

## Chapter Nine

### Government Procurement

#### Article 9.1: Scope and Coverage

1. This Chapter applies to any measure, including any act or guideline of a Party, 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 concession contracts;
  - (b) listed and subject to the conditions specified in:
    - (i) Annex 9.1.2(b)(i), which shall apply between the United States and each other Party; and
    - (ii) Annex 9.1.2(b)(ii), which shall apply between the Central American Parties;
  - (c) that is conducted by a procuring entity; and
  - (d) that is not excluded from coverage.
3. This Chapter does not apply to:
  - (a) non-contractual agreements or any form of assistance that a Party or a state enterprise provides, including grants, loans, equity infusions, 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 loans or grants made to a Party, including an entity of a Party by a person, international entities, associations, or another Party or a non-Party, to the extent that the conditions of such assistance are 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) hiring of government employees and related employment measures;
  - (e) any good or service component of any contract that a procuring entity that is not listed in Sections A through C of Annex 9.1.2(b)(i) awards; and
  - (f) purchases made under exceptionally advantageous conditions that only arise in the very short term, such as unusual disposals by companies that normally are not suppliers, or disposals of assets of businesses in liquidation or receivership.
4. Each Party shall ensure that its procuring entities comply with this Chapter in conducting any covered procurement.
5. Where a procuring entity awards a contract in a procurement that is not covered by this Chapter, nothing in this Chapter shall be construed to cover any good or service component of that contract.
6. No procuring entity may prepare, design, or otherwise structure or divide any procurement in order to avoid the obligations of this Chapter.
7. Nothing in this Chapter shall prevent a Party from developing new procurement policies, procedures, or contractual means, provided they are not inconsistent with this Chapter.

## **Article 9.2: General Principles**

1. With respect to any measure covered by this Chapter, each Party shall accord to the goods and services of another Party, and to the suppliers of another Party of such goods and services, treatment no less favorable than the most favorable treatment the Party or procuring entity accords to its own goods, services, and suppliers.
2. With respect to any measure covered by this Chapter, no 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 another Party.
3. For purposes of paragraphs 1 and 2, determination of the origin of goods shall be made in a manner consistent with Chapter Four (Rules of Origin and Origin Procedures).
4. With respect to covered procurement, a procuring entity shall not seek, take account of, or impose offsets in any stage of a procurement.
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:

- (a) publish any law or regulation, and any modification thereof, relating to procurement;
- (b) make publicly available any procedure, judicial decision, or administrative ruling of general application, relating to procurement; and
- (c) on request of a Party, provide to that Party a copy of a procedure, judicial decision, or administrative ruling of general application, relating to procurement.

### **Article 9.4: Publication of Notice of Intended Procurement**

1. Subject to Article 9.9.2, a procuring entity shall publish in advance a notice inviting interested suppliers to submit tenders for each covered procurement.

2. The information in each such notice shall include, at a minimum, an indication that the procurement is covered by this Chapter, a description of the intended procurement, any conditions that suppliers must fulfill to participate in the procurement, the name of the procuring entity, the address where all documents relating to the procurement may be obtained, if applicable, any sum payable for the tender documentation, the time limits and address for submission of tenders, and the time for delivery of the goods or services being procured.

3. Each Party shall encourage its procuring entities to publish information regarding their future procurement plans as early as possible in each Party's fiscal year.

### **Article 9.5: Time Limits for the Tendering Process**

1. A procuring entity shall provide suppliers sufficient time to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement. In no case shall a procuring entity provide less than 40 days from the date of publication of a notice of intended procurement to the final date for submission of tenders.

2. Notwithstanding paragraph 1, where there are no qualification requirements for suppliers, a procuring entity may establish a period for tendering that is less than 40 days, but in no case less than 10 days, in the following circumstances:

- (a) where the procuring entity published a separate notice containing a description of

the procurement, the approximate time limits for the submission of tenders or, where appropriate, conditions for participation in a procurement, and the address from which documents relating to the procurement may be obtained, at least 40 days and not more than 12 months before the final date for the submission of tenders;

- (b) where an entity procures commercial goods and services that are sold or offered for sale to, and customarily purchased and used by, non-governmental buyers for non-governmental purposes; or
- (c) where an unforeseen state of urgency that is duly substantiated by the procuring entity renders impracticable the time provided in paragraph 1.

