

Red Herring Alert: U.S.-Panama FTA Does NOT Provide Broad Access for U.S. Firms to Panama's Massive Canal Improvement Project

1. PANAMA'S PROCUREMENT MARKET IS SMALL

Panama's federal level schedules cover 16 agencies. Yet even if it had covered all of its procurement activity on all levels, how much would really be on offer given the annual GDP for the entire country was less than \$29 billion in 2007? (Just the U.S. federal procurement market is above \$1 trillion.)

In contrast, the U.S. federal schedule covers 78 agencies. Just one stimulus package item –medical electronic transcription – was \$20 billion, the same size of Panama's DGP. Sadly, much of that government money, intended to stimulate our economy, went offshore in no small part because of trade agreement procurement rules that ban domestic preferences.

2. PANAMA'S SIGNIFICANT EXCEPTIONS FOR THE CANAL PROJECT, THE MOST SIGNIFICANT PROSPECTIVE GOVERNMENT PROCUREMENT OPPORTUNITY

Although proponents of the FTA claim it provides a boon for U.S. construction and related firms given the major investments now underway by Panama to improve the Canal, a review of Section D Annex 9.1-16 of the FTA shows that in fact Panama scheduled major exceptions for contracts related to the Canal project. The Annex limiting application of the pact's procurement terms with respect to the Canal covers all agencies subordinate to Panama Canal Authority. The exceptions and exclusions include:

→ Cuts Formal Bid Notice Requirement to Just Five Days, Effectively Excluding Outsiders

ANNEX 9.1-16 (7): **The minimum 40-day time period set out in Article 9.5.1 shall not apply to the *Autoridad del Canal de Panamá*.** The *Autoridad del Canal de Panamá* shall provide suppliers sufficient time to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement. However, the *Autoridad del Canal de Panamá* **shall in no case provide for less than five business days** from the date on which the notice of intended procurement is published on the Internet to the final date for the submission of tenders.

→ All Dredging Services Categorically Excluded

See ANNEX 9.1-21 Section G

→ High Threshold for Covered Contracts, Double Normal Construction Threshold

While the general construction threshold is \$7,407,000, for first 12 years of the FTA (ie. through duration of the canal project) the threshold for construction relating to the Canal is \$12,000,000. And, even after that period, there is a special higher threshold of \$10,300,000.

→ Price Preferences for Domestic Firms Carved Out

Panama's schedule excludes from the FTA's coverage a 10 percent price preferences provided for Panamanian firms that employ up to 100 people. "Notes to this Section [ANNEX 9.1-16]: 1. This Chapter does not apply to procurement measures of the *Autoridad del Canal de Panamá* designed to promote micro, small, and medium enterprises as defined in Section H of this Annex, in accordance with the following: (a) The *Autoridad del Canal de Panamá* may award Panamanian micro, small, and medium enterprises a price preference that shall not exceed ten percent; ..."

→ **Panamanian Nationals Set Asides**

The agreement also includes nationality-based set asides for up to 10 percent of the Canal Authority's expenditures each year. [ANNEX 9.1-16]2. Notwithstanding any other provision of this Chapter, for each of the 12 full fiscal years following the entry into force of this Agreement, the *Autoridad del Canal de Panamá* may, at its discretion, set aside from the obligations of this Chapter procurement contracts for goods, services, and construction services for Panamanian nationals or suppliers owned and controlled by Panamanian nationals, provided that in each such fiscal year: (a) the total value of the *Autoridad del Canal de Panamá*'s procurement exceeds US\$200 million; (b) the total value of the procurement contracts that are set aside does not exceed ten percent of the total value of the *Autoridad del Canal de Panamá*'s procurement contracts for goods, services, and construction services awarded in that fiscal year that are: (i) otherwise covered by the Chapter; and (ii) in excess of the US\$200 million base for the fiscal year; and (c) the total value of procurement contracts under any single CPC version 1.0 section that is set aside does not exceed 20 percent of the total value of the procurement contracts that may be set aside for that year;... 4. If in any given fiscal year, the total value of procurement contracts set aside by the *Autoridad del Canal de Panamá* exceeds the level permitted under paragraph 2, the Parties, in conjunction with the *Autoridad del Canal de Panamá*, shall consult with a view to agreeing on an adjustment in the form of a reduction of the set asides permitted during the following fiscal year.

→ **No Nullification or Impairment Claims**

ANNEX 9.1-16 (10): "The procurements of the *Autoridad del Canal de Panamá* shall be excluded from the application of Annex 20.2 (Nullification or Impairment)."