

CHAPTER SEVENTEEN GOVERNMENT PROCUREMENT

ARTICLE 17.1: GENERAL PROVISIONS

1. The Parties reaffirm their rights and obligations under the GPA and their interest in further expanding bilateral trading opportunities in each Party's government procurement market.
2. The Parties recognize their shared interest in promoting international liberalization of government procurement markets in the context of the rules-based international trading system. The Parties shall continue to cooperate in the review under Article XXIV:7 of the GPA and on procurement matters in APEC and other appropriate international fora.
3. Nothing in this Chapter shall be construed to derogate from either Party's rights or obligations with respect to the other Party under the GPA.
4. The Parties confirm their desire and determination to apply the *APEC Non-Binding Principles on Government Procurement*, as appropriate, to all their government procurement that is outside the scope of the GPA and this Chapter.

ARTICLE 17.2: SCOPE AND COVERAGE

1. This Chapter applies to any measure regarding covered procurement.
2. For purposes of this Chapter, **covered procurement** means procurement for governmental purposes:
 - (a) of goods, services, or any combination thereof:
 - (i) as specified in a Party's Schedule to Annex 17-A; and
 - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
 - (b) by any contractual means, including purchase; lease; rental or hire purchase, with or without an option to buy; build-operate-transfer contracts; and public works concession contracts;
 - (c) for which the value equals or exceeds the relevant threshold provided for in Annex 17-A;
 - (d) by a procuring entity; and
 - (e) that is not otherwise excluded from coverage under paragraph 3 or Annex 17-A.
3. This Chapter does not apply to:

- (a) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
- (b) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption, and distribution of public debt, including loans and government bonds, notes and other securities; or
- (c) procurement conducted for the specific purpose of providing international assistance, including development aid.

4. For greater certainty relating to the procurement of digital products as defined in Article 15.9 (Definitions):

- (a) covered procurement includes the procurement of digital products; and
- (b) no provision of Chapter Fifteen (Electronic Commerce) shall be construed as imposing obligations on a Party with respect to the procurement of digital products.

5. The provisions of this Chapter do not affect the rights and obligations provided for in Chapters Two (National Treatment and Market Access for Goods), Eleven (Investment), Twelve (Cross-Border Trade in Services), and Thirteen (Financial Services).

ARTICLE 17.3: INCORPORATION OF GPA PROVISIONS

1. For all covered procurement, the Parties shall apply Appendices II through IV of the GPA, and the following articles of the GPA, *mutatis mutandis*:

Article I:3	Application to Non-listed Entities
Article II	Valuation of Contracts
Article III	National Treatment and Non-discrimination
Article IV:1	Rules of Origin
Article VI	Technical Specifications
Article VII	Tendering Procedures
Article VIII	Qualification of Suppliers
Article IX	Invitation to Participate Regarding Intended Procurement
Article X	Selection Procedures
Article XI:4	Time-Limits for Delivery
Article XII	Tender Documentation
Article XIII	Submission, Receipt and Opening of Tenders and Awarding of Contracts
Article XIV	Negotiation
Article XV	Limited Tendering
Article XVI:1	Offsets
Article XVIII	Information and Review as Regards Obligations of Entities
Article XIX:1 through 4	Information and Review as Regards Obligations of Parties

To that end, these GPA articles and appendices are incorporated into and made a part of this Chapter, *mutatis mutandis*.

2. For purposes of the incorporation of the GPA under paragraph 1, the term:

- (a) “Agreement” in the GPA means “Chapter,” except that “countries not Parties to this Agreement” means “non-Parties” and “Party to the Agreement” in GPA Article III:2(b) means “Party;”
- (b) “Appendix I” in the GPA means “Annex 17-A;”
- (c) “Annex 1” in the GPA means “Section A of Annex 17-A;”
- (d) “Annex 4” in the GPA means “Section C of Annex 17-A;”
- (e) “Annex 5” in the GPA means “Section D of Annex 17-A;”
- (f) “any other Party” in GPA Article III:1(b) means “a non-Party;”
- (g) “other Parties” in the GPA means “the other Party;”
- (h) “products” in the GPA means “goods;” and
- (i) “among suppliers of other Parties or” in GPA Article VIII shall not be incorporated.

