

## CHAPTER FIVE: PROCUREMENT

### Article 500: Application of General Rules

1. Articles 401 (Reciprocal Non-Discrimination) and 406 (Transparency) do not apply to this Chapter.
2. For greater certainty, Articles 400 (Application), 402 (Right of Entry and Exit), 403 (No Obstacles), 404 (Legitimate Objectives) and 405 (Reconciliation) apply to this Chapter.
3. For the purposes of Article 504, the reference in Article 404 (Legitimate Objectives) to "Article 401" shall be construed as a reference to "Article 504".

### Article 501: Purpose

Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

### Article 502: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A, where the procurement value is:
  - (a) \$25,000 or greater, in cases where the largest portion of the procurement is for goods;
  - (b) \$100,000 or greater, in cases where the largest portion of the procurement is for services, except those services excluded by Annex 502.1B;<sup>1</sup> or
  - (c) \$100,000 or greater, in the case of construction.
2. Subject to paragraphs 3, 3P6 and 4 and Article 517, entities listed in Annexes 502.2A and 502.2B are excluded from this Chapter.<sup>2</sup>
3. The entities listed in Annex 502.2B shall be free to pursue commercial procurement practices that may otherwise not comply with this Chapter. Nevertheless, the Parties shall

---

<sup>1</sup> See Interpretive Note No.1, immediately following Annex 502.1B.

<sup>2</sup> This paragraph was amended by the Sixth Protocol of Amendment.

not direct those entities to discriminate against the goods, services or suppliers of goods or services of any Party, including those related to construction.

3P6. Annex 502.3 establishes the provisions to cover procurement by entities of a commercial or industrial nature or those which have been granted exclusive rights by a Party.<sup>3</sup>

4. Annex 502.4 establishes the provisions to cover procurement by municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities (MASH entities). Annex 502.4 will only apply to those Provinces who subscribe to the Annex by giving written notice to the Secretariat.<sup>4</sup>

5. <sup>5</sup>

### **Article 503: Extent of Obligations**

Further to Article 102 (Extent of Obligations), each Party is responsible for compliance with this Chapter by its entities listed in Annex 502.1A and Annex 502.3 and for those entities covered by Annex 502.4.<sup>6</sup>

### **Article 504: Reciprocal Non-Discrimination**

1. Subject to Article 404 (Legitimate Objectives), with respect to measures covered by this Chapter, each Party shall accord to:

- (a) the goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own such goods and services; and
- (b) the suppliers of goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own suppliers of such goods and services.

2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:

---

<sup>3</sup> This paragraph was added to the Agreement on Internal Trade by means of the Sixth Protocol of Amendment.

<sup>4</sup> This paragraph was amended by the Third Protocol of Amendment.

<sup>5</sup> This paragraph was deleted by the Sixth Protocol of Amendment.

<sup>6</sup> This article was modified by the Sixth Protocol of Amendment.

- (a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or
  - (b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.
3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:
- (a) the imposition of conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a supplier's place of business in Canada, the place in Canada where the goods are produced or the services are provided, or other like criteria;<sup>7</sup>
  - (b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;
  - (c) the timing of events in the tender process so as to prevent suppliers from submitting bids;
  - (d) the specification of quantities and delivery schedules of a scale and frequency that may reasonably be judged as deliberately designed to prevent suppliers from meeting the requirements of the procurement;
  - (e) the division of required quantities or the diversion of budgetary funds to subsidiary agencies in a manner designed to avoid the obligations of this Chapter; and
  - (f) the use of price discounts or preferential margins in order to favour particular suppliers.
  - (g) <sup>8</sup>
4. No Party shall impose or consider, in the evaluation of bids or the award of contracts, local content or other economic benefits criteria that are designed to favour:
- (a) the goods and services of a particular Province or region, including those goods and services included in construction contracts; or
  - (b) the suppliers of a particular Province or region of such goods or services.

---

<sup>7</sup> This paragraph was amended by the Seventh Protocol of Amendment.

<sup>8</sup> This paragraph was deleted by the Seventh Protocol of Amendment and paragraphs (e) and (f) amended accordingly.

