

CAFTA's Restrictive Procurement Rules (Chapter 9)

CAFTA's procurement chapter applies to the purchase of goods or services by all "covered entities," which include federal agencies, states, and others listed in Annex 9.12(b)(i).¹

CAFTA prohibits many common purchasing policies, including preferences for local workers or local content; "green" procurement policies such as preferences for recycled content or renewable energy; policies targeting companies' human rights, environmental, or labor conduct; prevailing and living wages and project-labor agreements; pro-union or pro-public bidding assistance; and policies targeting countries' human rights, labor rights or other conduct.

National treatment: CAFTA requires "national treatment" for all goods and services a government purchases, meaning signatory governments cannot give preference to local firms or firms employing local workers, much less forbid the spending of state tax dollars on contracts with companies that offshore the work.²

Most favored nation: CAFTA requires "most favored nation" treatment in procurement, meaning that governments cannot treat foreign companies differently based on the human rights, labor rights or environmental records of the countries in which they are based or in which they operate.³

Technical specifications: CAFTA requires that "procuring entities not prepare, adopt or apply any technical specification describing a good or service with the purpose *or the effect* of creating unnecessary obstacles to trade... and that technical specifications are limited to performance requirements rather than design or descriptive characteristics." These constraints mean that specifications based on *how* a good is made or *how* a service is provided are forbidden.⁴

Supplier qualifications: CAFTA limits what sorts of qualifications may be required of companies seeking to supply a good or service. Conditions for participation in bidding are limited 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."⁵

The exceptions to CAFTA's restrictive rules are inadequate to safeguard most purchasing policies that reflect citizens' values by promoting social, environmental or development goals. CAFTA's procurement chapter has a limited set of binding exceptions for programs promoting the development of distressed areas, small businesses and businesses owned by minorities, disabled veterans and women. Some federal agencies and states have limited their particular commitments to

exclude sensitive products or industries. However, many other exceptions are written in non-binding language and are inadequate to safeguard purchasing policies that conflict with the rules.⁶

CAFTA's procurement chapter is enforced by the agreement's dispute resolution system established in Chapter 20. If a state law is challenged by another CAFTA country, state government officials have no standing before these tribunals and thus must rely on the federal government to defend a challenged policy. If the policy is ruled to be a violation of the agreement, it must be changed or trade sanctions can be imposed. The federal government is obliged to use all constitutionally-available powers – for instance, preemptive legislation, lawsuits and cutting off funding – to force compliance with trade tribunal rulings.

¹ States bound to CAFTA's procurement rules as of January 1, 2005 include: Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New York, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming.

² Article 9.2

³ Article 9.2

⁴ Article 9.7

⁵ Article 9.8

⁶ For example, Article 9.7.5, Article 9.14, and Annex 9.1.2(b)(i)-27 Notes to the Schedule of the United States at 3. For a more detailed discussion of these exceptions, see www.tradewatch.org/subfederal/procurement.