

**PROCUREMENT RULES AND RULES FOR FINANCIAL
CONTRIBUTIONS FROM THE OPERATIONAL BUDGET OF
THE EUROPEAN DEFENCE AGENCY**

(Approved by EDA Steering Board on 14 December 2006)

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AGENCY**

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**PROCUREMENT RULES AND RULES FOR FINANCIAL CONTRIBUTIONS
FROM THE OPERATIONAL BUDGET OF THE EUROPEAN DEFENCE
AGENCY (“the Agency”)**

CHAPTER 1

General provisions

Article 1

Definitions and Scope

1. Public contracts are contracts for pecuniary interest concluded in writing by the Agency acting as a contracting authority, in order to obtain, against payment of a price paid in whole or in part from the general budget, the supply of movable or immovable assets, the execution of works or the provision of services.

Public contracts comprise:

- (a) contracts for the purchase or rental of a building;
 - (b) supply contracts;
 - (c) works contracts;
 - (d) service contracts
2. (a) Building contracts cover the purchase, long lease, leasing, rental or hire purchase, with or without option to buy, of land, existing buildings or other real estate.
- (b) Supply contracts cover the purchase, leasing, rental or hire purchase, with or without option to buy, of products. A contract for the supply of products and, incidentally, for siting and installation shall be considered a supply contract.
- (c) Works contracts cover either the execution, or both the execution and design, of works or a work related to one of the activities referred to in Annex I to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts¹ or the realisation, by whatever means, of a work corresponding to the requirements specified by the Agency. A 'work' means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function.
- (d) Service contracts cover all intellectual and non-intellectual services other than those covered by supply contracts, works contracts and building contracts. Those services are listed in Annexes IIA and IIB to Directive 2004/18/EC.
- (e) A contract covering both products and services shall be considered a service contract where the value of the services in question exceeds that of the products included in the contract.

¹ OJ L 134, 30.4.2004, p. 114.

A contract having as its object services and involving works that are only incidental in relation to the principal object of the contract shall be considered a service contract.

A contract having as its object services covered by Annex IIA to Directive 2004/18/EC and services covered by Annex IIB thereto shall be considered as covered by Annex IIA if the value of the services listed in that Annex exceeds that of the services listed in Annex IIB.

(f) The description of the various types of contract is based on the reference nomenclature constituted by the common procurement vocabulary (CPV) within the meaning of Regulation (EC) No 2195/2002 of the European Parliament and of the Council¹.

In the event of differences between the CPV and the statistical classification of economic activities in the European Community (NACE), listed in Annex I to Directive 2004/18/EC, or between the CPV and the Central Product Classification (CPC) (provisional version), listed in Annex II to that Directive, the NACE nomenclature or the CPC nomenclature respectively shall take precedence.

(g) The terms "contractor", "supplier" and "service provider" refer to any natural or legal person or public entity or consortium of such persons and/or bodies which offers to execute works, supply products and provide services respectively. The terms "economic operator" covers "contractors", "suppliers" and "service providers". Economic operators who have submitted a tender are referred to as "tenderers". Those who have asked to be allowed to take part in a restricted procedure, including a competitive dialogue, or in a negotiated procedure are referred to as "candidates".

(h) The term "operational budget" refers to article 2 of the Financial Rules of the European Defence Agency and the "functioning budget" refers to the General Budget (as defined in article 1 of the Financial Rules of the European Defence Agency), except the Operational Budget.

(i) The term "contract related to defence" refers to a contract to be concluded by the Agency in the fields where Member States may invoke the exception of Article 10 of the Directive 2004/18/EC.

Article 2

Award Principles and Contracts with Lots

1. All public contracts financed in whole or in part by the general budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.
2. All procurement contracts shall be put out to tender on the broadest possible base, except when use is made of the negotiated procedure referred to in Article 4 (1)(f).
3. The estimated value of a contract may not be determined with a view to evading the requirements laid down in these Provisions, nor may a contract be split up for that purpose.

¹ OJ L 340, 16.12.2002, p. 1.

4. Where the subject of a supply, service or works contract is subdivided into several lots, each one the subject of an individual contract, the value of each lot shall be taken into account for the overall evaluation of the applicable threshold.

Where the overall value of lots is equal to or exceeds the thresholds laid down in Article 36, then articles 3 and 4 shall apply to each of the lots, save those with an estimated value of less than EUR 80 000 in the case of service or supply contracts, or less than one million euro in the case of works contracts, provided that the aggregate amount of those lots does not exceed 20% of the aggregate value of all the lots making up the contract in question.

5. Where the planned purchase of standard supplies may give rise to simultaneous contracts in separate lots, the estimated value of all those lots shall be taken as the basis for determining the applicable threshold.

Article 3

Publication

1. Except in the case of secret contracts and except also as otherwise provided herein for those contracts related to defence, all contracts exceeding the thresholds provided for in the Directive 2004/18/EC shall be published in the *Official Journal of the European Union*.

Contract notices shall be published in advance except in the cases of low-value contracts referred to in Article 34 and except as otherwise provided herein.

Publication of certain information after the contract has been awarded may be dropped where it would hinder application of the law, would be contrary to the public interest or to the interest of the Agency or of the Union, would harm the legitimate business interests of public or private undertakings or could distort fair competition between them.

2. Contracts with a value below the thresholds provided for in Article 34 shall be advertised as appropriate, except as otherwise provided herein.

Article 4

Procurement procedures

1. Procurement procedures shall take one of the following forms:

- (a) the open procedure;
- (b) the restricted procedure;
- (c) contests;
- (d) the dynamic purchasing system;
- (e) the competitive dialogue;
- (f) the negotiated procedure.

Article 5

Thresholds and Estimation of Contract Value

1. Except as otherwise provided herein for those contracts related to defence, the Directive 2004/18/EC shall lay down the thresholds which determine:

- (a) the publication arrangements referred to in Article 3;
- (b) the choice of procedures referred to in Article 4;
- (c) the corresponding time limits.

2. It shall be for each authorising officer by delegation or subdelegation to assess whether the thresholds referred in paragraph 1 have been reached.

3. For the purposes of calculating the estimated amount of a contract, the Agency shall include the contractor's total estimated remuneration.

Where a contract provides for options or possible renewal, the basis for calculation shall be the maximum amount authorised, including the use of option clauses and renewal.

