

CHAPTER 13

GOVERNMENT PROCUREMENT

ARTICLE 13.1

Introduction

This Chapter is based on Special and Differential Treatment for Signatory MERCOSUR States with a view to enabling the opportunity for Signatory MERCOSUR States to enjoy the full benefits of this Chapter in an effective and balanced manner. Special and Differential Treatment provisions for Signatory MERCOSUR States –necessary to preserve and promote their economic development through, *inter alia*, differentiated thresholds, the possibility to apply offsets, policies favoring Micro, Small and Medium Enterprises (hereinafter referred to as "MSMEs"), or excluding specific goods and services– shall be reflected in this Chapter, taking into consideration the different levels of development amongst the State Parties. Paraguay's double asymmetric condition being landlocked and of a relatively lower economic development shall be given additional considerations than those given to other Signatory MERCOSUR States in general.

ARTICLE 13.2

Scope and coverage

1. This Chapter shall apply to any measure regarding covered procurement, whether or not it is conducted by electronic means.
2. For the purposes of this Chapter, covered procurement means procurement for governmental purposes:
 - (a) of goods, services, or any combination thereof:
 - (i) as specified in each State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement); 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; and rental or hire purchase, with or without an option to buy;
- (c) for which the value, as estimated in accordance with Article 13.4 (Valuation of Contracts), equals or exceeds the relevant threshold specified in a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) at the time of publication of a notice in accordance with Article 13.13 (Notices);
- (d) by a procuring entity; and
- (e) that is otherwise not excluded from coverage in paragraph 3 or in a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement).

3. Except where provided otherwise in a State Party's Appendix, this Chapter shall not apply to:

- (a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon;
- (b) non-contractual agreements or any form of assistance that a State Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives;
- (c) 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;
- (d) public employment contracts;
- (e) procurement conducted:

- (i) for the specific purpose of providing international assistance, including development aid;
 - (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or
 - (iii) under the particular procedure or condition of an international organisation, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.
- (f) public procurement undertaken among public entities, regardless of whether they are included in Sections A, B and C of a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) ; or
- (g) procurement made outside the territory of a State Party, for consumption outside the territory of that State Party;

4. Each State Party shall specify the following information in its Appendix in Annex 13-A (Schedule of Commitments on Government Procurement):

- (a) in Section A (Central Entities), the central government entities whose procurement is covered by this Chapter;
- (b) in Section B (Sub-central Entities), the sub-central government entities whose procurement is covered by this Chapter;
- (c) in Section C (Other Entities), all other entities whose procurement is covered by this Chapter;
- (d) in Section D (Goods), the goods covered by this Chapter;
- (e) in Section E (Services), the services, other than construction services, covered by this Chapter;
- (f) in Section F (Construction Services), the construction services covered by this Chapter;

- (g) in Section G (General Notes), any General Notes;
- (h) In Section H (Means of Publication), means of publications; and
- (i) In Section I (Threshold Adjustment Formula), the applicable Threshold Adjustment Formula.

ARTICLE 13.3

Definitions

For the purposes of this Chapter:

- (a) "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, nongovernmental buyers for nongovernmental purposes;
- (b) "construction service" means a service that has as its objective the realisation by whatever means of civil or building works, based on Division 51 of the United Nations Provisional Central Product Classification ("CPC");
- (c) "days" means calendar days;
- (d) "electronic auction" means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders;
- (e) "in writing" or "written" means any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically transmitted and stored information;
- (f) "juridical person" means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or

governmentally-owned, including any branch, corporation, trust, partnership, joint venture, sole proprietorship or association;

- (g) "limited tendering" means a procurement procedure whereby the procuring entity contacts a supplier or suppliers of its choice;
- (h) "measure" means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;
- (i) "multi-use list" means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;
- (j) "natural person" means a national or permanent resident of a Signatory MERCOSUR State or a national of Singapore;
- (k) "notice of intended procurement" means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;
- (l) "offsets" means any condition or undertaking that encourages local development or improves a State Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement;
- (m) "open tendering" means a procurement procedure whereby all interested suppliers may submit a tender;
- (n) "person" means a natural person or a juridical person;
- (o) "procuring entity" means an entity covered under a State Party's Sections A, B or C to this Chapter;
- (p) "publish" means to disseminate information through paper or electronic means that is distributed widely and is readily accessible to the general public;