5. Except as otherwise required to comply with international obligations, a Party may accord a preference for Canadian value-added, subject to the following conditions:
- (a) the preference for Canadian value-added must be no greater than 10 per cent;
  - (b) the Party shall specify in the call for tenders the level of preference to be used in the evaluation of the bid; and
  - (c) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine the Canadian value-added.
6. Except as otherwise required to comply with international obligations, a Party may limit its tendering to Canadian goods, Canadian services or Canadian suppliers, subject to the following conditions:
- (a) the procuring Party must be satisfied that there is sufficient competition among Canadian suppliers;
  - (b) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine Canadian content; and
  - (c) the requirement for Canadian content must be no greater than necessary to qualify the procured good or service as a Canadian good or service.<sup>9</sup>

**Article 505: Valuation of Procurement**

1. An entity shall estimate the procurement value as at the time of publication of a notice of a call for tenders in accordance with Article 506.
2. An entity shall, in calculating the procurement value, take into account all forms of remuneration including premiums, fees, commissions and interest.
3. No entity shall prepare, design or otherwise structure a procurement, select a valuation method or divide procurement requirements in order to avoid the obligations of this Chapter.

**Article 506: Procedures for Procurement**

1. Each Party shall ensure that procurement covered by this Chapter is conducted in accordance with the procedures set out in this Article.

---

<sup>9</sup> This paragraph was amended by the Seventh Protocol of Amendment.

2. A call for tenders shall be made through one or more of the following methods:
  - (a) the use of an electronic tendering system that is equally accessible to all Canadian suppliers;
  - (b) publication in one or more predetermined daily newspapers that are easily accessible to all Canadian suppliers; or
  - (c) the use of source lists, provided that, in respect of any source list:
    - (i) registration on the source list is consistent with Article 504;
    - (ii) all registered suppliers in a given category are invited to respond to all calls for tenders in that category; and
    - (iii) a supplier that meets the conditions for registration on the source list is able to register at any time.
3. Each Party shall, no later than January 1, 1995, designate the electronic tendering system or predetermined daily newspapers referred to in paragraphs 2(a) and (b) that it will use when making its calls for tenders. If a Party decides to change the system or a newspaper so designated, it shall notify the other Parties at least 30 days prior to implementing the change.
4. A notice of a call for tenders shall contain at least the following information:
  - (a) a brief description of the procurement contemplated;
  - (b) the place where a person may obtain information and tender documents;
  - (c) the conditions for obtaining the tender documents;
  - (d) the place where the tenders are to be sent;
  - (e) the date and time limit for submitting tenders;
  - (f) the time and place of the opening of the tenders in the event of a public opening; and
  - (g) a statement that the procurement is subject to this Chapter.
5. Each Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement.
6. In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly

identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.<sup>10</sup>

7. An entity may limit tenders to goods, services or suppliers qualified prior to the close of call for tenders. However, the qualification process must itself be consistent with Article 504. An invitation to qualify shall be published at least annually by a method referred to in paragraph 2(a) or (b) or shall be distributed to suppliers listed on a source list referred to in paragraph 2(c).

8. An entity may limit a contract award to goods, services or suppliers that have been assessed (for example, certified, evaluated, qualified, registered or verified) by an independent nationally-recognized and industry-supported organization such as the Standards Council of Canada.

9. If a procurement exempted from the obligations of this Chapter under paragraph 11 or 12 or Article 507 or 508 is publicly tendered in a daily newspaper or on an electronic tendering system, the tender notice shall indicate the restrictions and highlight the practices that do not conform with this Article or Article 504.

10. An entity that uses a source list shall:

- (a) include information in its policies, procedures and practices describing the circumstances and manner in which the source list is used and any qualification criteria that a supplier must meet in order to register on the source list;
- (b) provide written confirmation of registration to any supplier that requests registration on the source list or indicate the qualification criteria that were not met; and
- (c) on request by any Party, provide that Party with the tender notice and the list of suppliers that will be invited to bid on a specific tender.

11. An entity of a Party may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances, provided that it does not do so for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers of any other Party:

- (a) where an unforeseeable situation of urgency exists and the goods, services or construction cannot be obtained in time by means of open procurement procedures;
- (b) where goods or consulting services regarding matters of a confidential or privileged nature are to be purchased and the disclosure of those matters through an open tendering process could reasonably be expected to compromise government confidentiality, cause economic disruption or otherwise be contrary to the public interest;

---

<sup>10</sup> This paragraph was amended by the Seventh Protocol of Amendment.