3. The Parties recognize that on December 8, 2006, the WTO Committee on Government Procurement provisionally approved the text of the revised GPA. Further to Article 24.3 (Amendment of the WTO Agreement), at such time as the revised GPA enters into force for both Parties, the Parties shall promptly incorporate by reference the appropriate provisions of the revised GPA in place of the provisions in paragraph 1.

4. If the GPA is further amended or is superseded by another agreement, the Parties shall, consistent with Article 24.2 (Amendments), amend this Chapter, as appropriate, after consultations.

ARTICLE 17.4: GENERAL PRINCIPLES

Use of Electronic Means

1. When conducting covered procurement by electronic means, a procuring entity shall:

- (a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and
- (b) maintain mechanisms that ensure the integrity of requests for participation

and tenders, including establishment of the time of receipt and the prevention of inappropriate access.

Valuation

2. For greater certainty with regard to Article II of the GPA, in estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including premiums, fees, commissions, interest, and other revenue streams that may be provided for in the procurement.

ARTICLE 17.5: CONDITIONS FOR PARTICIPATION

1. A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.

2. In assessing whether a supplier satisfies the conditions for participation, a procuring entity:

- (a) shall evaluate the supplier's financial capacity and commercial and technical abilities on the basis of that supplier's business activities outside the territory of the Party of the procuring entity, as well as its business activities, if any, inside the territory of the Party of the procuring entity;
- (b) shall not impose the condition that, in order for a supplier to participate in a procurement or be awarded a contract, the supplier has previously been awarded one or more contracts by a procuring entity of that Party or that the supplier has prior work experience in the territory of that Party; and
- (c) shall base its determination of whether a supplier has satisfied the conditions for participation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation.

3. A procuring entity may exclude a supplier on grounds such as:

- (a) bankruptcy;
- (b) false declarations;
- (c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
- (d) final judgments in respect of serious crimes or other serious offenses; and
- (e) failure to pay taxes.

ARTICLE 17.6: PUBLICATION OF NOTICES

Notice of Intended Procurement

1. For each covered procurement, a procuring entity shall publish a notice of intended procurement in accordance with Article IX of the GPA, in the appropriate electronic medium, except in the circumstances described in Article XV of the GPA.

Notice of Planned Procurement

2. Each Party shall encourage its procuring entities to publish, as early as possible in each fiscal year, a notice regarding their future procurement plans. The notice should include the subject matter of the procurement and the planned date of the publication of the notice of intended procurement and, to the extent possible, be published in an electronic medium listed in each Party's Appendix II to the GPA.

ARTICLE 17.7: TECHNICAL SPECIFICATIONS

For greater certainty, a Party, including its procuring entities, may, in accordance with Article VI of the GPA, prepare, adopt, or apply technical specifications:

- (a) to promote the conservation of natural resources or protect the environment; or
 - (b) to require a supplier to comply with generally applicable laws regarding
 - (i) fundamental principles and rights at work; and
 - (ii) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health,
- in the territory in which the good is produced or the service is performed.

ARTICLE 17.8: TIME-PERIODS

General

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as:

- (a) the nature and complexity of the procurement;
- (b) the extent of subcontracting anticipated; and
- (c) the time for transmitting tenders from foreign as well as domestic points where electronic means are not used.

Such time-periods, including any extension of the time-periods, shall be common for all interested or participating suppliers.

