

## CHAPTER 12

### GOVERNMENT PROCUREMENT

#### ARTICLE 12.1

##### Objectives

The Parties recognise the contribution of transparent, competitive and open tendering to economic development and set as their objective the effective opening of their respective procurement markets.

## ARTICLE 12.2

### Definitions

For the purposes of this Chapter, the following definitions apply:

- (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, non-governmental buyers for non-governmental 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 CPC;
- (c) "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;
- (d) "in writing" or "written" means any worded or numbered expression that can be read, reproduced and later communicated, which may include electronically transmitted and stored information;
- (e) "limited tendering" means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;

- (f) "measure" means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;
- (g) "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;
- (h) "negotiation" means a way of conducting the procurement procedure subject to the principles of transparency and non-discrimination, that is limited to specific situations in which procuring entities are allowed to negotiate with suppliers when certain conditions are met;
- (i) "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;
- (j) "offsets" means measures used to encourage local development or improve the balance-of-payments accounts by means of the use of domestic content, the licensing of technology, investment requirements, counter-trade or similar requirements;
- (k) "open tendering" means a procurement method whereby all interested suppliers may submit a tender;
- (l) "procuring entity" means an entity covered under the Appendices to Annexes 12-A to 12-E;
- (m) "qualified supplier" means a supplier that a procuring entity recognises as having satisfied the conditions for participation;

- (n) "selective tendering" means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;
- (o) "services" includes construction services, unless otherwise specified;
- (p) "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;
- (q) "supplier" means a person or persons that provide or could provide goods or services; and
- (r) "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 a service.

## ARTICLE 12.3

### Scope

1. This Chapter applies to covered procurement. Covered procurement means procurement for governmental purposes:
  - (a) of goods, services, or any combination thereof:
    - (i) as specified in each Party's Appendices to Annexes 12-A to 12-E; 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 equals or exceeds the relevant threshold specified in each Party's Appendices to Annexes 12-A to 12-E, at the time of publication of a notice in accordance with Article 12.13;
  - (d) by a procuring entity as specified in each Party's Appendices to Annexes 12-A to 12-E; and
  - (e) that is not otherwise excluded from coverage.

2. Except where provided otherwise in each Party's Appendices to Annexes 12-A to 12-E, this Chapter does 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 Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives, government provision of goods and services to state, regional, or local government entities;
- (c) the procurement or acquisition of fiscal agency or depositary 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; or
- (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;

- (iii) under the particular procedure or condition of an international agreement relating to the joint implementation by the signatory countries of a project;  
or
- (iv) 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.

3. Each Party shall specify in each of the Appendices to Annexes 12-A to 12-E the following information:

- (a) in Appendices 12-A-1, 12-B-1, 12-C-1, 12-D-1 and 12-E-1, the central government entities whose procurement is covered by this Chapter;
- (b) in Appendices 12-A-2, 12-B-2, 12-C-2, 12-D-2 and 12-E-2, the sub-central government entities whose procurement is covered by this Chapter;
- (c) in Appendices 12-A-3, 12-B-3, 12-C-3, 12-D-3 and 12-E-3, all other entities whose procurement is covered by this Chapter;
- (d) in Appendices 12-A-4, 12-B-4, 12-C-4, 12-D-4 and 12-E-4, the goods covered by this Chapter;
- (e) in Appendices 12-A-5, 12-B-5, 12-C-5, 12-D-5 and 12-E-5, the services, other than construction services, covered by this Chapter;

- (f) in Appendices 12-A-6, 12-B-6, 12-C-6, 12-D-6 and 12-E-6, the construction services covered by this Chapter; and
- (g) in Appendices 12-A-7, 12-B-7, 12-C-7, 12-D-7 and 12-E-7, any General Notes.

4. Where a procuring entity, in the context of covered procurement, requires persons not covered under a Party's Appendices to Annexes 12-A to 12-E to procure on its behalf, Article 12.6 shall apply *mutatis mutandis*.

## ARTICLE 12.4

### 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 Agreement; 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 all forms of remuneration, including:
    - (i) premiums, fees, commissions, and interest; and

- (ii) if the procurement provides for the possibility of options, the total value of such options.