- (c) where a contract is to be awarded under a cooperation agreement that is financed, in whole or in part, by an international cooperation organization, only to the extent that the agreement between the Party and the organization includes rules for awarding contracts that differ from the obligations set out in this Chapter;
- (d) where construction materials are to be purchased and it can be demonstrated that transportation costs or technical considerations impose geographic limits on the available supply base, specifically in the case of sand, stone, gravel, asphalt compound and pre-mixed concrete for use in the construction or repair of roads;<sup>11</sup>
- (e) where compliance with the open tendering provisions set out in this Chapter would interfere with a Party's ability to maintain security or order or to protect human, animal or plant life or health; and
- (f) in the absence of a receipt of any bids in response to a call for tenders made in accordance with the procedures set out in this Chapter.

12. Where only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances:

- (a) 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;
- (b) where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists;
- (c) for the procurement of goods or services the supply of which is controlled by a supplier that is a statutory monopoly;
- (d) for the purchase of goods on a commodity market;
- (e) for work to be performed on or about a leased building or portions thereof that may be performed only by the lessor;
- (f) for work to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work;
- (g) for a contract to be awarded to the winner of a design contest;

---

<sup>11</sup> This paragraph was amended by the Second Protocol of Amendment.

- (h) 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;
- (i) for the purchase of goods under exceptionally advantageous circumstances such as bankruptcy or receivership, but not for routine purchases;
- (j) for the procurement of original works of art;
- (k) for the procurement of subscriptions to newspapers, magazines or other periodicals; and
- (l) for the procurement of real property.

**Article 507: Non-Application**

This Chapter does not apply to:

- (a) procurement of goods intended for resale to the public;
- (b) procurement of goods, services or construction:
  - (i) purchased on behalf of an entity not covered by this Chapter; or
  - (ii) purchased by entities which operate sporting or convention facilities in order to comply with a commercial agreement with an entity not covered by this Chapter that contains provisions incompatible with this Chapter;<sup>12</sup>
- (c) procurement from philanthropic institutions, prison labour or persons with disabilities;
- (d) procurement contracts with a public body or a non-profit organization;<sup>13</sup>
- (e) procurement of:
  - (i) goods purchased for representational or promotional purposes; or
  - (ii) services or construction purchased for representational or promotional purposes outside the territory of a Party;<sup>14</sup> and

---

<sup>12</sup> This paragraph was amended by the Second and Seventh Protocols of Amendment.

<sup>13</sup> This paragraph was amended by the Second Protocol of Amendment.

<sup>14</sup> This paragraph was amended by the Seventh Protocol of Amendment.

- (f) procurement of any goods the interprovincial movement of which is restricted by laws not inconsistent with this Agreement.

## **Article 508: Regional and Economic Development**

### **Exceptional Circumstances**

1. A Party may, under exceptional circumstances, exclude a procurement from the application of this Chapter for regional and economic development purposes, provided that:

- (a) the exclusion of the procurement does not operate to impair unduly the access of persons, goods, services or investments of another Party;
- (b) the exclusion of the procurement is not more trade restrictive than necessary to achieve its specific objective;
- (c) notice of all such excluded procurements is provided no later than the time the contract is awarded by the methods usually used to publish this type of procurement under Article 506(2); this notice must provide details of the exceptional circumstances and, when published on an electronic tendering system, it must be accessible for a period of time sufficient to allow suppliers to become aware of the procurement; and notice of all such excluded procurements with details of the exceptional circumstances is also given to other Parties no later than the time the contract is awarded via email transmitted to the Internal Trade Secretariat which will redistribute it to the contact points designated under Article 512;<sup>15</sup> and
- (d) the Party seeks to minimize the discriminatory effects of the exclusion on suppliers of the other Parties.

2. In the case of a dispute relating to a procurement excluded from the application of this Chapter under paragraph 1, factors such as the following are to be taken into account in the dispute resolution process:

- (a) the frequency of the use by the Party of such exclusions for its procurements;
- (b) the extent to which the use by the Party of the exclusion for the particular procurement may contribute to economic development objectives or to the reduction of economic disparities;
- (c) whether the use of the exclusion for the particular procurement was applied in a manner to minimize the discrimination among bidders; and
- (d) the extent to which the use by the Party of the exclusion affects the development of competitive Canadian companies.