Deadlines

2. A procuring entity that uses selective tendering shall establish that the final date for the submission of requests for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

3. Except as provided for in paragraphs 4 and 5, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:

- (a) in the case of open tendering, the notice of intended procurement is published; or
- (b) in the case of selective tendering, the entity notifies suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

4. A procuring entity may reduce the time-period for tendering set out in paragraph 3 to not less than 10 days where:

- (a) the procuring entity published a notice of planned procurement under Article IX:7 of the GPA at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
 - (i) a description of the procurement;
 - (ii) the approximate final dates for the submission of tenders or requests for participation;
 - (iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;
 - (iv) the address from which documents relating to the procurement may be obtained; and
 - (v) as much of the information that is required under Article IX:6 of the GPA for the notice of intended procurement, as is available;
- (b) the procuring entity, for procurements of a recurring nature, indicates in an initial notice of intended procurement that subsequent notices will provide time-periods for tendering based on this paragraph; or
- (c) a state of urgency duly substantiated by the procuring entity renders such time-period impracticable.

5. A procuring entity may reduce the time-period for tendering set out in paragraph 3 by five days for each one of the following circumstances:

- (a) the notice of intended procurement is published by electronic means;

- (b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- (c) the tenders can be received by electronic means by the procuring entity.

6. The use of paragraph 5, in conjunction with paragraph 4, shall in no case result in the reduction of the time-period for tendering set out in paragraph 3 to less than ten days from the date on which the notice of intended procurement is published.

7. Notwithstanding any other time-period in this Article, where a procuring entity purchases commercial goods or services, it may reduce the time-period for tendering set out in paragraph 3 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. Where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time period set out in paragraph 3 to not less than ten days.

ARTICLE 17.9: MODIFICATIONS AND RECTIFICATIONS TO COVERAGE

1. A Party shall notify the other Party of any proposed rectification of Annex 17-A, withdrawal of an entity from Annex 17-A, or other modification of Annex 17-A (referred to generally in this Article as “modification”). The Party proposing the modification (modifying Party) shall include in the notification:

- (a) for any proposed withdrawal of an entity from Annex 17-A in the exercise of its rights on the grounds that government control or influence over the entity’s covered procurement has been effectively eliminated, evidence that such government control or influence has been effectively eliminated; or
- (b) for any other proposed modification, information as to the likely consequences of the change for the mutually agreed coverage provided under this Chapter.

2. Where the other Party objects to the proposed modification, it shall notify the modifying Party of its objection within 30 days of the notification of the proposed modification and include the reasons for its objection.

3. The Parties shall seek to resolve any objection through consultations. In such consultations, the Parties shall consider the proposed modification and, in the case of a notification under paragraph 1(b), any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Chapter prior to such notification.

4. If a Party proposes a modification pursuant to paragraph 1(b), the modifying Party shall offer to the other Party appropriate compensatory adjustments, where such adjustments are necessary to maintain a level of coverage comparable to that which was existing prior to the modification. Such modification shall become effective if the other Party does not notify the modifying Party of any objection to the proposed modification within 30 days of the notification. A Party need not provide compensatory adjustments where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence over the entity’s covered procurement.

5. The Joint Committee shall adopt any proposed modification only where the other Party:

- (a) does not object in writing to the proposed modification within 30 days of the notification provided under paragraph 1; or
- (b) submits to the modifying Party a written notice withdrawing the objection.

ARTICLE 17.10: GOVERNMENT PROCUREMENT WORKING GROUP

1. The Parties shall establish a Working Group on Government Procurement comprising representatives of each Party.

2. The Working Group shall meet, as mutually agreed or upon request of a Party, to:

- (a) consider issues regarding government procurement that a Party refers to it, including issues related to information technology; and
- (b) exchange information relating to the government procurement opportunities in each Party.

ARTICLE 17.11: DEFINITIONS

For purposes of this Chapter:

APEC means Asia Pacific Economic Cooperation;

build-operate-transfer contract and **public works concession contract** mean any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities, or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period 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 or services means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;

GPA means WTO *Agreement on Government Procurement*, done at Marrakesh, April 15, 1994; and

procuring entity means an entity covered under Section A of Annex 17-A.