suppliers**

1. Any conditions for participation in procurement shall be limited to those that are essential to ensure that the potential supplier has the capability to fulfil the requirements of the procurement and the ability to execute the contract in question.

2. In the process of qualifying suppliers, entities shall not discriminate between domestic suppliers and suppliers of the other Party.

3. A Party 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.

4. Entities shall recognise as qualified suppliers all suppliers who meet the conditions for participation in a particular intended procurement. Entities shall base their qualification decisions solely on the conditions for participation that have been specified in advance in notices or tender documentation.

5. Nothing in this Title shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations or conviction for serious crime such as participation in criminal organisations.

6. Entities shall promptly communicate to suppliers that have applied for qualification their decision on whether or not they qualify.

*Permanent lists of qualified suppliers*

7. Entities may establish permanent lists of qualified suppliers provided that the following rules are respected :

(a) entities establishing permanent lists shall ensure that suppliers may apply for qualification at any time.

(b) any supplier having requested to become a qualified supplier shall be notified by the entities concerned of the decision in this regard.

(c) suppliers requesting to participate in a given intended procurement who are not on the permanent list of qualified suppliers shall be given the possibility to participate in the procurement by presenting the equivalent certifications and other means of proof requested from suppliers who are on the list.

(d) when an entity operating in the utilities sector uses a notice on the existence of a permanent list as a notice of intended procurement, as provided in Article 147(7), suppliers requesting to participate who are not on the permanent list of qualified suppliers shall also be considered for the procurement, provided there is sufficient time to complete the qualification procedure; in this event, the procuring entity shall promptly start procedures for qualification and the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off the suppliers list.

*Article 147*

**Publication of notices**

*General provisions*

1. Each Party shall ensure that its entities provide for effective dissemination of the tendering opportunities generated by the relevant government procurement processes, providing suppliers of the other Party with all the information required to take part in such procurement.

2. For each contract covered by this Title, except as set out in Articles 143(3) and 145, entities shall publish in advance a notice inviting interested suppliers to submit tenders, or where appropriate, requests for participation for that contract.

3. The information in each notice of intended procurement shall include at least the following.

- (a) name, address, telefax number, electronic address of the entity and, if different, the address where all documents relating to the procurement may be obtained;
- (b) the tendering procedure chosen and the form of the contract;
- (c) a description of the intended procurement, as well as essential contract requirements to be fulfilled;
- (d) any conditions that suppliers must fulfil to participate in the procurement;
- (e) time-limits for submission of tenders and, where appropriate, other time limits;
- (f) main criteria to be used for award of the contract; and
- (g) if possible, terms of payment and any other terms.

*Notice of planned procurement*

4. Each Party shall encourage its entities to publish as early as possible in each fiscal year, a notice of planned procurement containing information regarding entities future procurement plans. Such notice should include the subject matter of the procurement and the planned date of the publication of the notice of intended procurement.

5. Entities operating in the utilities sector may use a notice of planned procurement as a notice of intended procurement, under the condition that such notice contains as much of the information referred to in paragraph 3 as is available, and that it explicitly invites interested suppliers to express their interest in the procurement to the entity.

6. Entities having used a notice of planned procurement as a notice of intended procurement shall subsequently communicate to all suppliers who have expressed an initial interest further information that shall include, at least, the information referred to in paragraph 3 and ask them to confirm their interest on that basis.

*Notice regarding permanent lists of qualified suppliers*

7. Entities which intend to maintain permanent lists shall, consistently with paragraph 2, publish a notice which shall identify the entity, and indicate the purpose of the permanent list and the availability of the rules concerning its operation, including criteria for qualification and disqualification, as well as its duration.

8. Where the permanent list is of a duration greater than three years, the notice shall be published annually.

9. Entities operating in the utilities sector may use a notice on the existence of permanent lists of qualified suppliers as a notice of intended procurement. In that case, they shall provide, in a timely manner, information which allows all those who have expressed an interest to assess their interest in participating in the procurement. This information shall include the information contained in the notice referred to in paragraph 3, to the extent that such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.

*Common provisions*

10. Each notice referred to in this Article shall be accessible during the entire time period established for tendering for the relevant procurement.

11. 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 XIII, Appendix 2.

*Article 148*

**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.

3. Entities shall promptly reply to any reasonable request for relevant information relating to the intended procurement, on condition that such information does not give that supplier an advantage over its competitors.

*Article 149*

**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 barriers 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 these exist or, in their absence, on national technical regulations<sup>12</sup>, recognised national standards<sup>13</sup>, or building codes.

4. The provisions of paragraph 3 do not apply when the entity can objectively demonstrate that the use of technical specifications referred to in that paragraph would be ineffective or inappropriate for the fulfilment 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 for or reference to a particular trademark or trade name, patent, 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 words, such as "or equivalent", are included in the tender documentation.