- (q) "qualified supplier" means a supplier that a procuring entity recognises as having satisfied the conditions for participation;
- (r) "selective tendering" means a procurement procedure whereby only qualified suppliers are invited by the procuring entity to submit a tender;
- (s) "services" includes construction services, unless otherwise specified;
- (t) "standard" means a document approved by a recognised body that provides for common and repeated use, rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, service, process or production method;
- (u) "supplier" means a person or group of persons that provides or could provide goods or services to a procuring entity; and
- (v) "technical specification" means a tendering requirement that:
 - (i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or
 - (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

ARTICLE 13.4

Valuation of contracts

1. In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall:

- (a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Chapter; and
- (b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account:
 - (i) all forms of remuneration, including premiums, fees, commissions, interest or other revenue stream that may be provided for under the contract; and
 - (ii) where the procurement provides for the possibility of options, the total value of such options.

2. Where an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts ("recurring contracts"), the calculation shall be based on the estimated maximum total value of the procurement. The estimation of the maximum total value may be based on:

- (a) the value of recurring contracts of the same type of good or service awarded during the preceding 12 (twelve) months or the procuring entity's preceding fiscal year, adjusted, where possible, to take into account anticipated changes in the quantity or value of the good or service being procured over the following 12 (twelve) months; or
- (b) The estimated value of recurring contracts of the same type of good or service to be awarded during the 12 (twelve) months following the initial contract award or the procuring entity's fiscal year.

3. In the case of procurement by lease, rental or hire purchase of goods or services, or procurement for which a total price is not specified, the basis for valuation may be:

- (a) in the case of a fixed-term contract:
 - (i) where the term of the contract is 12 (twelve) months or less, the total estimated maximum value for its duration; or

- (ii) where the term of the contract exceeds 12 (twelve) months, the total estimated maximum value, including any estimated residual value;
- (b) where a State Party's laws and regulations allow for contracts to be concluded for an indefinite period and a total price is not specified, the estimated monthly installment multiplied by 48 (forty-eight); and
- (c) where it is not certain whether the contract is to be a fixed-term contract, valuation based on subparagraph (b).

ARTICLE 13.5

Security and general exceptions

1. Nothing in this Chapter shall be construed to prevent any State Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between State Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent any State Party from imposing or enforcing measures:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.

3. The State Parties understand that subparagraph (b) of paragraph 2 includes environmental measures necessary to protect human, animal, or plant life or health.

Article 13.6

National Treatment and non-discrimination

1. With respect to any measure related to covered procurement:
 - (a) Singapore, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the Signatory MERCOSUR States and to the suppliers of the Signatory MERCOSUR States offering such goods and services, treatment no less favorable than the treatment accorded to its own goods, services and suppliers; and
 - (b) each Signatory MERCOSUR State, including its procuring entities, shall accord immediately and unconditionally to the goods and services of Singapore and to the suppliers of Singapore offering such goods and services, treatment no less favorable than the treatment accorded to its own goods, services and suppliers.
2. With respect to any measure regarding covered procurement, Singapore and each Signatory MERCOSUR State, including their respective procuring entities, shall not:
 - (a) treat a locally established supplier of another State Party less favourably than another locally established supplier on the basis of degree of foreign affiliation to, or ownership by, a person of that other State Party; nor
 - (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of another State Party.
3. This Article shall not apply to customs duties and charges of any kind imposed on, or in connection with, importation, the method of levying such duties and charges, or to other import regulations or formalities and measures affecting trade in services different from the ones which specifically regulate covered procurement under this Chapter.

ARTICLE 13.7

Use of electronic means

1. The State Parties shall conduct covered procurement by electronic means to the widest extent possible and may cooperate in developing and expanding the use of electronic means in government procurement systems.
2. 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 inter-operable 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.

ARTICLE 13.8

Conduct of procurement

1. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
 - (a) is consistent with this Chapter, using procedures such as open tendering, selective tendering and limited tendering;
 - (b) avoids conflicts of interest; and
 - (c) prevents corrupt practices.