This estimate shall be made when the contract notice is sent or, where there is no such publicity, when the Agency initiates the award procedure.

4. For framework agreements and dynamic purchasing systems the value to be taken into account shall be the maximum value of all the contracts envisaged during the total lifetime of the framework agreement or dynamic purchasing system.

5. For service contracts, account shall be taken of:

- (a) in the case of insurance services, the premium payable and other forms of remuneration;
- (b) in the case of banking or financial services, the fees, commissions, interest and other types of remuneration;
- (c) in the case of design contracts, the fees, commissions payable and other forms of remuneration.

6. In the case of service contracts which do not specify a total price or of supply contracts for leasing, rental or hire purchase of products, the value to be taken as the basis for calculating the estimated value shall be:

- (a) in the case of fixed-term contracts:
 - (i) where their term is forty-eight months or less in the case of services or twelve months or less in the case of supplies, the total contract value for their duration;
 - (ii) where their term is more than twelve months in the case of supplies, the total value including the estimated residual value;
- (b) in the case of contracts for an indefinite period or, in the case of services, for a period exceeding forty-eight months, the monthly value multiplied by forty-eight.

7. In the case of service or supply contracts which are awarded regularly or are to be renewed within a given time, the contract value shall be established on the basis of:

(a) either the actual aggregate cost of similar contracts for the same categories of services or products awarded over the previous financial year or twelve months, adjusted, where possible, for anticipated changes in quantity or value over the twelve months following the initial contract;

(b) or the estimated aggregate cost of successive contracts during the twelve months following the first service performed or first delivery or during the term of the contract, where this is greater than twelve months.

8. In the case of works contracts, account shall be taken not only of the value of the works but also of the estimated total value of the supplies needed to carry out the works and made available to the contractor by the Agency.

Article 6

Call for tenders

A full, clear and precise description of the subject of the contract shall be given in the documents relating to the call for tenders.

Article 7

Participation in tendering procedures

1. Participation in tendering procedures shall be open on equal terms to all natural and legal persons coming within the scope of the Treaties and to all natural and legal persons in a third country which has with the European Communities a special agreement in the field of public procurement under the conditions laid down in that agreement.

2. Participation in tendering procedures for contracts related to defence shall be open on equal terms only to natural and legal persons having a technological and/or industrial base appropriate for the related contract on the territory of any of the Member States of the European Union or on the territory of any third country having entered into an administrative arrangement with the Agency providing that natural and legal persons of such country may participate in tendering procedures for contracts related to defence, under the conditions laid down in that arrangement.

3. Consortia of economic operators shall be authorised to submit tenders or to be candidates. The Agency may not demand that consortia must have a given legal form in order to be allowed to submit a tender or request to take part, but the consortium selected may be required to adopt a given legal form after it has been awarded the contract if this change is necessary for proper performance of the contract.

Article 8

WTO Agreement on Government Procurement

Except for those contracts related to defence, where the Multilateral Agreement on Government Procurement concluded within the World Trade Organisation applies, the contracts shall also be open to nationals of the States which have ratified this agreement, under the conditions laid down in that agreement.

Article 9

Exclusion Criteria

1. Candidates or tenderers shall be excluded from participation in a procurement procedure if:
 - (a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
 - (b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*;
 - (c) they have been guilty of grave professional misconduct proven by any means which the Agency can justify;
 - (d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the Agency or those of the country where the contract is to be performed;
 - (e) they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' or the Agency's financial interests;
 - (f) following another procurement procedure financed by the budget of the European Union or the Agency's general budget, they have been declared to be in serious breach of contract for failure to comply with their contractual obligations.
2. Without prejudice to article 41, candidates or tenderers must certify that they are not in one of the situations listed in paragraph 1.

Article 10

Absence of conflict of interest and of misrepresentation

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

- (a) are subject to a conflict of interest;
- (b) are guilty of misrepresentation in supplying the information required by the Agency as a condition of participation in the contract procedure or fail to supply this information.

Article 11

Central Database

The Agency shall establish a central database containing details of candidates and tenderers who are in one of the situations described in Articles 9 and 10. The sole purpose of the database shall be to ensure, in compliance with Community rules on the processing of personal data, the correct application of Articles 9 and 10.

Article 12

Administrative or financial penalties

Administrative or financial penalties may be imposed by the Agency on candidates or tenderers who are in one of the cases of exclusion provided for in Articles 9 and 10, after they have been given the opportunity to present their observations.

These penalties may consist:

- (a) in the exclusion of the candidate or tenderer concerned from contracts financed by the Agency's general budget, for a maximum period of five years;
- (b) in the payment of financial penalties by the contractor in the case referred to in Article 9(1)(f) and by the candidate or tenderer in the cases referred to in Article 10 where they are really serious and without exceeding the value of the contract in question.

The penalties imposed shall be in proportion to the importance of the contract and the seriousness of the misconduct.

Article 13

Selection Criteria and Award Procedures

1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.
2. Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.

Article 14

General Principles for Tenders

1. The arrangements for submitting tenders shall ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.
2. The Agency may require tenderers, as provided in article 18, to lodge a security in advance as a guarantee that the bids made will not be withdrawn.
3. With the exception of the contracts with a value of less than or equal to EUR 60,000, applications and tenders shall be opened by an opening committee appointed for this purpose. Any tender or application declared by the committee not to satisfy the conditions laid down shall be rejected.
4. All applications or tenders declared by the opening committee to satisfy the conditions laid down shall be evaluated, on the basis of the selection and award criteria laid down in advance in the documents relating to the call for tenders, by a committee appointed for this purpose with a view to proposing to whom the contract should be awarded.

Article 15

Contacts between the Agency and the candidates or tenderers

1. While the procurement procedure is under way, all contacts between the Agency and candidates or tenderers shall satisfy conditions ensuring transparency and equal treatment under the conditions set out in paragraphs 2 and 3. They may not lead to amendment of the conditions of the contract or the terms of the original tender.
2. Before the closing date for the submission of tenders, in respect of the additional documents and information referred to in Article 49, the Agency may:
 - (a) at the instance of tenderers, communicate additional information solely for the purpose of clarifying the nature of the contract, such information to be communicated on the same date to all tenderers who have asked for the specifications;
 - (b) at its own instance, if it discovers an error, a lack of precision, an omission or any other type of clerical defect in the text of the contract notice, invitation to tender or specifications, inform the persons concerned on the same date and in a manner identical with that applicable in respect of the original invitation to tender.
3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the Agency may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.
4. In every case where contact has been made, a 'note for the file' shall be drawn up.
5. In the case of contracts for legal services within the meaning of Annex IIB to Directive 2004/18/EC¹ and in the case of contracts related to defence, the Agency may enter into the necessary contacts with tenderers to check the selection and/or award criteria.