2. If an individual requirement for a procurement results in the award of more than one contract or in the award of contracts in separate parts (both hereinafter referred to as "recurring procurements"), the calculation of the estimated maximum total value shall be based on:

- (a) the value of recurring procurements 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 subsequent 12 (twelve) months; or
- (b) the estimated value of recurring procurements of the same type of good or service to be awarded during the 12 (twelve) months subsequent to 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 shall 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) if the contract is of an indefinite duration, the estimated monthly instalment multiplied by 48 (forty-eight); and
- (c) if it is not certain whether the contract is of indefinite duration or a fixed-term contract, point (b) shall apply.

## ARTICLE 12.5

### Security and general exceptions

1. Nothing in this Chapter shall be construed as preventing a 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, defence products or war materials, or to procurement indispensable for national security or for national defence purposes.

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

- (a) relating to goods or services of persons with disabilities, of philanthropic institutions or of prison labour;
- (b) necessary to protect public morals, order or safety;

- (c) necessary to protect human, animal, or plant life or health, including environmental measures; or
- (d) necessary to protect intellectual property.

## ARTICLE 12.6

### Non-discrimination

1. With respect to any measure related to covered procurement:
  - (a) the European Union, 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 those goods and services, treatment no less favourable than the treatment accorded to its domestic goods, services and suppliers;
  - (b) each Signatory MERCOSUR State, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the European Union, and to the suppliers of the European Union offering those goods and services, treatment no less favourable than the treatment accorded to its domestic goods, services and suppliers.

2. With respect to any measure concerning covered procurement, the European Union and each Signatory MERCOSUR State, including their respective procuring entities, shall not:

- (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation to, or ownership by, persons of the other Party<sup>1 2</sup>; or
- (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 the other Party.

3. This Article does not apply to customs duties or any other measure of an equivalent nature which have an impact on foreign trade, or to other import regulations and measures affecting trade in services, different from the ones which specifically regulate public procurement covered under this Chapter.

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<sup>1</sup> Notwithstanding Article 12.3(1), in the case of the European Union and Argentina, point (a) of paragraph 2 shall apply to all procurement in Argentina with regard to suppliers of the European Union which are juridical persons established in Argentina, and in the European Union with regard to suppliers of Argentina which are juridical persons established in the European Union. This remains subject to security and general exceptions as defined in Article 12.5.

<sup>2</sup> Notwithstanding Article 12.3(1), in the case of the European Union and Brazil, point (a) of paragraph 2 shall apply to all procurement in Brazil with regard to suppliers of the European Union which are juridical persons established in Brazil, and in the European Union with regard to suppliers of Brazil which are juridical persons established in the European Union. This remains subject to security and general exceptions as defined in Article 12.5.

## ARTICLE 12.7

### Use of electronic means

1. Each Party shall conduct covered procurement by electronic means to the widest extent possible and shall cooperate in developing and expanding the use of electronic means in government procurement systems.
2. If a procuring entity conducts a covered procurement by electronic means, it 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 interoperable 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 and receipt and the prevention of inappropriate access.

## ARTICLE 12.8

### Conduct of procurement

A procuring entity shall conduct covered procurement in a transparent and impartial manner that avoids conflicts of interest, prevents corrupt practices and that is consistent with this Chapter, using the following methods: open tendering, selective tendering or limited tendering. Each Party shall adopt or maintain sanctions against corrupt practices according to its law.

## ARTICLE 12.9

### Rules of origin

For the purposes of Article 12.6, determination of the origin of goods shall be made on a non-preferential basis.

## ARTICLE 12.10

### Denial of benefits

Without prejudice to the time-periods of the procurement procedure, and subject to prior notification to a service supplier of the other Party and, if requested, consultations with a service supplier of the other Party, a Party may deny the benefits of this Chapter to that supplier, if such supplier is a juridical person of the other Party not engaged in substantial business operation in the territory of that other Party.

## ARTICLE 12.11

### Offsets

With regard to covered procurement, a Party shall not seek, take account of, impose or enforce offsets.