---

<sup>15</sup> This paragraph was amended by the Seventh Protocol of Amendment.

### **Transitional and Non-Conforming Procurement Measures**

3. A Party may continue the transitional procurement policies and programs listed in Column I of Annex 508.3 until January 1, 1996.
4. A Party may continue the non-conforming procurement policies and programs listed in Column II of Annex 508.3, provided that the Party:
  - (a) prepares an annual written report on such policies and programs; and
  - (b) conducts a review of such policies and programs, no later than January 1, 1998, to ensure that they meet their regional and economic objectives.

#### **Article 509: Language**

Each entity shall specify the language requirements for its procurement procedures.

#### **Article 510: Confidentiality**

Nothing in this Chapter requires an entity to breach confidentiality obligations imposed by law or to compromise security or commercially sensitive or proprietary information identified by a supplier in its tender documents.

#### **Article 511: Information and Reporting**

1. Each Party shall report annually to the other Parties on procurement by its entities listed in Annex 502.1A. The report shall contain the number and aggregate values of the procurements awarded that equal or exceed the applicable threshold values specified in Article 502. The report shall also contain the estimated aggregate values of contracts awarded below the applicable threshold values. The aggregate values shall be broken down by each category of procurement, being goods, services and construction.
2. The Parties shall, before the date of entry into force of this Agreement, develop a general mechanism to report through an electronic tendering system as provided in Article 516(3).
3. Each Party shall report annually to the other Parties on procurement above the applicable threshold value specified in Article 502 for each of Articles 506(11)(a) and (e) and 506(12)(a) and (h) and on all procurement excluded under Article 508(1) and policies and programs listed in Column I of Annex 508.3, the following information:
  - (a) the number of contracts;
  - (b) a description including the value of what was procured for each procurement; and

- (c) the total value of the procurements.
4. Statistics shall be collected on the basis of the fiscal year.
  5. Each Party shall provide annually to the Secretariat information suitable for publication on that Party's procedures for procurement, and specify:
    - (a) the name of the contact point to which inquiries or complaints may be made;
    - (b) the name of any daily newspaper or electronic tendering system used; and
    - (c) the place where information may be obtained on how to register on a source list or acquire access to any electronic tendering system used.
  6. The Secretariat shall compile the information received from the Parties under paragraph 5, in respect of a year, into one advertisement that separately displays the insignia and pertinent information of each Party in a format suitable for newspaper publication. Each Party shall annually publish the advertisement within its territory by either an electronic tendering system or a newspaper.
  7. Where, in the context of a procurement by another Party, a Party considers that its rights under this Chapter may have been adversely affected, that Party may request, with the intent of avoiding a dispute, any relevant bid information concerning that procurement from the procuring Party. On receipt of such a request, the procuring Party shall promptly provide such information.

**Article 512: Contact Point**

Each Party shall designate a contact point for receiving and reviewing complaints from Parties and suppliers that may arise from the application of this Chapter.

**Article 513: Bid Protest Procedures - Provinces**

1. This Article applies to complaints regarding procurement by Provinces.
2. Where, in respect of a specific procurement, a supplier has had recourse to the dispute settlement procedures under another procurement agreement, it may not utilize the bid protest procedures of this Chapter for that specific procurement.
3. The supplier shall communicate its concerns or complaints in writing to the procuring Party with a view to resolving them.
4. Where a supplier has exhausted all reasonable means of recourse with respect to a complaint with the procuring Party, it may make a written request to the contact point in the Province where the supplier is located to seek resolution of the complaint.

5. Where the contact point determines that the complaint is reasonable, it shall, on behalf of the supplier, within 20 days after the date of delivery of the request, approach the contact point of the procuring Party and make representations on the supplier's behalf. Where the contact point determines that the complaint is unreasonable, it shall provide a written notice to the supplier within 20 days after the date of delivery of the request setting out reasons for the decision. Failure to provide such notice is deemed to be notice for the purposes of Article 1711(2)(a) (Initiation of Proceedings by Persons).<sup>16</sup>