Article 16

Informing Candidates and Tenderers

1. The authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.
2. The Agency shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing, of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded. However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or to the interest of the Agency or of the Union or would harm the legitimate business interests

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114) as amended by Commission Regulation (EC) No 1874/2004 of 28 October 2004 (OJ L 326 17 29.10.2004) and Commission Directive 2005/51/EC of 7 September 2005 (OJ L 257 127 1.10.2005).

of public or private undertakings or could distort fair competition between those undertakings.

The Agency shall, at the same time as the unsuccessful candidates or tenderers are informed that their tenders or applications have not been accepted, inform the successful tenderer of the award decision, specifying that the decision notified does not constitute a commitment on the part of the Agency.

Article 17

Cancellation or Abandonment of the Procedure

The Agency may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation. The decision must be substantiated and be brought to the attention of the candidates or tenderers.

Article 18

Guarantees

1. The Agency may and, in certain cases provided hereunder, shall require contractors to lodge a guarantee in advance in order to:

- (a) ensure full performance of the contract,
- (b) limit the financial risks connected with prepayment.

2. The Agency may require a tender guarantee representing 1% to 2% of the total value of the contract. A tender guarantee shall be released when the contract is awarded. If no tender is submitted by the deadline set or if the tender is subsequently withdrawn, the guarantee shall be retained.

3. Where suppliers, contractors or service providers are required to lodge a guarantee in advance, it must be for an amount and a period that are sufficient for it to be activated. The guarantee shall be supplied by a bank or an authorised financial institution. It may be replaced by a joint and several guarantee by a third party acceptable to the Agency. The guarantee shall be denominated in euro. It shall have the effect of making the bank or financial institution or the third party stand as irrevocable collateral security, or first-call guarantor of the contractor's obligations.

4. A performance guarantee may be demanded by the authorising officer in accordance with the usual commercial terms for supply and service contracts and in accordance with the special specifications for works contracts. This guarantee shall be mandatory above EUR 345 000 for works contracts. A guarantee corresponding to 10% of the total value of the contract may be constituted by deductions from payments as and when they are made. It may be replaced by an amount withheld from the final payment in order to constitute a guarantee until final acceptance of the services, supplies or works. Guarantees shall be released in accordance with the terms of the contract, save where the contract has not been performed or has been performed incorrectly or completion is late. In such cases a proportion of the guarantee shall be

retained in proportion to the seriousness of the damage suffered.

5. A guarantee shall be required in return for any prepayment exceeding EUR 150 000 or in the cases referred to in Article 42.6.

However where the contractor is a public body, the authorising officer responsible may, depending on his risk assessment, waive that obligation.

The guarantee shall be released as and when the prepayment is deducted from interim payments or payments of balances to the contractor in accordance with the terms of the contract.

Article 19

Vitiating of the Procedure

1. Where the award procedure or performance of the contract is vitiated by substantial errors or irregularities or by fraud, the Agency shall suspend performance of the contract. Contracts shall be suspended in order to verify whether presumed substantial errors or irregularities or fraud have actually occurred. If they are not confirmed, performance of the contract shall resume as soon as possible (and the Agency shall grant an extension of the contractual time limits).

2. Where such errors, irregularities or fraud are attributable to the contractor, the Agency may in addition refuse to make payments or may recover amounts already paid, in proportion to the seriousness of the errors, irregularities or fraud.

3. A substantial error or irregularity shall be any infringement of a provision of a contract or regulation resulting from an act or an omission which causes or might cause a loss to the Agency budget.

CHAPTER 2

Implementing modalities

Article 20

Framework Agreements and Specific Contracts

1. A framework agreement is an agreement between the Agency and one or more economic operators the purpose of which is to establish the terms governing contracts which may be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators who satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

A framework agreement with a number of economic operators may take the form of separate contracts but concluded in identical terms.

The term of a framework agreement may not exceed four years, save in exceptional cases duly justified in particular by the subject of the framework agreement.

The Agency may not use framework agreements improperly or in such a way that the purpose or effect is to prevent, restrict or distort competition.

Framework agreements shall be treated as procurement contracts for the purposes of the award procedure, including advertising.

2. Specific contracts based on framework agreements shall be awarded in accordance with the terms of the framework agreement, only between the Agency and the economic operators originally party to the framework agreement.

When awarding specific contracts, the parties may not make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

3. Where a framework agreement is concluded with a single economic operator, the specific contracts shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those specific contracts, the Agency may consult in writing the economic operator party to the framework agreement, requesting it to supplement its tender if necessary.

4. Specific contracts based on framework agreements concluded with a number of economic operators shall be awarded in accordance with the following arrangements:

- (a) by application of the terms laid down in the framework agreement without reopening competition;
- (b) where not all the terms are laid down in the framework agreement, after the parties have again competed on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, on the basis of other terms referred to in the specification for the framework agreement.

For every specific contract to be awarded in accordance with the arrangements in point (b) of the first subparagraph, the Agency shall consult in writing the economic operators capable of performing the contract, fixing a time limit which is sufficiently long to allow tenders to be submitted. Tenders shall be submitted in writing. The Agency shall award each specific contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specification for the framework agreement.

5. Only specific contracts concluded under framework agreements shall be preceded by a budget commitment.

Article 21

Advertising of Contracts Covered by Directive 2004/18/EC

1. In the case of contracts covered by the Directive 2004/18/EC, publication shall consist in a pre-information notice, a contract notice and an award notice.

2. The pre-information notice shall be the notice by which the Agency makes known, by way of indication, the estimated total value of contracts, by category of service or groups of products, and the essential characteristics of works contracts which they intend to award during a budgetary year. The pre-information notice shall be compulsory only where the estimated total value of the contracts is equal to or above

the thresholds laid down in Article 35 and the Agency intends to make use of the possibility of shortening time limits for receipt of tenders in accordance with Article 48(4).