## ARTICLE 12.12

### Publication of procurement information

1. Each Party shall:
  - (a) promptly publish any law, regulation, judicial decision or administrative ruling of general application, standard contract clauses that are mandated by law or regulation and incorporated by reference in notices and tender documentation and procedure regarding covered procurement, and any modifications thereof, in officially designated electronic or paper media that are widely disseminated and remain readily accessible to the public;
  - (b) provide, if so requested by the other Party, further information concerning the application of such provisions;
  - (c) list, in Appendices 12-F-1, 12-G-1, 12-H-1, 12-I-1 and 12-J-1, the electronic or paper media in which the Party publishes the information described in point (a);
  - (d) list, where available in Appendices 12-F-2, 12-G-2, 12-H-2, 12-I-2 and 12-J-2, the electronic media, in which the Party publishes the notices required by Articles 12.13, 12.15(4) and 12.23(2).
2. Each Party shall promptly notify the other Party of any modification to the information listed in its Appendices to Annexes 12-F to 12-J. The Trade Council shall amend Annexes 12-F to 12-J accordingly, pursuant to point (f) of Article 22.1(6).

## ARTICLE 12.13

### Publication of notices

#### Notice of intended procurement

1. For each covered procurement, except in the circumstances described in Article 12.20, a procuring entity shall publish a notice of intended procurement, which shall be directly accessible by electronic means, free of charge, through a single point of access, for the European Union at European level and for Signatory MERCOSUR States at national level or once such single point of access is established at the MERCOSUR level. The notice of intended procurement shall remain readily accessible to the public, at least until the expiration of the time-period indicated in the notice. The electronic medium shall be listed by each Party in its Appendices to Annexes 12-F to 12-J. Each such notice shall include the information set out in Annex 12-O.

#### Summary notice

2. 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 languages in which the WTO Agreement is authentic. Each such notice shall include the information set out in Annex 12-K.

## Notice of planned procurement

3. Procuring entities are encouraged to publish in the appropriate paper or electronic medium listed in Appendices to Annexes 12-F to 12-J as early as possible in each fiscal year a notice regarding their future procurement plans. Such notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

4. A procuring entity in Appendices 12-A-2, 12-A-3, 12-B-2, 12-B-3, 12-C-2, 12-C-3, 12-D-2, 12-D-3, 12-E-2 and 12-E-3 to Annexes 12-A to 12-E may use a notice of planned procurement as a notice of intended procurement, provided that it includes as much of the information referred to in Annex 12-O as is available and a statement that interested suppliers should express their interest in the procurement to the procuring entity.

## ARTICLE 12.14

### 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 assessing whether a supplier satisfies the conditions for participation, a procuring entity shall evaluate the financial capacities and commercial and technical abilities of a supplier on the basis of that supplier's business activities inside and outside the territory of the Party of the procuring entity.

3. The procuring entity may require a supplier to demonstrate relevant prior experience; it may not, however, 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 a given Party or that the supplier has prior work experience in the territory of a given Party.

4. In making this assessment, the procuring entity shall base its evaluation on the conditions that it has specified in advance in notices or tender documentation.

5. A procuring entity may exclude a supplier on the following grounds:

- (a) bankruptcy;
- (b) false declarations;
- (c) significant deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
- (d) final judgments in respect of crime or serious public offences;
- (e) other sanctions that disqualify the supplier to contract with entities of a Party;
- (f) grave professional misconduct which renders the suppliers' integrity questionable;  
or
- (g) failure to pay taxes.

6. The conditions for participation established by a procuring entity as set out in paragraphs 1, 2 and 3 shall be fulfilled by the suppliers of the Parties through the presentation of the documentation required by the tender or through equivalent documentation.

## ARTICLE 12.15

### Qualification of suppliers

#### Selective tendering

1. Where a procuring entity intends to use selective tendering, the entity shall:
  - (a) include in the notice of intended procurement at least the information specified in points (a), (b), (c), (i), (j) and (k) of Annex 12-O, 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 points (d) to (h) of Annex 12-O to the qualified suppliers.
2. A procuring entity shall recognise as qualified suppliers any domestic supplier and any supplier of the other Party that meets the conditions for participation in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation regarding the number of suppliers permitted to tender and the criteria for selecting the limited number of suppliers.

3. Where the tender documentation is not made publicly available on the date of publication of the notice referred to in paragraph 1, a procuring entity shall ensure that those documents are made available at the same time to all qualified suppliers selected in accordance with paragraph 2.