2. A State Party may establish or maintain sanctions against such corrupt practices consistent with its laws and regulations.
3. For greater certainty, nothing in this Chapter shall be construed to prevent a State Party from developing new procurement policies, procedures or contractual means, provided that they are not inconsistent with this Chapter.

ARTICLE 13.9

Rules of origin

For the purposes of covered procurement, a State Party shall not apply rules of origin to goods imported from another State Party that are different from the rules of origin that the State Party applies at the same time in the normal course of trade to imports of the same goods from the same State Party.

ARTICLE 13.10

Denial of benefits

A State Party may deny the benefits of this Chapter to a service supplier of another State Party if such supplier:

- (a) is a juridical person of that other State Party not engaged in substantive business operation in the territory of that other State Party; or
- (b) is a person that supplies the service from the territory of a non-Party.

ARTICLE 13.11

Offsets

Signatory MERCOSUR States may, in the qualification and selection of suppliers, goods or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.

ARTICLE 13.12

Information on the procurement system

Each State Party shall:

- (a) promptly publish any law, regulation, judicial decision or administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public; and
 - (b) provide an explanation thereof to another State Party, on request.
2. Each State Party shall list in Section H (Means of Publication) of its Appendix in Annex 13-A (Schedule of Commitments on Government Procurement):
- (a) the electronic or paper media in which the State Party publishes the information described in subparagraph (a) of paragraph 1; and
 - (b) the electronic or paper media in which the State Party publishes the notices required by Article 13.13 (Notices), Article 13.15(7) (Qualification of Suppliers), and Article 13.22(2) (Transparency of Procurement Information).
3. Each State Party shall promptly notify the other State Parties of any modification to the State Party's information listed in Section H (Means of Publication) of its Appendix in Annex 13-A (Schedule of Commitments on Government Procurement).

ARTICLE 13.13

Notices

1. For each covered procurement, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Section H (Means of Publication) of the State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement), except in the circumstances described in Article 13.19 (Limited Tendering). Such medium shall be widely disseminated and such notice shall remain readily accessible to the public, at least until the expiration of the time period indicated in the notice. Procuring entities are encouraged to publish their notices by electronic means free of charge through a single point of access.

2. Unless otherwise provided for in this Chapter, each notice of intended procurement shall include the following information, unless that information is provided in the tender documentation that is made available free of charge to all interested suppliers at the same time as the notice of intended procurement:
 - (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;
 - (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
 - (c) for recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;
 - (d) a description of options, if any;
 - (e) the timeframe for delivery of goods or services or the duration of the contract;
 - (f) the procurement procedure that will be used and whether it will involve negotiation or electronic auction;

- (g) where applicable, the address and any final date for the submission of requests for participation in the procurement;
- (h) the address and the final date for the submission of tenders;
- (i) the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the State Party of the procuring entity;
- (j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith; and
- (k) where, pursuant to Article 13.15 (Qualification of Suppliers), a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender.

3. For each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement in one of the WTO official languages. The summary notice shall contain at least the following information:

- (a) the subject matter of the procurement;
- (b) the final date for the submission of tenders or, where applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and
- (c) the address from which documents relating to the procurement may be requested.

4. Procuring entities are encouraged to publish in the appropriate paper or electronic medium listed in Section H (Means of Publication) of the State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement), as early as possible in each fiscal year, a notice

regarding their future procurement plans ("notice of planned procurement"). The notice of planned procurement should include the subject matter of the procurement and the planned date or indicative period of the publication of the notice of intended procurement.

5. A procuring entity covered under Section B (Sub-Central Entities) and Section C (Other Entities) of a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) may use a notice of planned procurement as a notice of intended procurement provided that the notice of planned procurement includes as much of the information referred to in paragraph 2 as is available to the procuring entity and a statement that interested suppliers should express their interest in the procurement to the procuring entity.

ARTICLE 13.14

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 establishing the conditions for participation, a procuring entity:

(a) shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of that State Party or that the supplier has prior work experience in the territory of a given State Party; and

(b) may require relevant prior experience where essential to meet the requirements of the procurement.

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

(a) shall evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the State Party of the procuring entity; and

(b) shall base its evaluation on the conditions that the procuring entity has specified in advance in notices or tender documentation.

