

CHAPTER FIVE: PROCUREMENT

Annex 502.3¹

**Procurement - Provisions for Entities of a Commercial or Industrial Nature
or Those Which Have Been Granted Exclusive Rights by a Party**

A. Scope and Coverage

1. This Annex shall apply to contracting by entities listed in Appendix “A”.
2. This Annex applies to measures, related to the procurement within Canada of goods, services and construction, which are adopted and maintained by the entities covered by this Annex, where the procurement value is:
 - (a) \$500,000 or more in cases where the procurement is for goods or services;
 - (b) \$5,000,000 or more in cases where the procurement is for construction.
3. In the case of framework agreements or long-term agreements with one or more suppliers, all procurement covered by said agreements shall be considered in determining the value of the contracts.

B. Relationship to the Agreement on Internal Trade

1. Chapter Five (Procurement) and the provisions of other Chapters of the Agreement on Internal Trade apply only as specified in this Annex.
2. The following Articles of the Agreement on Internal Trade, or portions thereof, apply to this Annex: Article 505 (Valuation of Procurement); Article 509 (Language); Article 512 (Contact Point); Article 518 (Definitions); Article 1600 (a), (b), and (d) (Committee on Internal Trade); Article 1603.4 (Secretariat); Article 1802 (Aboriginal Peoples); Article 1803 (Culture); Article 1805 (Taxation); and Article 1811 (Accession and Withdrawal).

C. Contracting Rules

1. Entities covered by this Annex shall maintain a procurement policy for procurements subject to this Annex, and shall make that policy available on request. Entities may continue existing policies and procedures, provided they are consistent with the provisions of this Annex.
2. Policies referred to in paragraph 1 may contain measures intended to achieve a legitimate objective as defined in Article 200 of the Agreement on Internal Trade, provided that it can be demonstrated that:
 - (a) the purpose of the measure is to achieve a legitimate objective;

¹ This Annex was added to the Agreement on Internal Trade by means of the Sixth Protocol of Amendment.

- (b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet the legitimate objective;
- (c) the measure is not more trade restrictive than is necessary to achieve the legitimate objective; and
- (d) the measure does not create a disguised restriction on trade.

3. A call for tenders includes all methods of tendering such as Requests for Information, Requests for Quotations, Requests for Proposals, Request for Qualification and Requests for tenders.

4. All forms of discrimination based on the province of origin, either of goods, services or construction materials or of suppliers of such goods, services or materials of construction contractors, shall be eliminated from practices used in all stages of the procurement process.

5. Procurements covered by this Annex shall be announced by a notice on any electronic tendering system easily accessible to all suppliers in Canada. The information published shall give potential suppliers an overview of the proposed procurement and basic tendering information. Entities subject to this Annex shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information, the complexity and the context of the procurement.

6. An entity subject to this Annex may restrict a tender to pre-qualified goods, services or suppliers. The pre-qualification process shall be announced as provided in clause 5.

An entity shall announce its prequalification process sufficiently in advance of either a procurement or each procurement cycle so as to give suppliers an opportunity to qualify.

Pre-qualification of potential suppliers shall be on the basis of their ability to meet the entity's requirements. For reasons of efficiency, an entity may limit the number of potential suppliers pre-qualified in a manner consistent with clauses 3 and 4 while ensuring a competitive and fair process.

7. Tender appraisals may consider price, quality, quantity, delivery, security of supply, maintenance services, experience and financial capacity of the supplier, or any other criteria directly related to the contract that are consistent with the provisions of this Annex. Tender documents, including the notice for pre-qualification, shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids, the relative importance of those criteria, and a brief outline of the methods that will be used to evaluate those criteria.

Entities subject to this Annex may include in the bid document requirements for maintaining their effective operation, including best business practices, provided that such requirements are not designed to favour:

- (a) the goods and services of a particular Province, including those goods and services included in construction contracts; or
- (b) the suppliers of a particular Province of such goods or services, including construction contractors.

8. Entities subject to this Annex may restrict all tendering to Canadian goods or suppliers or provide a margin of preference to Canadian goods or suppliers.

Crown corporations – Applicable provisions of the AIT

9. A Party may, under exceptional circumstances, exclude a procurement of an entity covered by this Annex from the provisions of this Annex for regional and economic development purposes provided that all such exceptions are reported, prior to the commencement of any procedure leading to the award of a contract, to the other Parties with an explanation of the reasons justifying the decision. A Party invoking this provision will seek to minimize the discriminatory effects of the exception on the goods or suppliers of the other Parties.

D. Buying Groups

1. Entities subject to this Annex who participate in group purchasing activities through Buying Groups shall ensure that the activities of such buying groups are carried out in a manner consistent with this Annex.

2. Buying Group means an organization, involving two or more entities, created to achieve efficiencies and economies of scale by combining the purchasing requirements and activities of the members of the group into one joint procurement process. Buying Groups include cooperative arrangements in which individual members administer the procurement function for specific contracts for the group, and more formal corporate arrangements in which the organization administers procurement for group members. Buying groups may involve a variety of entities, including public sector, private sector and not-for-profit organizations.

3. The Parties agree not to direct the procurement activities of Buying Groups so as to discriminate against out-of-province suppliers for procurement covered by this Annex.