### **Article 9.6: 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. The documentation shall include all criteria that the procuring entity will consider in awarding the contract, including all cost factors, and the weights or, where appropriate, the relative values, that the entity will assign to these criteria in evaluating tenders.
2. A procuring entity may satisfy paragraph 1 by publishing the documentation by electronic means accessible to all interested suppliers. Where a procuring entity does not publish tender documentation by electronic means accessible to all interested suppliers, the entity shall, on request of any supplier, promptly make the documentation available in written form to the supplier.
3. Where a procuring entity, in the course of a procurement, modifies the criteria referred to in paragraph 1,<sup>1</sup> it shall transmit all such modifications in writing:
  - (a) to all suppliers that are participating in the procurement at the time the criteria are modified, if the identities of such suppliers are known, and in cases where the identities of suppliers participating are not known, in the same manner as the original information was transmitted; and
  - (b) in adequate time to allow the suppliers to modify and re-submit their tenders, as appropriate.

### **Article 9.7: Technical Specifications**

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

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<sup>1</sup> Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua may make such modifications before tenders are opened. The United States may make such modifications before awarding the contract.

2. A procuring entity shall prescribe any technical specifications, where appropriate:
  - (a) in terms of performance requirements rather than design or descriptive characteristics; and
  - (b) based on international standards, where applicable, otherwise on recognized national standards.
3. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, 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 shall 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.

#### **Article 9.8: Requirements and Conditions for Participating in Procurement**

1. Where a procuring 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, the procuring entity shall publish a notice inviting suppliers to apply for registration or qualification, or to satisfy any other conditions for participation. The procuring entity shall publish the notice sufficiently in advance to provide interested suppliers sufficient time to prepare and submit applications and for the entity to evaluate and make its determinations based on such applications.
2. Each procuring entity shall:
  - (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) recognize as qualified all suppliers of another Party that have met the requisite conditions for participation; and
  - (c) base qualification determinations solely on the conditions for participation that have been specified in advance in notices or tender documentation.

3. Procuring entities may establish publicly available lists of suppliers qualified to participate in procurements. 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 in the list, the procuring entity shall promptly start the qualification procedures and shall allow the supplier to submit a tender, if it is determined to be a qualifying supplier, provided there is sufficient time to fulfill the conditions for participation within the time period established for tendering.

4. No procuring entity may make it a condition for participation in a procurement that a supplier has previously been awarded one or more contracts by a procuring entity or that the supplier has prior work experience in the territory of a Party. A procuring entity shall evaluate the financial and technical abilities of a supplier on the basis of that supplier's business activity outside the territory of the Party of the procuring entity, as well as activity, if any, in the territory of the Party of the procuring entity.

5. A procuring entity shall promptly communicate to any supplier that has applied for qualification its decision on whether that supplier is qualified. Where a procuring entity rejects an application for qualification or ceases to recognize a supplier as qualified, that entity shall, on request of the supplier, promptly provide a written explanation of the reasons for its action.

6. Nothing in this Article shall preclude a procuring entity from prohibiting a supplier from participating in a procurement on grounds such as bankruptcy or false declarations.

### **Article 9.9: Tendering Procedures**

1. Subject to paragraph 2, a procuring entity shall award contracts by means of open tendering procedures.

2. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers, a procuring entity may award contracts by means other than an open tendering procedure in the following circumstances:

- (a) in the absence of tenders that conform to the essential requirements in the tender documentation provided in a prior notice of intended procurement or invitation to participate, including any conditions for participation, provided that the requirements of the initial notice or invitation 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 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 contracts have been fulfilled, subsequent procurements of goods or services shall be subject to this Chapter;
- (f) where additional construction services that were not included in the initial contract but that were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein. However, the total value of contracts awarded for additional construction services may not exceed 50 percent of the amount of the initial contract; or
- (g) in so far as is strictly necessary where, for reasons of urgency brought about by events unforeseeable by the procuring 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 procuring entity, the entity's program responsibilities, or the Party.

3. A procuring entity shall maintain records or prepare written reports providing specific justification for any contract awarded under paragraph 2, in a manner consistent with Article 9.11.3.

#### **Article 9.10: Awarding of Contracts**

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, conform to the essential requirements of the tender documentation that the procuring entity provided in advance to all participating suppliers, and be from a supplier that has complied with any conditions for participation that the procuring entity has communicated in advance to all participating suppliers.

2. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to a supplier that the procuring entity has 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 a contract it has awarded, in order to avoid the obligations of this Chapter.

### **Article 9.11: Information on Contract Awards**

1. A procuring entity shall promptly inform participating suppliers of decisions on contract awards. A procuring entity shall, on request, 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.

2. Promptly after awarding a contract in a covered procurement, a procuring entity shall publish a notice that includes at least the following information about the contract award:

- (a) the name of the entity;
- (b) a description of the goods or services included in the contract;
- (c) the name of the supplier awarded the contract;
- (d) the value of the contract award; and
- (e) where the entity did not use an open tendering procedure, an indication of the circumstances justifying the procedure used.