The pre-information notice shall be sent to the Office for Official Publications of the European Communities as soon as possible and by no later than 31 March of each budgetary year in the case of supply and service contracts and, in the case of works contracts, as soon as possible after the decision approving the programme for those contracts.

If the Agency publishes the pre-information notice on its buyer profile, it shall send to the Office for Official Publications of the European Communities, electronically and using the format and transmission procedures specified in point 3 of Annex VIII to Directive 2004/18/EC, a notice announcing the publication of a pre-information notice on a buyer profile.

3. The contract notice shall be the means by which the Agency makes known its intention to launch a procurement procedure. It shall be compulsory for contracts of an estimated value equal to or greater than the thresholds laid down in points (a) and (c) of Article 36. It shall not be compulsory for specific contracts awarded under a framework agreement.

If the Agency wishes to award a specific contract based on a dynamic purchasing system, it shall make known its intention by means of a simplified contract notice.

Where there is unrestricted, direct and full access to the call for tenders by electronic means, in particular in the dynamic purchasing systems referred to in Article 29, the Internet address at which these documents can be consulted shall appear in the contract notice.

In an open procedure the contract notice shall specify the date, time and place of the meeting of the opening committee, which shall be open to the tenderers, except for the contracts related to defence.

The Agency, when wishing to organise a contest, shall issue a notice announcing its intention.

4. The award notice shall give the outcome of the procurement procedure. In the case of contracts the value of which is equal to or greater than the thresholds laid down in Article 36, the award notice shall be compulsory. It shall not be compulsory for specific contracts awarded under a framework agreement.

The award notice shall be sent to the Office for Official Publications of the European Communities no later than forty eight calendar days after the date on which the contract is signed.

However, notices relating to contracts based on a dynamic purchasing system may be grouped together on a quarterly basis. In such cases, they shall be sent to the Office for Official Publications of the European Communities no later than forty-eight days after the end of each quarter.

If the Agency has held a design contest, it shall send the Office for Official Publications of the European Communities a notice of the results of the contest.

5. The notices shall be drawn up in accordance with the standard forms adopted by the Commission pursuant to Directive 2004/18/EC.

Article 22

Advertising of Contracts not Covered by Directive 2004/18/EC

1. Contracts with a value below the thresholds provided for in Articles 35 and 36 and the service contracts referred to in Annex IIB to Directive 2004/18/EC and the contracts related to defence, except secret contracts, shall be advertised by appropriate means in order to ensure competitive tendering and impartiality of the procurement procedure. Such advertising shall involve:

- (a) if no contract notice referred to in Article 21 has been published, notice of a call for expressions of interest for contracts covering a similar subject with a value equal to or greater than the amount referred to in Article 33(1);
- (b) the annual publication of a list of contractors, specifying the subject and the value of the contract awarded, for contracts with a value equal to or greater than EUR 25,000.

The publication provided for in point (b) of the first subparagraph shall not be compulsory for specific contracts based on a framework agreement nor for the contracts related to defence.

2. A list of contractors to whom building contracts are awarded shall be published annually, with an indication of the subject and value of the contracts awarded. A list of contractors to whom contracts declared secret in accordance with Article 31(1)(j) are awarded, shall be sent annually to the Steering Board with an indication of the subject and value of the contracts awarded.

3. Except for the contracts related to defence, information relating to contracts with a value equal to or greater than the amount referred to in Article 33(1) shall be sent to the Office for Official Publications of the European Communities. The annual lists of contractors shall be sent by no later than 31 March following the end of the financial year.

Ex ante advertising and the annual publication of the list of contractors for the other contracts, except the secret contracts, shall be on the Internet site of the Agency; *ex post* publication shall take place by 31 March of the following financial year. Publication may also be in the *Official Journal of the European Union*.

Article 23

Publication of Notices

1. The Office for Official Publications of the European Communities shall publish the notices referred to in Articles 21 and 22 in the *Official Journal of the European Union* no later than twelve calendar days after their dispatch.

That period specified in the first subparagraph shall be reduced to five calendar days in the case of the fast-track procedures referred to in Article 50.

2. The Agency must be able to provide evidence of the date of dispatch.

Article 24

Other Forms of Advertising

1. In addition to the advertising provided for in Articles 21, 22 and 23, contracts may be advertised in any other way, notably in electronic form. Any such advertising shall refer to the notice published in the *Official Journal of the European Union* as provided for in Article 23, if one has been published, and may not precede the publication of that notice, which alone is authentic.

2. Such advertising may not introduce any discrimination between candidates or tenderers nor contain details other than those contained in the contract notice, if one has been published in the *Official Journal of the European Union*.

Article 25

Types of Procurement procedures

1. Contracts shall be awarded by call for tender, using the open, restricted or negotiated procedure (including the competitive dialogue), after publication of a contract notice in the *Official Journal of the European Union* or by negotiated procedure without prior publication of a contract notice, where appropriate following a contest.

2. Calls for tenders are open where all interested economic operators may submit a tender. That applies also in the case of the dynamic purchasing systems referred to in Article 29. Calls for tenders are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 42 and invited simultaneously and in writing by the Agency may submit a tender or a solution under the competitive dialogue procedure referred to in Article 30.

The selection phase may be repeated for each individual contract, also in the case of a competitive dialogue, or may involve drawing up a list of potential candidates under the procedure referred to in Article 33.

3. In a negotiated procedure, the Agency shall consult tenderers of its choice who satisfy the selection criteria laid down in Article 42, and negotiate the terms of the contract with one or more of them.

In negotiated procedures where a contract notice is published, as referred to in Article 32, the Agency shall simultaneously and in writing invite the selected candidates to negotiate.

4. Contests are procedures which enable the Agency to acquire, mainly in the fields of architecture and civil engineering or data processing, a plan or design proposed by a selection board after being put out to competitive tender with or without the award of prizes.

Article 26

Number of Candidates in Restricted or Negotiated Procedures

1. In a restricted procedure, including the procedure referred to in Article 33, the number of candidates invited to submit a tender may not be less than five, provided that a sufficient number of candidates satisfy the selection criteria.

The Agency may also provide for a maximum number of twenty candidates, depending on the subject of the contract and on the basis of objective and non-discriminatory selection criteria. In such cases, the range and criteria shall be indicated in the contract notice or the call for expressions of interest referred to in Articles 21 and 22.

In any event, the number of candidates invited to tender must be sufficient to ensure genuine competition.