7. The tenderer shall have the burden of proving that his bid meets the essential requirements.

*Article 150*

**Time-limits**

1. All time-limits established by the entities for the receipt of tenders and requests to participate shall be adequate to allow suppliers of the other Party, as well as domestic suppliers, to prepare and to submit tenders, and where appropriate, requests for participation or applications for qualifying. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement and the normal time for transmitting tenders from foreign as well as domestic points.

2. Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of request for participation or for qualifying for the supplier's list.

3. The minimum time-limits for the receipt of tenders are specified in Annex XIII, Appendix 3.

*Article 151*

**Negotiations**

1. A Party may provide for its entities to conduct negotiations:

(a) in the context of procurements in which they have indicated such intent in the notice of intended procurement; or

(b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.

3. Entities shall not, in the course of negotiations, discriminate between tenderers. In particular, they shall ensure that:

(a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;

(b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;

(c) on the basis of the revised requirements and/or when negotiations are concluded, all remaining participants are afforded an opportunity to submit new or amended tenders in accordance with a common deadline.

*Article 152*

**Submission, receipt and opening of tenders**

1. Tenders and requests to participate in procedures shall be submitted in writing.
2. Entities shall receive and open bids from tenderers under procedures and conditions guaranteeing the respect of the principles of transparency and non-discrimination.

*Article 153*

**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 supplier which complies with the conditions for participation.
2. Entities shall make the award to the tenderer whose tender is either the lowest tender or the tender which, in terms of the specific objective evaluation criteria previously set forth in the notices or tender documentation, is determined to be the most advantageous.

*Article 154*

**Information on contract award**

1. Each Party shall ensure that its entities provide for effective dissemination of the results of government procurement processes.
2. Entities shall promptly inform tenderers of decisions regarding the award of the contract and of the characteristics and relative advantages of the selected tender. Upon request, entities shall inform any eliminated tenderer of the reasons for the rejection of its tender.
3. Entities may decide to withhold certain information on the contract award where release of such information would prevent law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of suppliers, or might prejudice fair competition between them.

*Article 155*

**Bid challenges**

1. Entities shall accord impartial and timely consideration to any complaints from suppliers regarding an alleged breach of this Title 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 Title 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:

(a) rapid interim measures to correct breaches of this Title and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied; and

(b) if appropriate, correction of the breach of this Title 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 156*

### **Information technology**

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. With a view to improving access to government procurement markets, each Party shall endeavour to implement an electronic information system, which is compulsory for their respective entities.

3. The Parties shall encourage the use of electronic means for the transmission of offers.

#### *Article 157*

### **Cooperation and assistance**

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 and better access to their respective markets.

#### *Article 158*

### **Statistical reports**

Where a Party does not ensure an acceptable level of compliance with Article 147(11), it shall, upon request of the other Party, collect and provide to the other Party on an annual basis statistics on its procurements covered by this Title. Such reports shall contain the information established in Annex XIII, Appendix 4.

*Article 159*

**Modifications to coverage**

1. A Party may modify its coverage under this Title, 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 paragraph 1(b), no compensatory adjustments shall be provided to the other Party where the modification by a Party of its coverage under this Title concerns:
  - (a) rectifications of a purely formal nature and minor amendments to Annexes XI and XII;
  - (b) one or more covered entities on which government control or influence has been effectively eliminated as a result of privatisation or liberalisation.
3. Where appropriate, the Association Committee shall by decision modify the relevant Annex to reflect the modification notified by the Party concerned.

*Article 160*

**Further negotiations**

If either Party should offer in the future a third party additional advantages with regard to access to their respective procurement markets beyond what has been agreed under this Title, it shall agree to enter into negotiations with the other Party with a view to extending these advantages to it on a reciprocal basis by means of a decision of the Association Committee.

*Article 161*

**Exceptions**

Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between them, nothing in this Title shall be construed to prevent any Party from adopting or maintaining measures:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human life, health or security;
- (c) necessary to protect animal or plant life or health;
- (d) necessary to protect intellectual property; or
- (e) relating to goods or services of handicapped persons, of philanthropic institutions or of prison labour.

*Article 162*

**Review and implementation**

The Association Committee shall review the implementation of this Title every two years, unless otherwise agreed by the Parties; it shall consider any issue arising from it, and take appropriate action in the exercise of its functions. It shall, in particular, fulfil the following tasks:

- (a) coordinate exchanges between the Parties regarding the development and implementation of information technology systems in the field of public procurement;
- (b) make appropriate recommendations regarding the cooperation between the Parties; and
- (c) adopt decisions where provided for under this Title.