4. Where there is supporting evidence, a State Party, including its procuring entities, 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 offences;

(e) professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier;

(f) failure to pay taxes; or

(g) other sanctions and grounds provided for in a State Party's laws and regulations that disqualify the supplier to contract with entities of that State Party provided that these sanctions and grounds are not inconsistent with the Chapter.

ARTICLE 13.15

Qualification of suppliers

1. A State Party may maintain a supplier registration system under which interested suppliers are required to register and provide certain information.

2. Each State Party shall endeavour to ensure that:

(a) its procuring entities make efforts to minimise differences in their qualification procedures;
and

(b) where its procuring entities maintain registration systems, the entities make efforts to minimise differences in their registration systems.

3. A State Party that uses supplier registration systems or qualification procedures shall not adopt or apply such systems or procedures with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of another State Party in its procurement. A State Party shall ensure that all requirements for inclusion in such supplier registration system or for participation in such qualification procedure are publicly available.

4. If a State Party provides for the possibility for a procuring entity to use selective tendering, the procuring entity shall:

(a) include in the notice of intended procurement at least the information specified in subparagraphs (a), (b), (f), (g), (j) and (k) of Article 13.13(2) (Notices) and invite suppliers to submit a request for participation; and

(b) provide, by the commencement of the time period for tendering, at least the information specified in subparagraphs (c), (d), (e), (h) and (i) of Article 13.13(2) (Notices) to the qualified suppliers that it notifies as specified in sub-paragraph (b) of Article 13.17(3) (Time periods).

5. A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.

6. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 4, a procuring entity shall ensure that those documents are made available at the same time to all the qualified suppliers selected in accordance with paragraph 5.

7. A procuring entity, where the laws and regulations of the State Party to which it belongs permit, may maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is:

- (a) published annually; and
- (b) where published by electronic means, made available continuously,

in the appropriate medium listed in Section H (Means of Publication) of the State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement).

8. The notice provided for in paragraph 7 shall include:

- (a) a description of the goods or services, or categories thereof, for which the list may be used;
- (b) the conditions for participation to be satisfied by suppliers for inclusion on the list and the methods that the procuring entity will use to verify that a supplier satisfies the conditions;
- (c) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the list;
- (d) the period of validity of the list and the means for its renewal or termination, or, where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and
- (e) an indication that the list may be used for procurement covered by this Chapter.

9. Notwithstanding paragraph 7, where a multi-use list will be valid for 3 (three) years or less, a procuring entity may publish the notice referred to in paragraph 7 only once, at the beginning of the period of validity of the list, provided that the notice:

- (a) states the period of validity and that further notices will not be published; and
- (b) is published by electronic means and is made available continuously during the period of its validity.

10. A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.

11. Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents, within the time period provided for in Article 13.17(2) (Time periods), a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement on the grounds that the procuring entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the procuring entity is not able to complete the examination of the request within the time period allowed for the submission of tenders.

12. A procuring entity covered under Section B (Sub-Central Entities) and Section C (Other Entities) of a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:

- (a) the notice is published in accordance with paragraph 7 and includes the information required under paragraph 8, as much of the information required under Article 13.13(2) (Notices) as is available, and a statement that it constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list; and
- (b) the procuring entity promptly provides to suppliers that have expressed to the procuring entity an interest in a given procurement, sufficient information to permit them to assess their interest in the procurement, including all remaining information required in Article 13.13(2) (Notices), to the extent that such information is available.

13. A procuring entity covered under Section B (Sub-Central Entities) and Section C (Other Entities) of a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) may allow a supplier that has applied for inclusion on a multi-use list in accordance with paragraph 10 to tender in a given procurement, where there is sufficient time for the procuring entity to examine whether the supplier satisfies the conditions for participation.

14. A procuring entity shall promptly inform any supplier that submits a request for participation in a procurement or application for inclusion on a multi-use list of the procuring entity's decision with respect to the request or application.

15. Where a procuring entity rejects a supplier's request for participation in a procurement or application for inclusion on a multi-use list, ceases to recognise a supplier as qualified, or removes a supplier from a multi-use list, the procuring entity shall promptly inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

ARTICLE 13.16

Technical specifications and tender documentation

1. A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of precluding competition, discriminating between suppliers, or otherwise creating unnecessary obstacles to trade between the State Parties.