2. In negotiated procedures and in restricted procedures after a competitive dialogue the number of candidates invited to negotiate or to tender may not be less than three, provided that a sufficient number of candidates satisfy the selection criteria.

In any event, the number of candidates invited to tender must be sufficient to ensure genuine competition.

The first and second subparagraphs shall not apply to the following :

- (a) contracts involving very small amounts, as referred to in Article 34(3);
- (b) contracts for legal services within the meaning of Annex IIB of Directive 2004/18/EC;
- (c) contracts declared secret, as referred to in Article 31(1)(j);
- (d) those cases listed in article 31 where the Agency is entitled to negotiate with one tenderer only or to award the contract to one economic operator only.

3. Where the number of candidates meeting the selection criteria and the minimum levels is below the minimum number specified in paragraphs 1 and 2, the Agency may continue the procedure by inviting the candidate or candidates with the required capacities. However, the Agency may not include other economic operators who did not ask to take part, or candidates who do not have the required capacities.

Article 27

Arrangements for Negotiated Procedures

In negotiated procedures, the Agency shall negotiate with tenderers the tenders they have submitted in order to adapt them to the requirements set out in the contract notice referred to in Article 21, or in the specifications and in any additional documents, in order to find the tender offering best value for money. During the negotiation, the Agency shall ensure equal treatment for all tenderers.

Where the Agency may, in accordance with Article 32, award contracts using a negotiated procedure after publishing a contract notice, it may arrange for the negotiated procedure to be conducted in stages so as to reduce the number of tenders to be negotiated, while applying the award criteria set out in the contract notice or specification. The contract notice or specification shall state that use is to be made of this possibility.

Article 28

Contests

1. The rules for the organisation of a contest shall be communicated to those interested in taking part. In any event, the number of candidates invited to take part must be sufficient to ensure genuine competition.

2. The selection board shall be appointed by the authorising officer responsible. It shall be made up exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required for participation in a contest, at least one third of the members of the selection board must have the same or an equivalent qualification.

The selection board shall be autonomous in its opinions. Its opinions shall be adopted on the basis of projects submitted to it anonymously by the candidates and solely in the light of the criteria set out in the contest notice.

3. The proposals of the selection board, based on the merits of each project, and its observations, shall be recorded in a report signed by its members. Candidates shall remain anonymous until the selection board has given its opinion. Candidates may be asked by the selection board to answer the questions recorded in the report in order to clarify a project. A full report of the resulting dialogue shall be drawn up.

4. The Agency shall then take a decision giving the name and address of the candidate selected and the reasons for the choice by reference to the criteria announced in the contest notice, especially if it departs from the proposals made in the selection board's opinion.

Article 29

Dynamic Purchasing System

1. The dynamic purchasing system, as referred to in Articles 1(6) and 33 of Directive 2004/18/EC, is a completely electronic process for making commonly used purchases, which is open throughout its duration to any economic operator who satisfies the selection criteria and has submitted an indicative tender that complies with the specification and any additional documents. The indicative tenders may be improved at any time provided that they continue to comply with the specification.

2. For the purposes of setting up the dynamic purchasing system, the Agency shall publish a contract notice stating that a dynamic purchasing system is being used and containing a reference to the Internet address offering unrestricted, direct and full access to the specification and to any additional documents from the time of publication of the notice up to the expiry of the system.

It shall indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, and all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications.

3. The Agency shall give any economic operator, throughout the duration of the dynamic purchasing system, the possibility of submitting an indicative tender with a view to being admitted to the system under the conditions referred to in paragraph 1. It shall complete evaluation within a maximum of fifteen days from the date of

submission of the indicative tender. However, it may extend the evaluation period provided that no invitation to tender is issued in the meantime.

The Agency shall inform tenderers at the earliest possible opportunity that they have been admitted to the dynamic purchasing system or that their tender has been rejected.

4. Each specific contract shall be the subject of an invitation to tender. Before issuing this invitation, the Agency shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, within a time limit that may not be less than fifteen days from the date on which the simplified notice is sent. The Agency may not proceed with tendering until it has completed evaluation of all the indicative tenders received by that deadline.

The Agency shall invite all tenderers admitted to the system to submit a tender within a reasonable time. It shall award the contract to the tenderer who has submitted the tender offering best value for money on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system. Those criteria may, if appropriate, be formulated more precisely in the invitation to tender.

5. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

The Agency may not resort to this system to prevent, restrict or distort competition.

No charges may be billed to the interested economic operators or to parties to the system.

Article 30

Competitive Dialogue

1. In the case of particularly complex contracts, where the Agency considers that direct use of the open procedure or the existing arrangements governing the restricted procedure will not allow the contract to be awarded to the tender offering best value for money, it may make use of the competitive dialogue referred to in Article 29 of Directive 2004/18/EC.

A contract is considered to be ‘particularly complex’ where the Agency is not objectively able to define the technical means capable of satisfying the needs or objectives or able to specify the legal or financial make-up of the project.

2. The Agency shall publish a contract notice setting out its needs and requirements, which it shall define in that notice and/or in a descriptive document.

3. The Agency shall open a dialogue with the candidates satisfying the selection criteria set out in Article 42 in order to identify and define the means best suited to satisfying its needs.

During the dialogue, the Agency shall ensure equality of treatment among all tenderers and confidentiality of the solutions proposed or other information communicated by a candidate participating in the dialogue unless he/she agrees to its disclosure.

The Agency may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document if

provision is made for this possibility in the contract notice or the descriptive document.

4. After informing the participants that the dialogue is concluded, the Agency shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

At the request of the Agency, these tenders may be clarified, specified and fine-tuned provided this does not have the effect of changing basic aspects of the tender or of the invitation to tender, variations in which could distort competition or have a discriminatory effect.

At the request of the Agency, the tenderer identified as having submitted the tender offering best value for money may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tenders and does not risk distorting competition or causing discrimination.