#### Multi-use lists

4. If a Party's law provides that procuring entities may maintain a multi-use list of suppliers, it shall ensure 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 Appendices to Annexes 12-F to 12-J. Such a notice shall include the information set out in Annex 12-L.

5. Notwithstanding paragraph 4, if a multi-use list is valid for 3 (three) years or less, a procuring entity may publish the notice referred to in paragraph 4 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.

6. 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.

7. 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 the required documents relating thereto, within the time period provided for in Annex 12-M, 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 it has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time period allowed for the submission of tenders.

Entities listed in Appendices 12-A-2, 12-A-3, 12-B-2, 12-B-3, 12-C-2, 12-C-3, 12-D-2, 12-D-3, 12-E-2 and 12-E-3

8. A procuring entity listed in Appendices 12-A-2, 12-A-3, 12-B-2, 12-B-3, 12-C-2, 12-C-3, 12-D-2, 12-D-3, 12-E-2 and 12-E-3 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 4 and includes the information listed in Annex 12-L, as much of the information listed in Annex 12-O 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 their interest in a given procurement information that is sufficient to allow them to assess the procurement, including all remaining information required pursuant to Annex 12-O, to the extent such information is available.

9. A supplier having applied for inclusion on a multi-use list in accordance with paragraph 6 may be allowed by a procuring entity covered under Appendices 12-A-2, 12-A-3, 12-B-2, 12-B-3, 12-C-2, 12-C-3, 12-D-2, 12-D-3, 12-E-2 and 12-E-3 to tender in a given procurement, if there is sufficient time for the procuring entity to examine whether it satisfies the conditions for participation.

#### Information on procuring entity decisions

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

11. The procuring entity shall promptly inform the supplier and, on the request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision, if the entity:

- (a) rejects a supplier's request for participation in a procurement or its application for inclusion on a multi-use list;
- (b) ceases to recognise a supplier as qualified; or
- (c) removes a supplier from a multi-use list.

## ARTICLE 12.16

### Technical specifications

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 limiting competition, creating unnecessary obstacles to international trade, or discriminating between suppliers.
2. In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:
  - (a) set out the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics; and
  - (b) base the technical specifications on international standards, where these exist; otherwise, on national technical regulations, recognised national standards or building codes; each reference shall be accompanied by the words "or equivalent".
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 fulfil 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 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 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.

## ARTICLE 12.17

### Tender documentation

1. 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 the following issues:

- (a) the procurement, including the nature and 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 therewith;
- (c) all evaluation criteria to be considered in the awarding of the contract and, except where the price is the sole criterion, the relative importance of such criteria;
- (d) where the procuring entity conducts 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 holds 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 is 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 to the means by which tenders may be submitted, for instance on paper or by electronic means; and
- (h) any dates for the delivery of goods or the supply of services.

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

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

4. A procuring entity shall promptly provide the tender documentation to any supplier participating in the procurement, if so requested by such supplier, and reply to any reasonable request for relevant information by a supplier participating in the procurement, provided that such information does not give that supplier an advantage over its competitors in the procurement and that the request was presented within the applicable time limits.

5. Where, prior to the assessment of tenders in accordance with Article 12.22, a procuring entity modifies or amends the criteria or requirements set out in the notice of intended procurement or tender documentation provided to participating suppliers, it shall transmit in writing all such modifications:

- (a) to all suppliers that are participating at the time the information is amended, if such suppliers are known, and in all other cases, in the same manner as the original information; and
- (b) at a time that allows such suppliers to modify and re-submit amended tenders, as appropriate.

6. Procuring entities may require the participating suppliers to provide guarantees for maintaining the offer, and the successful supplier to provide a guarantee for the execution.

## ARTICLE 12.18

### Time periods

A procuring entity shall, in accordance with its own needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as the nature and complexity of the procurement, the extent of subcontracting that is anticipated, and the time for transmitting tenders from foreign as well as domestic points where electronic means are not used. Such time periods, including any extension thereof, shall be the same for all interested or participating suppliers. The applicable time periods are set out in Annex 12-M.

## ARTICLE 12.19

### Negotiations

1. If a Party's law provides that procuring entities may conduct procurement through negotiations, the procuring entities may do so in the following cases:
  - (a) in the context of procurements in which they have indicated such intent in the notice of intended procurement; or
  - (b) where it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices 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 notices or tender documentation; and
  - (b) when negotiations are concluded, provide a common deadline for the remaining suppliers to submit any new or revised tenders.