2. In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:

- (a) set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognised national standards or building codes.

3. Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfill the requirements of the procurement by including words such as "or equivalent" in the tender documentation.

4. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the procuring entity includes words such as "or equivalent" in the tender documentation.
5. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.
6. For greater certainty, a State Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.
7. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:
 - (a) the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings or instructional materials;
 - (b) any conditions for participation of suppliers, including a list of information and documents that suppliers are required to submit in connection with the conditions for participation;
 - (c) all evaluation criteria the procuring entity will apply in the awarding of the contract, and, except where price is the sole criterion, the relative importance of such criteria;
 - (d) where the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements or other requirements related to the submission of information by electronic means;

- (e) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;
- (f) where there will be a public opening of tenders, the date, time and place for the opening and, where appropriate, the persons authorised to be present;
- (g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, such as whether on paper or by electronic means; and
- (h) any dates for the delivery of goods or the supply of services.

8. In establishing any date for the delivery of goods or the supply of services being procured, a procuring entity shall take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the point of supply or for supply of services.

9. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

10. A procuring entity shall promptly provide, on request, the tender documentation to any interested supplier, and reply to any reasonable request for relevant information by an interested or participating supplier, or make the information available, provided that the information does not give that supplier an advantage over other suppliers and that the request was presented within the time limits set out in the notice of intended procurement or the tender documentation.

11. A procuring entity may require bidders to provide guarantees for maintaining the offer, and the successful bidder to provide a guarantee for the execution of the contract.

12. Where, prior to the award of a contract, a procuring entity modifies the criteria or requirements set out in the notice of intended procurement or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit in writing all such modifications or amended or reissued notice or tender documentation:

- (a) to all suppliers that are participating at the time of the modification, amendment or reissuance, where such suppliers are known to the procuring entity, and in all other cases, in the same manner as the original information was made available; and
- (b) in adequate time to allow such suppliers to modify and resubmit amended tenders, as appropriate.

ARTICLE 13.17

Time periods

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 necessary for transmitting tenders by nonelectronic means 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 the same for all interested or participating suppliers.

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 (twenty-five) 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 (ten) days.

3. Except as provided for in paragraphs 4, 5, 7 and 8, a procuring entity shall establish that the

final date for the submission of tenders shall not be less than 40 (forty) 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 procuring 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 established in accordance with paragraph 3 to not less than 10 (ten) days where:

- (a) The procuring entity has published a notice of planned procurement as described in Article 13.13(4) (Notices) at least 40 (forty) days and not more than 12 (twelve) 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) the address from which documents relating to the procurement may be obtained; and
 - (iv) as much of the information that is required for the notice of intended procurement under Article 13.13(2) (Notices), as is available;
- (b) the procuring entity, for recurring contracts, 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 the time period for tendering established in accordance with paragraph 3 impracticable.

5. A procuring entity may reduce the time period for tendering established in accordance with paragraph 3 by 5 (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; or
 - (c) the procuring entity accepts tenders by electronic means.
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 established in accordance with paragraph 3 to less than 10 (ten) days from the date on which the notice of intended procurement is published.
7. Notwithstanding any other provision in this Article, where a procuring entity purchases commercial goods or services, or any combination thereof, it may reduce the time period for tendering established in accordance with paragraph 3 to not less than 13 (thirteen) days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. In addition, where the procuring entity accepts tenders for commercial goods or services by electronic means, it may reduce the time period established in accordance with paragraph 3 to not less than 10 (ten) days.
8. Where a procuring entity that is covered under Section B (Sub-Central Entities) or Section C (Other Entities) of a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) has selected all or a limited number of qualified suppliers, the time period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 (ten) days.

ARTICLE 13.18

Negotiations

1. A State Party may provide for its procuring entities to conduct negotiations:
- (a) where the procuring entity has indicated its intent to conduct negotiations in the notice of intended procurement required under Article 13.13(2) (Notices); or

(b) where it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation.