5. The Agency may specify prices or payments to the participants in the dialogue.

Article 31

Use of a Negotiated Procedure without Prior Publication of a Contract Notice

1. The Agency may use the negotiated procedure without prior publication of a contract notice, whatever the estimated value of the contract, in the following cases:

- (a) where no tenders or no suitable tenders, or no applications, have been submitted in response to an open procedure or restricted procedure after the initial procedure has been completed, provided that the original terms of the contract as specified in the call for tenders referred to in Article 37 are not substantially altered;
- (b) where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract can be awarded only to a particular economic operator;
- (c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the Agency in the case of contracts covered by Directive 2004/18, it is impossible to comply with the timelimits set for the other procedures and laid down in Articles 48, 49 and 50;
- (d) where a service contract follows a contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates; in the latter case, all successful candidates shall be invited to participate in the negotiations;
- (e) for additional services and works not included in the project initially envisaged nor in the initial contract but which, through unforeseen circumstances, have become necessary for the performance of the services or works, subject to the conditions set out in paragraph 2;
- (f) for new services or works consisting in the repetition of similar services or works entrusted to the economic operator awarded the initial contract by the Agency, provided that these services or works conform to a basic project and that this

project was the subject of an initial contract awarded under the open or restricted procedure, subject to the conditions set out in paragraph 3;

(g) for supply contracts:

(i) in the case of additional deliveries which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the Agency to acquire equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts may not exceed three years;

(ii) where the products are manufactured purely for the purpose of research, experiment, study or development, with the exception of commercial viability tests and large-scale production aimed at recovering research and development costs;

(iii) in respect of supplies quoted and purchased on a commodity market;

(iv) in respect of purchases on particularly advantageous terms, either from a supplier which is definitively winding up its business activities, or from the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national law;

(h) for building contracts, after prospecting the local market;

(i) for contracts for legal services within the meaning of Annex IIB to Directive 2004/18/EC; provided that such contracts are appropriately advertised;

(j) for contracts declared to be secret by the Agency, or for contracts whose performance must be accompanied by special security measures, in accordance with the administrative provisions in force or when the protection of the essential interests of the Agency, of one or more participating Member States, or of the Union so requires;

(k) for contracts with a value less or equal to EUR 60,000 ;

(l) for research and development services contracts which are not covered by Directive 2004/18 ;

(m) for contracts not covered by Directive 2004/18, other than those listed elsewhere in this paragraph, where a call of expressions of interest has been published;

(n) where the contract can be awarded only to a particular economic operator, for reasons connected with major preliminary investments related to defence equipment or technology, to unique specific defence facilities, or in order to ensure the security of supply in defence equipment or technology or in view of the need to further develop an innovative defence technology developed by such operator;

(o) where the European Commission or another European or international organisation or entity has entered into an agreement with a particular economic operator in the field of security research and it is appropriate to award a research contract related to defence to the same economic operator;

(p) for contracts related to defence, to be let in the frame of a programme or project managed in cooperation with another international organisation.

2. For the additional services and works referred to in point (e) of paragraph 1, the Agency may make use of the negotiated procedure without prior publication of a contract notice on condition that the award is made to the contractor performing the contract:

- (a) where such additional contracts cannot be technically or economically separated from the main contract without serious inconvenience for the Agency; or
- (b) where such services or works, although separable from the performance of the original contract, are strictly necessary for its completion.

Except in the case of contracts related to defence, the aggregate value of additional contracts may not exceed 50 % of the amount of the initial contract.

3. In the cases referred to in point (f) of the first subparagraph of paragraph 1, the option of using the negotiated procedure shall be pointed out as soon as the first operation is put out to competitive tender, and the total estimated amount of the subsequent services or work shall be taken into consideration in calculating the thresholds referred to in Article 36. That procedure may be used only during the three years following conclusion of the original contract.

Article 32

Use of a Negotiated Procedure after Prior Publication of a Contract Notice

1. The Agency may use the negotiated procedure after having published a contract notice whatever the estimated value of the contract, in the following cases:

- (a) where tenders which are irregular or unacceptable, by reference in particular to the selection or award criteria, are submitted in response to an open or restricted procedure, or a competitive dialogue, which has been completed, provided that the original terms of the contract as specified in the call for tenders referred to in Article 37 are not substantially altered, without prejudice to the application of paragraph 2;
- (b) in exceptional cases involving work, supplies or services where the nature or the risks do not permit prior overall pricing by the tenderer;
- (c) where the nature of the service to be procured, in particular in the case of financial services and intellectual services, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender in accordance with the rules governing open or restricted procedures;
- (d) for works contracts, where the works are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs;
- (e) for the service contracts referred to in Annex IIB to Directive 2004/18/EC, subject to point (i) and (j) of the first subparagraph of Article 31(1) and the second subparagraph thereof;
- (e) without prejudice to article 31.1, for contracts related to defence where no call of expression of interest neither any prior information notice has been published.

2. In the cases referred to in point (a) of paragraph 1, the Agency may refrain from publishing a contract notice if it includes in the negotiated procedure all the tenderers

and only the tenderers satisfying the selection criteria who, during the previous procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

Article 33

Calls for Expressions of Interest

1. A call for expressions of interest shall constitute a means of preselecting candidates who will be invited to submit tenders in response to future restricted invitations to tender for contracts with a value of more than EUR 60 000, subject to Articles 31 or 32. A call for expressions of interest shall, subject to Articles 31 or 32, also be used as a means of preselecting candidates who will be invited to submit tenders in response to future invitations to tender for contracts related to defence, whatever the amount of the contract and whether using the restricted or the negotiated procedure.
2. The list drawn up following a call for expressions of interest shall be valid for no more than three years from the date on which the notice referred to in point (a) of Article 22(1) is sent to the Office for Official Publications of the European Communities or published on the website of the Agency. Any interested person may submit an application at any time during the period of validity of the list, with the exception of the last three months of that period. Such list may be divided into sub-categories according to the type of contract for which the list is valid.
3. Where a specific contract is to be awarded, the Agency shall invite either all candidates entered on the list or only some of them, on the basis of objective and non-discriminatory selection criteria specific to that contract, to submit a tender.

Article 34

Low-Value Contracts

1. A negotiated procedure with at least five candidates being consulted may be used for contracts with a value of less than or equal to EUR 60 000 under the functioning budget and with a value of less than EUR 137,000 under the operational budget, subject to Articles 31 or 32.
If, following consultation of the candidates, the Agency receives only one tender that is administratively and technically valid, the contract may be awarded provided that the award criteria are met.
2. The negotiated procedure with at least three candidates may be used for contracts with a value of less than or equal to EUR 25 000 under the functioning budget and with a value of less than EUR 60,000 under the operational budget.
3. Contracts with a value of less than or equal to EUR 3500 under the functioning budget and with a value of less than EUR 5,000 under the operational budget may be awarded on the basis of a single tender.
4. Payments of amounts lower than or equal to EUR 200 in respect of items of expenditure may consist simply in payment against invoices, without prior acceptance of a tender.