3. A procuring entity shall maintain records and reports relating to tendering procedures and contract awards in procurements covered by this Chapter, including the records and reports provided for in Article 9.9.3, for at least three years after the date a contract is awarded.

### **Article 9.12: Non-Disclosure of Information**

1. A Party, its procuring entities, and its review authorities shall not disclose confidential information the disclosure of which would prejudice legitimate commercial interests of a particular person or might prejudice fair competition between suppliers, without the formal authorization of the person that provided the information to the Party.

2. Nothing in this Chapter shall prevent a Party or its procuring entities from withholding the release of information 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 9.13: Ensuring Integrity in Procurement Practices**

Further to Article 18.8 (Anti-Corruption Measures), 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 another 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 9.14: Exceptions**

1. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between 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: Domestic Review of Supplier Challenges**

1. Each Party shall establish or designate at least one impartial administrative or judicial authority, which shall be independent from its procuring entities, to receive and review challenges that suppliers submit relating to the obligations of the Party and its entities under this Chapter and to make appropriate findings and recommendations. In the event that a body other than such an impartial authority initially reviews a supplier's challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent from the procuring entity that is the subject of the challenge.

2. Each Party shall provide that an authority established or designated under paragraph 1 may 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.

3. Each Party shall ensure that its review procedures are publicly available in writing, and are timely, transparent, effective, and consistent with the principle of due process.

4. Each Party shall ensure that all documents related to a challenge to a procurement are available to any impartial authority established or designated under paragraph 1.
5. A procuring entity shall respond in writing to a supplier's complaint.
6. Each Party shall ensure that an impartial authority it establishes or designates under paragraph 1 provides to suppliers the following:
  - (a) a sufficient period to prepare and submit written challenges, which in no case shall be less than 10 days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;
  - (b) an opportunity to review relevant documents and to be heard by the authority in a timely manner;
  - (c) an opportunity to reply to the procuring entity's response to the supplier's complaint; and
  - (d) prompt delivery in writing of its findings and recommendations relating to the challenge, with an explanation of the grounds for each decision.
7. Each Party shall ensure that a supplier's submission of a challenge does not prejudice the supplier's participation in ongoing or future procurements.

#### **Article 9.16: Modifications and Rectifications to Coverage**

1. A Party may make technical rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Schedules to Section A through C of Annexes 9.1.2(b)(i) and 9.1.2(b)(ii), provided that it notifies the other Parties in writing and no other Party objects in writing within 30 days after the notification. A Party that makes such a rectification or minor amendment shall not be required to provide compensatory adjustments to the other Parties.
2. A Party may modify its coverage under this Chapter provided that it:
  - (a) notifies the other Parties in writing and no other Party objects in writing within 30 days after the notification; and
  - (b) except as provided in paragraph 3, offers within 30 days after notifying the other Parties acceptable compensatory adjustments to the other Parties to maintain a level of coverage comparable to that existing before the modification.
3. A Party need not provide compensatory adjustments in those circumstances where the proposed modification covers one or more procuring entities on which the Parties agree that government control or influence has been effectively eliminated. Where the Parties do not agree

that such government control or influence has been effectively eliminated, the objecting Party or Parties 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 Commission shall modify the relevant section of Annexes 9.1.2(b)(i) and 9.1.2(b)(ii) to reflect any agreed modification, technical rectification, or minor amendment.

#### **Article 9.17: Definitions**

For purposes of this Chapter:

**build-operate-transfer contract** and **public works concession contract** mean any contractual arrangements, the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plants, buildings, facilities, or other government-owned works and under which, as consideration for a supplier's execution of a contract, a procuring entity grants to the supplier, for a specified period, temporary ownership, if the Party permits such ownership, or a right to control and operate, and demand payment for the use of, such works for the duration of the contract;

**in writing** or **written** means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information;

**offsets** means conditions or undertakings imposed or considered by a procuring entity 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;

**open tendering procedure** means any type of procurement method of a Party, except direct purchasing methods as specified in Article 9.9.2, provided these methods are consistent with this Chapter;

**procuring entity** means an entity listed in Annexes 9.1.2(b)(i) and 9.1.2(b)(ii);

**publish** means to disseminate information in an electronic or paper medium that is distributed widely and is readily accessible to the general public;

**services** includes construction services, unless otherwise specified;

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

**technical specification** means a specification that sets out the characteristics of goods to be procured or their related processes and production methods, or the characteristics of services to be procured or their related operating methods, including the applicable administrative

provisions, and requirements relating to conformity assessment procedures that an entity prescribes. A technical specification may also include or deal exclusively with terminology, symbols, packaging, or marking or labeling requirements, as they apply to a good, process, service, or production or operating method.