2. A procuring entity shall:

(a) ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation; and

(b) where negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

ARTICLE 13.19

Limited tendering

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of another State Party or protects domestic suppliers, a procuring entity may use limited tendering, and according to its laws and regulations, may choose not to apply Article 13.13 (Notices), Article 13.14 (Conditions for Participation), Article 13.15 (Qualification of Suppliers), Article 13.16(7) to (11) (Technical Specifications and Tender Documentation), Article 13.17 (Time periods), Article 13.18 (Negotiations), Article 13.20 (Electronic Auctions) and Article 13.21 (Treatment of Tenders and Awarding of Contracts) only under any of the following circumstances:

(a) where:

(i) no tenders were submitted or no suppliers requested participation;

(ii) no tenders that conform to the essential requirements of the tender documentation were submitted;

(iii) no suppliers satisfied the conditions for participation; or

- (iv) the tenders submitted have been collusive,

provided that the requirements of the tender documentation are not substantially modified;
- (b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:
 - (i) the requirement is for a work of art;
 - (ii) the protection of patents, copyrights or other exclusive rights; or
 - (iii) due to an absence of competition for technical reasons;
- (c) for additional deliveries by the original supplier of goods or services that were not included in the initial procurement where a change of supplier for such additional goods or services:
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or inter-operability with existing equipment, software, services or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;
- (e) for goods purchased on a commodity market;
- (f) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality

standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs. Subsequent procurements of these developed goods or services, however, shall not be subject to this subparagraph.

- (g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership or bankruptcy, but not for routine purchases from regular suppliers;
- (h) where a contract is awarded to a winner of a design contest provided that:
 - (i) the contest has been organised in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a notice of intended procurement; and
 - (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner; or
- (i) where additional construction services that were not included in the initial contract but that were within the objectives of the original tender documentation have, due to unforeseeable circumstances by the procuring entity, become necessary to complete the construction services described therein. However, the total value of contracts awarded for additional construction services shall not exceed the limits set forth in the laws and regulations of a State Party, which shall in no case exceed 50 % of the value of the main contract.

2. A procuring entity shall maintain records or prepare a report in writing on each contract awarded under paragraph 1. The records or the report shall include the name of the procuring entity, the value and kind of goods or services procured and a statement indicating the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

ARTICLE 13.20
Electronic auctions

1. Where a procuring entity intends to conduct a covered procurement using an electronic auction, the procuring entity shall provide each participant, before commencing the electronic auction, with:
 - (a) the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or reranking during the auction;
 - (b) the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and
 - (c) any other relevant information relating to the conduct of the auction.

ARTICLE 13.21

Treatment of tenders and awarding of contracts

1. A procuring entity shall receive, open and treat all tenders in accordance with procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.
2. Where a procuring entity provides a supplier with an opportunity to correct errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunity to all participating suppliers, provided that the correction of the error does not substantially alter the submitted tender, nor affect the principles of transparency and fair competition between suppliers.
3. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation and be from a supplier that satisfies the conditions for participation.
4. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to

be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) where price is the sole criterion, the lowest price.

5. Where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted or the estimated procurement value, the procuring entity may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.

6. A procuring entity shall not use options, cancel a procurement or modify awarded contracts in a manner that circumvents the obligations under this Chapter.

7. A State Party may provide that if, for reasons imputable to the successful supplier, the contract is not concluded within a reasonable time, or the successful supplier does not fulfil the required guarantee for the execution of the contract, or does not comply with the contract terms, the contract may be awarded to the next tenderer and so forth.

ARTICLE 13.22

Transparency of procurement information

1. A procuring entity shall promptly inform participating suppliers of the procuring entity's contract award decisions and, on request of a supplier, shall do so in writing. Subject to Article 13.23(2) and (3) (Disclosure of Information), a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select its tender and the relative advantages of the successful supplier's tender.

2. No later than 72 (seventy-two) days after the award of each contract covered by this Chapter, a procuring entity shall promptly publish a notice in the appropriate paper or electronic medium

listed in Section H (Means of Publication of the State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement)). Where the procuring entity publishes the notice only in an electronic medium, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:

- (a) a description of the goods or services procured;
- (b) the name and address of the procuring entity;
- (c) the name of the successful supplier;
- (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
- (e) the date of award; and
- (f) the type of procurement procedure used, and in cases where limited tendering was used in accordance with Article 13.19 (Limited Tendering), a description of the circumstances justifying the use of limited tendering.