Article 35

Thresholds for Pre-Information Notices

The thresholds for publication of a pre-information notice shall be:

- (a) EUR 750 000 for the supply and service contracts listed in Annex IIA to Directive 2004/18/EC;
- (b) EUR 5 278 000 for works contracts.

Article 36

Thresholds applicable to the Procedures under Directive 2004/18/EC

The thresholds referred to in Article 5 shall be:

- (a) EUR 137 000 for the supply and service contracts listed in Annex IIA to Directive 2004/18/EC, with the exception of the research and development contracts listed in category 8 of that Annex;
- (b) EUR 211 000 for the service contracts listed in Annex IIB to Directive 2004/18/EC and for the research and development service contracts listed in category 8 of Annex IIA to that Regulation;
- (c) EUR 5 278 000 for works contracts.

Article 37

Documents relating to the Invitation to Tender

1. Documents relating to the invitation to tender shall include at least:

- (a) the invitation to tender or to negotiate or to take part in the dialogue under the procedure set out in Article 30;
- (b) the attached specifications, to which shall be annexed the general terms and conditions applicable to contracts or, in the case of a competitive dialogue as referred to in Article 30, a document describing the needs and requirements of the Agency, or the reference for the Internet address at which such specification or document can be consulted;
- (c) the model contract.

The documents relating to the invitation to tender shall contain a reference to the advertising measures taken under Articles 21 to 24.

2. The invitation to tender or to negotiate or to take part in the dialogue shall at least:

- (a) specify the rules governing the lodging and presentation of tenders, including in particular the closing date and time for submission, any requirement as to the use of a standard reply form, the documents to be attached, including those in evidence of financial, economic, technical and professional capacity referred to in Article 42 if they are not specified in the contract notice, and the address to which they must be sent;

- (b) state that submission of the tender implies acceptance of the specifications and of the general terms and conditions referred to in paragraph 1 to which the tender relates and that this submission binds the contractor to whom the contract is awarded during performance of the contract;
- (c) specify the period during which a tender will remain valid and may not be varied in any respect;
- (f) forbid any contact between the Agency and the tenderer during the procedure, save, exceptionally and, where provision is made for an on-the-spot visit, specify the arrangements for such a visit.
- (g) specify, in the case of a competitive dialogue, the date set and the address for the start of the consultation phase.

3. The specifications shall at least:

- (a) specify the exclusion and selection criteria applying to the contract, save in the restricted procedure, including after a competitive dialogue, and in the negotiated procedures following publication of a notice referred to in Article 32; in such cases those criteria shall appear solely in the contract notice or the call for expressions of interest;
- (b) specify the award criteria and their relative weighting, or, where appropriate, the decreasing order of importance, if this is not specified in the contract notice;
- (c) set out the technical specifications referred to in Article 38;
- (d) state the minimum requirements which variants must meet in the procedures referred to in Article 45(2) under which the contract is awarded to the tender offering best value for money, where the Agency has stated in the contract notice that such variants are permitted;
- (e) state that the Decision of the representatives of the Governments of the Member States of the European Union, meeting within the Council, on the privileges and immunities granted to the European Defence Agency and to its staff members, of 10 November 2004, as supplemented by the additional protocol between the Kingdom of Belgium and the Agency, applies;
- (h) specify the evidence of access to contracts, as set out in Article 41.
- (i) specify, in the dynamic purchasing systems referred to in Article 29, the nature of the purchases envisaged, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications.

4. The model contract shall in particular:

- (a) specify the penalties for failure to comply with its clauses;
- (b) specify the details which must be contained in invoices or in the relevant supporting documents;
- (c) specify the law applicable to the contract and the competent court for hearing disputes.

5. The Agency may demand information from the tenderer on any part of the contract that the tenderer may intend to subcontract to third parties and on the identity of any subcontractors.

6. In the context of provision of technical specifications to interested economic operators, of selection of economic operators and of award of contracts, the Agency may impose requirements with a view to protecting the confidential or classified nature of information which the Agency makes available.

7. Without prejudice to the provisions concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers, the Agency shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders or requests to participate. Classified information exchanged between the Agency and candidates or tenderers shall be used, transmitted, stored, handled and safeguarded in accordance with the EU Council Security Regulations 2001/264/EC, adopted on 19 March 2001 as amended from time to time.

Article 38

Technical Specifications

1. Technical specifications shall afford equal access for candidates and tenderers and not have the effect of creating unjustified obstacles to competitive tendering. The specifications shall define the characteristics required of a product, service, material or work with regard to the purpose for which they are intended by the Agency.

2. The characteristics referred to in paragraph 1 shall include:

- (a) the quality levels;
- (b) environmental performance;
- (c) wherever possible, the accessibility criteria for people with disabilities or the design for all users;
- (d) the levels and procedures of conformity assessment;
- (e) fitness for use;
- (f) safety or dimensions, including, for supplies, the sales name and user instructions, and, for all contracts, terminology, symbols, testing and test methods, packaging, marking and labelling, production procedures and methods;
- (g) for works contracts, the procedures relating to quality assurance and the rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all the other technical conditions which the Agency may impose under general or specific regulations in relation to the finished works and to the materials or parts which they involve.

3. The technical specifications shall be formulated as follows:

- (a) by reference to European standards, or to European technical approvals or common technical specifications, where such exist, to international standards or to other technical reference material produced by European standards bodies or, failing this, their national equivalents. Every reference shall be followed by the expression ‘or equivalent’; or

- (b) in terms of performance or of functional requirements which may include environmental characteristics and shall be sufficiently detailed to enable tenderers to determine the purpose of the contract and the Agency to award the contract; or
- (c) by a mixture of those two formulation methods.

4. Where the Agency make use of the possibility of referring to the specifications referred to in point (a) of paragraph 3, they may not reject a tender on the grounds that it does not comply with those specifications if the tenderer or candidate proves, to the satisfaction of the Agency, by any appropriate means, that the tender meets in equivalent manner the requirements set.

An appropriate means may take the form of a technical dossier of the manufacturer or a test report from a recognised body.