6. Where the matter has not been resolved under paragraph 5 within 20 days after the date of delivery of the supplier's request, the Party in whose territory the supplier is located may make a written request for consideration of the complaint by a review panel. The request shall be delivered to the procuring Party and to the Secretariat. Where the Party in whose territory the supplier is located determines the complaint to be unreasonable, it shall provide written notice to the person within 20 days after the date of delivery of the supplier's request. Failure to provide such notice is deemed to be notice for the purposes of Article 1711(2)(b) (Initiation of Proceedings by Persons).<sup>17</sup>

7. The review panel shall consider the complaint in accordance with the following:

- (a) each Party shall, before the date of entry into force of this Agreement, establish a roster consisting of competent and impartial people who will be able to serve on and chair review panels, and deliver notice of the roster to the other Parties;
- (b) the contact points of the two Parties shall, within five days after the date of delivery of the request by the Secretariat, appoint panellists from the rosters. A panel shall usually consist of a maximum of three members, one selected from each of the rosters of the Parties involved, and a chairperson, also competent and impartial, to be ratified by panel members;
- (c) Parties may agree to choose a chairperson who is mutually acceptable and who is not listed on their rosters;
- (d) notwithstanding paragraphs (b) and (c), any other composition of a panel acceptable to both Parties is permissible;
- (e) the panel shall begin consideration of a complaint within five business days after its formation;
- (f) the panel should complete its work within 20 business days after its formation. On formal request, an extension owing to extraordinary circumstances may be granted with notice to all Parties;

---

<sup>16</sup> This paragraph was amended by the Seventh Protocol of Amendment.

<sup>17</sup> This paragraph was amended by the Seventh Protocol of Amendment.

- (g) the panel shall establish procedures and guidelines appropriate to each case. The contact points of both Parties shall provide secretarial and research support to the panel and maintain necessary records;
- (h) the panel may investigate the challenge to determine whether there is an inconsistency with this Chapter. Where necessary, the panel is entitled to receive a copy of pertinent tender documents and other relevant support information that it may require to assist in its determination. The panel shall keep confidential all information obtained by it in accordance with Article 510;
- (i) the panel may make written recommendations to the procuring Party and, where appropriate, to the Party in whose territory the supplier is located, concerning practices related to the procurement in question that the panel considers to be inconsistent with this Chapter;
- (j) the panel shall deliver its report to both Parties. Both Parties shall consult with each other and the supplier with the object of reaching a mutually acceptable accommodation based on the report; and
- (k) both Parties shall share the fees and expenses of the panel equally.

8. The contact points shall, within 10 business days after the date of delivery of the report, append to the report a description of the accommodation or, if an agreement on accommodation has not been reached, the different positions of both Parties. The report is complete and final at this stage.

9. Where a Party considers, as a result of a panel's report and subsequent consultations, or another series of similar unresolved complaints, that the other Party is not complying with the terms of this Chapter, the Party may have recourse to Article 1708 (Publication, Committee Agenda) or 1709 (Non-Implementation - Retaliatory Action).<sup>18</sup>

#### **Article 514: Bid Protest Procedures - Federal Government**

1. This Article applies to complaints regarding procurement by the Federal Government.
2. In order to promote fair, open and impartial procurement procedures, the Federal Government shall adopt and maintain bid protest procedures for procurement covered by this Chapter that:
  - (a) allow suppliers to submit bid protests concerning any aspect of the procurement process, which for the purposes of this Article begins after an entity has decided on its procurement requirement and continues through to the awarding of the contract;

---

<sup>18</sup> This paragraph was amended by the Seventh Protocol of Amendment.

- (b) encourage suppliers to seek a resolution of any complaint with the entity concerned prior to initiating a bid protest;
  - (c) ensure that its entities accord fair and timely consideration to any complaint regarding procurement covered by this Chapter;
  - (d) limit the period within which a supplier may initiate a bid protest, provided that the period is at least 10 business days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;
  - (e) permit a supplier that does not achieve a successful resolution of its complaint to bring the matter to the attention of an authority, with no substantial interest in the outcome, to receive and consider the complaint and make appropriate findings and recommendations with respect to the complaint;
  - (f) require the reviewing authority to provide its findings and recommendations in writing and in a timely manner and make them available to the Parties; and
  - (g) require the reviewing authority to specify its bid protest procedures in writing and make them generally available.
3. The reviewing authority may:
- (a) recommend, where appropriate, a delay in awarding a proposed contract pending the resolution of the bid protest;
  - (b) issue a recommendation to resolve the bid protest, which may include directing the entity to re-evaluate offers or terminate or re-compete the contract in question;
  - (c) recommend, where appropriate, the award of compensation for lost profit or the costs associated with filing the complaint and preparing the bid; and
  - (d) make, where appropriate, written recommendations to the entity concerning practices that the reviewing authority considers to be inconsistent with this Chapter.