## ARTICLE 12.20

### Limited tendering

1. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers, a procuring entity may award contracts by limited tendering, in 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 involved collusion,

provided that the requirements of the tender documentation are not substantially modified;

(b) where, for works of art, or for reasons connected with the protection of exclusive intellectual property rights, such as patents or copyrights, or proprietary information, or where there is absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

- (c) for additional deliveries by the original supplier of goods and 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 interoperability 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) for goods purchased on a commodity market;
- (e) 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; when such contracts have been fulfilled, subsequent procurements of goods or services shall be subject to this Chapter;
- (f) insofar as is strictly necessary where for reasons of urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time by means of an open tendering procedure or selective tendering;
- (g) where a contract is awarded to a winner of a design contest provided that the contest has been organised in a manner that is consistent with the principles of this Chapter, and the participants are judged by an independent jury with a view to awarding a design contract to a winner; or

- (h) for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as unusual disposals by juridical persons that normally are not suppliers, or disposals of assets of businesses in liquidation or receivership.

2. A procuring entity shall maintain records or prepare written reports providing specific justification for any contract awarded under paragraph 1.

## ARTICLE 12.21

### Electronic auctions

Where a procuring entity intends to conduct a covered procurement using an electronic auction, the 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 are to be used in the automatic ranking or re-ranking 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 12.22

### Treatment of tenders and award of contracts

1. A procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process and the confidentiality of tenders.
2. A procuring entity shall not penalise any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
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 tender documentation and, where applicable, in the notices, and it shall 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 entity shall award the contract to the supplier that the 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 the most advantageous tender or, 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, it 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. Each 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 guarantee for the execution of the contract referred to in Article 12.17 or does not comply with the contract terms, the contract may be awarded to the supplier that has submitted the next most advantageous tender.

## ARTICLE 12.23

### Transparency of procurement information

1. A procuring entity shall promptly inform participating suppliers of the entity's contract award decisions and, on the request of a supplier, shall do so in writing. Subject to paragraphs 2 and 3 of Article 12.24, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender.

2. After the award of each contract covered by this Chapter, a procuring entity shall, as soon as possible according to the time limits established in each Party's law, publish a notice in the appropriate paper or electronic media listed in Appendices to Annexes 12-F to 12-J. Where only an electronic medium is used, the information shall remain readily available for a reasonable period of time. The notice shall include at least the following information:

- (a) a description of the goods or services procured which may include the nature and the quantity of the goods procured and the nature and the extent of the 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 the award; and
- (f) the type of procurement method used and, if limited tendering was used, a description of the circumstances justifying the use of limited tendering.

3. Each Party shall communicate to the other Party the available and comparable statistical data relevant to the procurement covered by this Chapter.

## ARTICLE 12.24

### Disclosure of information

1. On request of a Party, the other Party shall promptly provide all relevant information about the adjudication of a covered procurement, in order to determine if the procurement was conducted in accordance with the rules of this Chapter. In cases where the release of this information would prejudice competition in future tenders, the Party that receives that information shall not disclose it to any supplier, except after consultation with, and agreement of, the Party that provided the information.
2. Notwithstanding any other provision of this Chapter, a 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 as requiring a Party, including its procuring entities, authorities and review bodies, to disclose confidential information where such 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 12.25

### Domestic review procedures

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

- (a) a breach of this Chapter; or
- (b) a failure to comply with a Party's measures implementing this Chapter, if the supplier does not have a right to challenge directly a breach of this Chapter under the law of a 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 publicly available.

2. Each Party may foresee in its law that, in the event of a complaint by a supplier arising in the context of covered procurement, the Party concerned shall encourage its 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 may in no case 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 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 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. A review body that is not a court shall either be subject to judicial review or have procedural guarantees which shall provide that:

- (a) the procuring entity responds in writing to the challenge and discloses all relevant documents to the review body;
- (b) the participants to the proceedings have the right to be heard prior to a decision of the review body being made on the challenge;
- (c) the participants to the proceedings have the right to be represented and accompanied;
- (d) the participants to the proceedings have access to all proceedings;
- (e) the participants to the proceedings have the right to request that the proceedings take place in public and that witnesses may be presented; and
- (f) decisions or recommendations relating to challenges by suppliers be provided, within a reasonable time, in writing, with an explanation of the basis for each decision or recommendation.