3. Each procuring entity shall, for a period of at least 3 (three) years from the date it awards a contract, maintain:

- (a) the documentation and reports or records of tendering procedures and contract awards relating to covered procurement, including the reports or records required under Article 13.19 (Limited Tendering); and
- (b) data that demonstrate how covered procurement by electronic means has been conducted from the publication of the notice to the award of the contract.

4. Each State Party shall communicate to the other State Parties the available and comparable statistics relevant to the procurement covered by this Chapter.

Disclosure of information

1. On request of a State Party, another State Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the State Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of, the State Party that provided the information.
2. Notwithstanding any other provision of this Chapter, a State Party, including its procuring entities, shall not provide to any supplier information that might prejudice fair competition between suppliers.
3. Nothing in this Chapter shall be construed to require a State Party, including its procuring entities, authorities and review bodies, to disclose confidential information where disclosure:
 - (a) would impede law enforcement;
 - (b) might prejudice fair competition between suppliers;
 - (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or
 - (d) would otherwise be contrary to the public interest.

ARTICLE 13.24

Domestic review procedures

1. Each State Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

- (a) breaches of this Chapter; or
- (b) a failure to comply with a State Party's measures implementing this Chapter, where the supplier does not have a right to challenge directly a breach of this Chapter under the laws and regulations of a State Party

arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

2. In the event of a complaint by a supplier, arising in the context of covered procurement in which the supplier has, or has had, an interest, that there has been a breach or a failure as referred to in paragraph 1, the State Party of the procuring entity may encourage that procuring entity and the supplier to seek resolution of the complaint through consultations. The procuring entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or its right to seek corrective measures under the administrative or judicial review procedure.

3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case shall be less than 10 (ten) days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.

4. Each State Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.

5. Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the State Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge.

6. Each State Party shall ensure that a review body that is not a court shall have its decision subject to judicial review or have procedures that provide that:

- (a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;
- (b) the participants to the proceedings (hereinafter referred to as "participants") shall have the right to be heard prior to a decision of the review body being made on the challenge;
- (c) the participants shall have the right to be represented and accompanied;
- (d) the participants shall have access to all proceedings;
- (e) the participants shall have the right to request that the proceedings take place in public and that witnesses may be presented; and
- (f) the review body shall make its decisions or recommendations in a timely fashion, in writing, and shall include an explanation of the basis for each decision or recommendation.

7. Each State Party shall adopt or maintain procedures that provide for:

- (a) Rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and
- (b) Corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both, if a review body determines that there has been a breach or a failure as referred to in paragraph 1.

ARTICLE 13.25

Modifications and rectifications to coverage

- 1. A State Party may propose to modify or rectify its Appendix in Annex 13-A (Schedule of Commitments on Government Procurement).

2. When a State Party intends to modify an Appendix in Annex 13-A (Schedule of Commitments on Government Procurement), the State Party shall:

- (a) notify the other State Parties in writing; and
- (b) include in the notification a proposal for appropriate compensatory adjustments to the other State Parties to maintain a level of coverage comparable to that existing prior to the modification.

3. Notwithstanding subparagraph (b) of paragraph 2, a State Party does not need to provide compensatory adjustments if the proposed modification covers a procuring entity over which the State Party has effectively eliminated its control or influence over that procuring entity's covered procurement.

4. If another State Party disputes that:

- (a) an adjustment proposed under subparagraph (b) of paragraph 2 is adequate to maintain a comparable level of mutually agreed coverage; or
- (b) the modification covers an entity over which the State Party has effectively eliminated its control or influence under paragraph 3,

it shall object in writing within 45 (forty-five) days of receipt of the notification referred to in subparagraph (a) of paragraph 2. If no such objection is submitted within 45 (forty-five) days after having received the notification, the proposed modification shall become effective.

5. The following changes to a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) shall be considered a rectification of a purely formal nature, provided that they do not affect the mutually agreed coverage provided for in this Chapter:

- (a) a change in the name of a procuring entity;
- (b) a merger of 2 (two) or more procuring entities listed within its Appendix in Annex 13-A (Schedule of Commitments on Government Procurement); and

- (c) the separation of a procuring entity listed in its Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) into 2 (two) or more procuring entities that are all added to the entities listed in the same Appendix in Annex 13-A (Schedule of Commitments on Government Procurement).