### **Article 515: Relationship to Other Agreements**

In the event of an inconsistency between a provision of this Chapter and a provision of any comparable procurement liberalization agreement entered into by two or more Parties before the date of entry into force of this Agreement or subsequently under Article 1800 (Trade Enhancement Arrangements), the provision that is more conducive to trade liberalization prevails to the extent of the inconsistency.

**Article 516: Future Reviews**

1. Subject to Article 502(4), the Parties shall, within 12 months after the date of entry into force of this Agreement, undertake a review to:
  - (a) assess whether this Chapter has met its objectives;
  - (b) assess and adjust threshold levels, as necessary;
  - (c) revise this Chapter to accommodate changing principles under this Agreement; and
  - (d) review the opportunities for progress related to public procurement not covered by or excluded from this Chapter.
2. The Parties shall conduct subsequent reviews in March of each fiscal year and shall present their findings and recommendations to the Committee for inclusion in its annual report on the Agreement.
3. The Parties shall, no later than January 1, 1995, establish a working group on electronic tendering to:
  - (a) review the operation of electronic tendering systems in relation to the provisions of this Chapter;
  - (b) develop common approaches for improving:
    - (i) the cost effectiveness and efficiency for suppliers;
    - (ii) the accessibility of information to governments and suppliers; and
    - (iii) the quality of information and service to suppliers;
  - (c) design ways to maximize the use of a common system or to ensure that the electronic tendering systems used by the Parties are fully compatible and accessible; and
  - (d) develop a process for selecting the supplier or suppliers of a common electronic tendering system.
4. The Parties shall review the opportunity to harmonize or reconcile the bid protest procedures provided in Articles 513 and 514 and make appropriate recommendations to the Committee no later than three years after the date of entry into force of this Agreement.
5. The Parties shall, before the date of entry into force of this Agreement, review and finalize the list of excluded services set out in Annex 502.1B.

**Article 517: Treatment of Excluded Entities<sup>19</sup>**

Parties may exclude access to their procurement opportunities from suppliers of another Party if:

- (a) the other Party has a comparable entity that is not subject to the obligations of Chapter Five by virtue of coverage under Annex 502.1A, 502.3, or 502.4;
- (b) the other Party's comparable entity has excluded or impaired access to its procurement opportunities; and
- (c) consultations have failed to resolve the matter.

**Article 518: Definitions**

In this Chapter:

**bid** means a submission in response to a call for tenders;

**call for tenders** means a call for competitive bids from suppliers, inviting them to submit a tender or proposal for the purpose of a procurement;

**Canadian good** means a good produced exclusively from domestic materials, a good manufactured in Canada or a good which if exported outside of Canada would qualify as a good of Canada under appropriate rules of origin;

**Canadian service** means a service performed in Canada by persons of a Party;<sup>20</sup>

**Canadian supplier** means a supplier that has a place of business in Canada;

**Canadian value-added** means:

- (a) in relation to services, the proportion of the service contract performed by residents of Canada; and
- (b) in relation to goods, the difference between the dutiable value of imported goods and the selling price, taking into account any value added by manufacturers and distributors, and including any costs incurred in Canada related to:
  - (i) research and development;
  - (ii) sales and marketing;

---

<sup>19</sup> The former article was replaced by the current article by means of the Sixth Protocol of Amendment.

<sup>20</sup> This definition was added to the Agreement on Internal Trade by means of the Seventh Protocol of Amendment.