E. Exclusions

1. The following procurements shall be excluded from the provisions of this Annex:
 - (a) contracts between subsidiaries or affiliates of the same entity, or between an entity and any of its subsidiaries or affiliates, or between an entity and a general, limited or special partnership in which the entity has a majority or controlling interest, and contracts with a public body or non-profit organization;
 - (b) procurement intended for resale to the public or on behalf of an entity not covered by this Annex;
 - (c) contracts with the only supplier able to meet the bid requirements, including contracts to ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative;
 - (d) contracts with the only supplier able to ensure the continuation of guarantees or warranties;
 - (e) contracts for procuring cultural or artistic goods or services including goods and services relating to the creation, production, distribution or broadcasting of programming in Canada including co-productions, sports and news;
 - (f) contracts concluded where a situation of urgency is brought about by events unforeseeable by the entity;

- (g) contracts for procuring services which, under applicable laws or regulations in the province of tender, can be provided only by the following authorized professional: physicians, dentists, nurses, pharmacists, veterinarians, engineers, architects, land surveyors, accountants, lawyers and notaries;
- (h) contracts for procuring financial services for managing the entity's assets (including endowment funds) and liabilities, and accessory consulting and information services;
- (i) contracts for procuring goods and services to be used outside Canada or for construction work outside Canada;
- (j) goods or services regarding matters of a confidential, competitive or privileged nature, where disclosure of those matters could reasonably be expected to compromise confidentiality, cause economic disruption or otherwise be contrary to the public interest or the interests of the entity;
- (k) contracts financed under international cooperative agreements, only where such agreements include rules for awarding contracts;
- (l) contracts for goods purchased on a commodity market;
- (m) for the procurement of a prototype or a first good or service to be developed in the course of and for a particular contract for research, experiment, study or original development, but not for any subsequent purchases;
- (n) for the purchase of goods under exceptionally advantageous circumstances such as bankruptcy or receivership, but not for routine purchases;
- (o) contracts for the transportation of alcoholic products in bulk by sea or for the transportation of alcoholic products by air; and
- (p) advertising and public relations services.

F. Dispute Resolution

1. Each entity covered by this Annex shall establish a complaint process which provides equal treatment to all Canadian suppliers and shall provide a written description thereof to any supplier requesting same.
2. If a supplier, after completing the complaint process of an entity, continues to believe that the entity has not adhered to the provisions of this Annex, the supplier may register a complaint with the designated contact point of the Party where the supplier is located. If a Party has received recurring complaints from suppliers about a specific covered entity regarding its failure to adhere to the provisions of this Annex, or if a Party agrees that there is merit in an individual supplier's complaint against a covered entity, that Party shall inform the Party responsible for that entity. Both Parties shall make every effort to work with affected suppliers and entities so that entities do adhere to this Annex.
3. The complaints process shall not cause delay in the awarding of a contract by an entity covered by this Annex.

G. Confidentiality

Nothing in this Annex requires an entity to:

- (a) breach confidentiality obligations imposed by law;
- (b) breach confidentiality obligations imposed by a contract with a third party with respect to confidential information provided by the third party to the entity;
- (c) compromise security or commercially sensitive or proprietary information of its own through the dispute resolution process in this Annex;
- (d) compromise commercially sensitive or proprietary information identified by a supplier in its tender documents; or
- (e) disclose those provisions of a contract where such disclosure would compromise the competitive position of, or cause economic disruption to, the entity.

H. Final Provisions

1. This Annex shall come into force on January 1, 2005 for all provinces and on April 1, 2005 for the federal government.
2. After the date of entry into force of the Annex, entities covered by this Annex will be encouraged to use the electronic tendering system or systems referred to in paragraph C for all covered procurement and six months after the date of entry into force of this Annex, entities covered by this Annex will be required to post tender notices on the above mentioned electronic tendering system or systems.
3. Contracts awarded under an agreement predating, or initiated, prior to the coming into force of this Annex shall not be subject to this Annex. Nevertheless, any agreement providing for contracting over a period extending five years beyond the coming into force of Annex shall be announced by the entity within three months of the adoption of this Annex.
4. The Parties agree to review the provisions of this Annex within two years of the coming into force of this Annex with a view to determining how adequately the procurement activities of the entities subject to this Annex are covered and the efficiency of the dispute resolution mechanism in resolving complaints.
5. Following the review referred to in paragraph 4, the Parties shall conduct yearly reviews of the operation of this Annex and present their findings to the Committee on Internal Trade.

APPENDIX "A"

Government Entities Covered by Annex 502.3

This Annex includes entities of a commercial or industrial nature or those which have been granted exclusive rights by a Party.

The Parties agree to provide the Internal Trade Secretariat with a list of their entities covered by this Annex and to advise the Secretariat immediately of:

- (a) the addition of a newly created entity to the list of entities covered by this Annex;
- (b) any changes to an entity covered by this Annex resulting from a change of name, the amalgamation of two or more entities, the restructuring of an entity into two or more entities, the dissolution of an entity; or the privatization of an entity; and
- (c) any movement of entities from one annex to another annex that offers a higher level of coverage under Chapter Five.

Changes resulting from actions other than the ones listed above require the consent of the Parties. The Secretariat shall amend the list after every notification of such changes, shall maintain an up to date copy of the list, shall forward the list to all Parties after every change and shall make it readily available.

Note: A current list can be found by going to the "Crown corporations" menu and clicking on "Covered entities".