The State Party making such rectification of a purely formal nature shall not be obliged to provide for compensatory adjustments.

6. In the case of proposed rectifications to a State Party's Appendix in Annex 13-A (Schedule of Commitments on Government Procurement), the State Party shall notify the other State Parties every 2 (two) years following the entry into force of this agreement.

7. A State Party may notify the other State Parties of an objection to a proposed rectification within 45 (forty-five) days from having received the notification. Where a State Party submits an objection, it shall set out the reasons why it believes the proposed rectification is not a change provided for in paragraph 5, and describe the effect of the proposed rectification on the mutually agreed coverage provided for in the Agreement. If no such objection is submitted in writing within 45 (forty-five) days after having received the notification, the proposed rectification shall become effective.

8. If another State Party objects to the proposed modification or rectification, or to the proposed compensatory adjustments, the State Parties shall seek to resolve the issue through consultations, including any request of additional information. If no agreement is found within 60 (sixty) days after the receipt of the objection, the State Parties may refer the matter to the dispute settlement procedures under Chapter 18 (Dispute Settlement) unless the State Parties agree to extend the deadline. Once the State Parties agree through consultations or on the basis of a final arbitral award of an arbitration panel under Article 18.13 (Interim Report and Final Arbitral Award) of Chapter 18 (Dispute Settlement), the Joint Committee shall modify forthwith the relevant Appendix in Annex 13-A (Schedule of Commitments on Government Procurement) to reflect the agreed modifications or rectifications or the agreed compensatory adjustments.

9. The consultation procedure pursuant to paragraph 8 is without prejudice to the consultation pursuant to Article 18.6 (Consultations) of Chapter 18 (Dispute Settlement).

ARTICLE 13.26

Facilitation of participation of Micro, Small and Medium Enterprises

1. The State Parties recognise the important contribution that MSMEs can make to economic growth and employment, and the importance of facilitating their participation in government procurement.
2. If available, a State Party shall, upon request of another State Party, grant information regarding its measures aimed at promoting, encouraging and facilitating the participation of MSMEs in government procurement.
3. To facilitate participation by MSMEs in government procurement, each State Party shall, to the extent possible and if appropriate:
 - (a) share information relevant to MSMEs;
 - (b) endeavour to make all tender documentation available free of charge; and
 - (c) undertake activities aimed at facilitating the participation of MSMEs in government procurement.

ARTICLE 13.27

Government procurement subcommittee

The State Parties hereby establish a Subcommittee on Government Procurement (hereinafter referred to as "Subcommittee"), composed of government representatives of each State Party. On request of a State Party, the Subcommittee shall meet to address matters related to the operation of this Chapter, such as:

- (a) exchange of information on topics of mutual interest, including exchanges on procurement statistical data;

- (b) cooperation between the State Parties, as provided for in Article 13.28 (Cooperation in Government Procurement);
- (c) facilitation of participation by MSMEs in covered procurement, as provided for in Article 13.26 (Facilitation of participation of Micro, Small and Medium Enterprises); and
- (d) discussion of any other matters related to the operation of this Chapter.

ARTICLE 13.28

Cooperation in government procurement

1. The State Parties recognise the importance of cooperation with a view to achieving a better understanding of their respective government procurement systems as well as better access to their respective markets, in particular for MSMEs.
2. The State Parties shall endeavour to cooperate to ensure an effective implementation of this Chapter.
3. The State Parties shall endeavour to cooperate in matters such as, *inter alia*:
 - (a) facilitating participation by suppliers in government procurement, in particular, with respect to MSMEs;
 - (b) exchanging experiences and information, such as regulatory frameworks, best practices and statistics including sustainable procurement;
 - (c) developing and expanding the use of electronic means in government procurement systems;
 - (d) providing capacity building and technical assistance to suppliers with a view to facilitate access to the government procurement markets of each State Party; and

- (e) institutional strengthening for the fulfilment of this Chapter including *inter alia*, capacity building activities, transfer of knowledge, and training of government officials.