- (iii) communications and manuals;
- (iv) customization and modifications;
- (v) installation and support;
- (vi) warehousing and distribution;
- (vii) training; and
- (viii) after-sales service;

The preference for Canadian value-added, as used in Article 504(5)(a), means the premium that may be awarded by a Party during the evaluation of bids for Canadian value-added, not the required level of Canadian content;<sup>21</sup>

**construction** means a construction, reconstruction, demolition, repair or renovation of a building, structure or other civil engineering or architectural work and includes site preparation, excavation, drilling, seismic investigation, the supply of products and materials, the supply of equipment and machinery if they are included in and incidental to the construction, and the installation and repair of fixtures of a building, structure or other civil engineering or architectural work, but does not include professional consulting services related to the construction contract unless they are included in the procurement;

**electronic tendering** means the use of a computer-based system directly accessible by suppliers and providing them with information related to calls for tenders and requests for information;

**goods** means, in relation to procurement, moveable property (including the costs of installing, operating, maintaining or manufacturing such moveable property) and includes raw materials, products, equipment and other physical objects of every kind and description whether in solid, liquid, gaseous or electronic form, unless they are procured as part of a general construction contract;

**information technology** means software, electronic equipment or combinations thereof used to collect, store, process, communicate, protect or destroy information in all its forms, particularly in the form of text, symbol, sound and image;

**place of business** means an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during normal working hours;

**procurement** means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:

---

<sup>21</sup> This paragraph was added to the definition by means of the Seventh Protocol of Amendment.

- (a) any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives; or
- (b) government provision of goods and services to persons or other government organizations;

**procurement procedures** means the processes by which suppliers are invited to submit a tender, a proposal, qualification information, or a response to a request for information and includes the ways in which those tenders, proposals or information submissions are treated;

**procurement value** means the estimated total financial commitment resulting from a procurement, not taking into account optional renewals when the compulsory part of the contract is of at least one year's duration;

**qualification of goods and services** means a process whereby a buyer establishes a list of goods or services capable of responding to a specific need;

**request for information** means a procurement procedure whereby suppliers are provided with a general or preliminary description of a problem or need and are requested to provide information or advice about how to better define the problem or need, or alternative solutions. It may be used to assist in preparing a call for tenders;

**request for qualification** means a procurement procedure used for the qualification of goods or services or to invite suppliers, if they meet the required qualification criteria, to register on a permanent source list or on a particular source list intended for a specific tender or some specific subsequent tenders;

**services** means all services including printing, but does not include those services excluded by Annex 502.1B;

**statutory monopoly** means an enterprise that in any relevant market in the territory of a Party has been designated by law or by governmental authority as the sole provider of a good or service;

**supplier** means a person who, based on an assessment of that person's financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction procurement;

**tender** means a response to a call for tenders;

**technical specification** means a specification that sets out characteristics of goods or their related processes and production methods, or characteristics of services or their related operating methods, including applicable administrative provisions, and may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, process, or production or operating method.

**Annex 502.1A<sup>22</sup>**

**Government Entities Covered by Chapter Five**

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.

---

<sup>22</sup> This Annex was amended by the Fifth Protocol of Amendment.

**Annex 502.1B****Services Covered by Chapter Five**

1. All services are covered except the following:<sup>23</sup>
  - (a) services that may, under the applicable laws of the Party issuing the tender, only be provided by the following licensed professionals: medical doctors, dentists, nurses, pharmacists, veterinarians, engineers, land surveyors, architects, accountants, lawyers and notaries;
  - (b) transportation services provided by locally-owned trucks for hauling aggregate on highway construction projects;
  - (c) services of financial analysts or the management of investments by organizations who have such functions as a primary purpose;
  - (d) financial services respecting the management of government financial assets and liabilities (i.e. treasury operations), including ancillary advisory and information services, whether or not delivered by a financial institution;
  - (e) health services and social services; and
  - (f) advertising and public relation services.
2. The foregoing is an illustrative list. The Parties shall, before the date of entry into force of this Agreement, review the list and reduce it in accordance with the principle of open government procurement.

---

<sup>23</sup> This paragraph was amended by the Second Protocol of Amendment.

**Interpretive Note No. 1<sup>24</sup>****Annex 502.1B  
(Services Covered by Chapter Five)**

1. Annex 502.1B provides a list of services excluded from the coverage of Chapter Five (Procurement). The Parties recognize that there may be difficulties in distinguishing between contracts *for* service which may be the subject of procurement by a Party and contracts *of* service which may be categorized as employer-employee relationships and which are not intended by the Parties to be subject to the procurement obligations found in Chapter Five. To reduce any difficulties in making such a distinction, to aid in the application of the obligations in Chapter Five and to clearly state their original intent, the Parties issue this interpretive note.

2. Contracts of service are not the procurement of services within the meaning of Chapter Five. Contracts of service is a term which is not to be construed narrowly but rather refers to an employer-employee relationship between a Party and one or more individuals.