6. Each 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 12.26

### Amendments and rectifications of coverage

1. A Party may propose to amend or rectify its respective Annexes 12-A to 12-E.

#### Amendments

2. If a Party intends to amend its Annexes referred to in paragraph 1, the Party shall:
  - (a) notify the other Party in writing; and

- (b) include in the notification a proposal for appropriate compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the amendment.

3. Notwithstanding point (b) of paragraph 2, a Party does not need to provide compensatory adjustments if the amendment covers an entity over which the Party has effectively eliminated its control or influence.

4. The other Party may object to the amendment if:

- (a) an adjustment proposed under point (b) of paragraph 2 is not adequate to maintain a comparable level of mutually agreed coverage; or

- (b) the amendment covers an entity over which the Party has not effectively eliminated its control or influence under paragraph 3.

The other Party shall object in writing within 45 (forty-five) days of receipt of the notification referred to in point (a) of paragraph 2. If no such objection is submitted within 45 (forty-five) days after having received the notification, the Party shall be deemed to have agreed to the proposed amendment.

## Rectifications

5. The following changes to a Party's Annexes shall be considered a rectification of a purely formal nature, provided that they do not affect the mutually agreed coverage provided for in the Chapter:

- (a) a change in the name of an entity;
- (b) a merger of two or more entities listed within an Appendix; and
- (c) the separation of an entity listed in an Appendix into 2 (two) or more entities that are all added to the entities listed in the same Appendix.

The 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 Party's Annexes, that Party shall notify the proposed rectifications to the other Party every 2 (two) years following the date of entry into force of this Agreement.

7. A Party may notify the other Party of an objection to a proposed rectification within 45 (forty-five) days after the receipt of the notification. If a 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 this Chapter. If no such objection is submitted in writing within 45 (forty-five) days after the receipt of the notification, the Party shall be deemed to have agreed to the proposed rectification.

#### Consultations and Dispute resolution

8. If the other Party objects to the proposed amendment or rectification, the Parties shall seek to resolve the issue through consultations. If no agreement is found within 60 (sixty) days of receipt of the objection, the Party seeking to modify or rectify its Annexes may refer the matter to the dispute settlement procedure established in Chapter 21 unless the Parties agree to extend the deadline.

9. The consultation procedure under paragraph 8 is without prejudice to the consultations provided for in Chapter 21.

10. If a Party does not object to the proposed amendment pursuant to paragraphs 2 and 3 or to the proposed rectification pursuant to paragraph 5, or the amendment or rectifications are agreed between the Parties through consultations or there is a final settlement of the matter under Chapter 21, the Trade Council shall amend the relevant Annex to reflect the agreed amendment or rectifications or the agreed compensatory adjustments.

## ARTICLE 12.27

### Subcommittee on government procurement

1. The Subcommittee on government procurement, established pursuant to Article 22.3(4), shall have the following functions, in addition to those listed in Article 22.3:

- (a) review the mutual opening of procurement markets;
- (b) exchange information relating to the government procurement opportunities in each Party including exchanges on procurement statistical data; and
- (c) discuss the extent and the means of cooperation in government procurement between the Parties as referred to in Article 12.28.

## ARTICLE 12.28

### Cooperation in government procurement

1. The Parties shall cooperate to ensure the effective implementation of this Chapter. The Parties shall use the available and existing instruments, resources and mechanisms.

2. In particular, cooperation activities in this area shall be carried out, among other activities, through:

- (a) exchange of information, good practices, statistical data, experts, experiences and policies in areas of mutual interest;
- (b) exchange of good practices regarding the use of sustainable procurement practices and other areas of mutual interest;
- (c) promotion of networks, seminars and workshops in topics of mutual interest;
- (d) transfer of knowledge, including contacts between experts from the European Union and Signatory MERCOSUR States; and
- (e) sharing of information between the European Union and Signatory MERCOSUR States, with a view to facilitate access of the Parties' suppliers, in particular for SMEs, to the government procurement markets of the Parties.