3. The Parties recognize that the existence of an employer-employee relationship may be determined according to various tests. For the purposes of determining whether a contract is subject to the procurement obligations of Chapter Five (or an employer-employee relationship which is not subject to this chapter), the Parties are of the view that consideration should be given to the various elements which constitute the relationship between a Party and an individual or individuals, including the nature of the work and the circumstances in which it is performed.

4. In making a determination as to whether there is an employer-employee relationship between a Party and an individual or individuals, the Parties also believe that consideration should be given, among other factors, to whether:

- (a) the Party reserves the right of direction and control over the individual or individuals;
- (b) the Party is responsible for remuneration;
- (c) the Party hires and has the power to dismiss the individual or individuals;
- (d) the Party is believed to be the employer by the employee or employees;
- (e) there exists an intention to create an employer-employee relationship, or
- (f) there is a chance of profit or risk of loss for the individual or individuals.

---

<sup>24</sup> This Interpretive Note was added to the Agreement on Internal Trade by means of the First Protocol of Amendment.

**Annex 502.2A<sup>25</sup>****Government Entities Excluded from Chapter Five**

This Annex includes entities that are not accountable to executive branches of governments of the Parties, entities whose objective is national security, businesses of a commercial nature or in competition with the private sector, and state monopolies involved in the transformation and distribution of goods and services.

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.

---

<sup>25</sup> This Annex was amended by the Fifth Protocol of Amendment.

**Annex 502.2B<sup>26</sup>**

**Government Entities Covered by Non-Intervention Commitment**

This Annex includes entities that are businesses of a commercial nature or in competition with the private sector, and state monopolies involved in the transformation and distribution of goods and services.

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.

---

<sup>26</sup> This Annex was amended by the Fifth Protocol of Amendment.

## Annex 508.3

## Transitional and Non-Conforming Measures

**COLUMN I<sup>27</sup>**

TRANSITIONAL PROCUREMENT  
POLICIES AND PROGRAMS

**COLUMN II<sup>28</sup>**

NON-CONFORMING  
PROCUREMENT POLICIES AND  
PROGRAMS

**Federal Government**

Industrial and Regional Benefits Policy

The Federal Government may seek national industrial and regional benefits in procurement exceeding \$2 million provided that the evaluation of regional benefits is carried out in a non-discriminatory manner with respect to regions for which the Federal Government has a general framework of regional development.

**British Columbia**

The RISP contract system (B.C.  
Transportation and Highways)

**Northwest Territories**

Business Incentive Policy (BIP)

The Government of the Northwest Territories (G.N.W.T.) will continue to apply the BIP, or successor programs having similar objectives, to all procurements by G.N.W.T. departments and corporations, as well as communities and other organizations which receive fifty-one (51) per cent or more of funding from the G.N.W.T. The program has

<sup>27</sup> Column I was amended by the Sixth and Seventh Protocols of Amendment.

<sup>28</sup> Column II was amended by the Fifth and Sixth Protocols of Amendment.

the objective of compensating business for the higher costs of northern operations. It operates to discount 2bids from both northern and southern contractors on the basis of northern and/or local content included in the tender. Most tenders are publicly called and opened and details of the program and its criteria are publicly available and generally are included in tender calls.

## **Yukon**

The Government of Yukon will continue to apply the following programs or contracting conditions, or the successor programs and contracting conditions having similar objectives, to all procurements by the Government of Yukon.

### **Business Incentive Policies (BIPs)**

The Business Incentive Policies which provide cash rebates for the use of Yukon apprentices, the use of Yukon labour and materials, and the provision of Yukon-made goods.

### **Community Contracting Policy**

The Community Contracting Policy (CCP) which states that "Government departments shall contract for goods and services in the communities in which they are to be used, to the extent that their needs can be met by community-based businesses."

### **Supplementary Conditions in Construction Contracts**

The Supplementary Conditions which require contractors to provide adequate living accommodation, meals, and transportation to the job site, and to make other "best efforts" to hire locally.

## **Prince Edward Island**

### *Public Purchasing Act Regulations*

Section 11 exempts certain commodities, including those related to highway maintenance and construction from the application of the Act. The effect of section 11 is to create opportunities to encourage local and regional suppliers.