5. Where the Agency makes use of the possibility provided for in point (b) of paragraph 3, of prescribing specifications in terms of performance or of functional requirements, they may not reject a tender which complies with a national standard transposing a European standard, a European technical approval or common technical specifications, an international standard or technical reference material produced by a European standards body, if those specifications relate to the necessary performance or functional requirements.

The tenderer must prove to the satisfaction of the Agency and by any appropriate means that the tender meets the performance or functional requirements set by the Agency. An appropriate means may take the form of a technical dossier of the manufacturer or a test report from a recognised body.

5bis. Where the Agency lays down environmental characteristics in terms of performance or of functional requirements, it may use the detailed specifications, or, if necessary, parts thereof, as defined by European, multinational or national eco-labels, or by any other eco-label, provided that the following conditions are satisfied:

- (a) the specifications used are appropriate to define the characteristics of the supplies or services that are the object of the contract;
- (b) the requirements for the label are drawn up on the basis of scientific information;
- (c) the eco-labels are adopted using a procedure in which all parties concerned, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate;
- (d) the eco-labels are accessible to all interested parties.

The Agency may indicate that the products or services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents. The Agency shall accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

5ter. A recognised body for the purposes of paragraphs 4, 5 and 5bis is a test and calibration laboratory or a certification and inspection body which complies with applicable European standards.

6. Save in exceptional cases, duly warranted by the subject of the contract, those specifications may not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production which would have the effect of favouring or eliminating certain products or economic operators. Where it is

not possible to provide a sufficiently detailed and intelligible description of the subject of the contract, the reference shall be followed by the expression 'or equivalent'.

Article 39

Price Revision

1. The documents relating to the invitation to tender shall clearly state whether a firm, non-revisable price must be quoted.
2. If that is not the case, the documents relating to the invitation to tender shall lay down the conditions and/or formulas for revision of prices during the lifetime of the contract. In such cases the Agency shall take particular account of:
 - (a) the object of the procurement procedure and the economic situation in which it is taking place;
 - (b) the type of tasks and contract and their duration;
 - (c) its financial interests.

Article 40

Administrative and Financial Penalties

1. Without prejudice to the application of penalties laid down in the contract, candidates or tenderers and contractors who have been guilty of making false declarations or have been found to have seriously failed to meet their contractual obligations in an earlier procurement procedure shall be excluded from all contracts financed by the Agency's general budget for a maximum of two years from the time when the infringement is established, as confirmed after an adversarial procedure with the contractor.

That period may be extended to three years in the event of a repeat offence within five years of the first infringement.

Tenderers or candidates who have been guilty of making false declarations shall also receive financial penalties representing 2 to 10 % of the total value of the contract being awarded.

Contractors who have been found to have seriously failed to meet their contractual obligations shall receive financial penalties representing 2 to 10 % of the total value of the contract in question.

That rate may be increased to 4 to 20 % in the event of a repeat offence within five years of the first infringement.

2. In the cases referred to in points (a), (c) and (d) of Article 9(1), the candidates or tenderers shall be excluded from all contracts for a maximum of two years from the time when the infringement is established, as confirmed after an adversarial procedure with the contractor.

In the cases referred to in points (b) and (e) of Article 9(1), the candidates or tenderers shall be excluded from all contracts for a minimum of one year and a maximum of four years from the date of notification of the judgment.

Those periods may be extended to five years in the event of a repeat offence within five years of the first infringement or the first judgment.

3. The cases referred to in point (e) of Article 9(1) shall be the following:

- (a) cases of fraud as referred to in Article 1 of the Convention on the protection of the European Communities' financial interests drawn up by the Council Act of 26 July 1995¹;
- (b) cases of corruption as referred to in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997²;
- (c) cases of participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union³;
- (d) cases of money laundering as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering⁴.

Article 41

Evidencing Documents

1. The Agency shall accept, as satisfactory evidence that the candidate or tenderer to whom the contract is to be awarded is not in one of the situations described in points (a), (b) or (e) of Article 9(1), a recent extract from the judicial record or, failing that, an equivalent document recently issued by a judicial or administrative authority in the country of origin or provenance showing that those requirements are satisfied. The Agency shall accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in point (d) of Article 9(1), a recent certificate issued by the competent authority of the country concerned.

Where the document or certificate referred to in the first sub-paragraph is not issued in the country concerned and for the other cases of exclusion referred to in Article 9, it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in his country of origin or provenance.

2. For contracts with a value of less than EUR 60 000 under the functioning budget and with a value of less than EUR 137,000 under the operational budget, the Agency may, depending on the analysis of risks by the authorising officer, ask candidates or tenderers to provide only a declaration on their honour that they are not in one of the situations referred to in Articles 9 and 10.

¹ OJ C 316, 27.11.1995, p. 48.

² OJ C 195, 25.6.1997, p. 1.

³ OJ L 351, 29.12.1998, p. 1.

⁴ OJ L 166, 28.6.1991, p. 77. Directive as amended by Directive 2001/97/EC of the European Parliament and of the Council (OJ L 344, 28.12.2001, p. 76).

In the case of a consortium, whatever the amount of the contract, the Agency may accept that only the leader of the consortium provides the documents required under paragraph 1 above, provided that such leader undertakes to be jointly and severally liable with all other members of the consortium during the tendering procedure and the performance of the subsequent contract if any; and provided also that the other members of the consortium provide the Agency with a declaration on their honour that they are not in one of the situations referred to in Articles 9 and 10.

3. Depending on the national legislation of the country in which the candidate or tenderer is established, the documents referred to in paragraph 1 shall relate to legal persons and/or natural persons including, where considered necessary by the Agency, company directors or any person with powers of representation, decision-making or control in relation to the candidate or tenderer.

4. Where the Agency has doubts as to whether candidates or tenderers are in one of the situation of exclusion, it may itself apply to the competent authorities referred to in paragraph 1 to obtain any information it considers necessary about that situation.

5. The Agency may waive the obligation of a candidate or tenderer to submit the documentary evidence referred to in paragraph 1 if such evidence has already been submitted to it for the purposes of another procurement procedure and provided that the issuing date of the documents does not exceed one year and that they are still valid.

In such a case, the candidate or tenderer shall declare on his honour that the documentary evidence has already been provided in a previous procurement procedure and confirm that no changes in his situation have occurred.

6. The tenderers shall indicate in which State they have their headquarters or domicile and present the supporting evidence normally acceptable under their own law.

Article 42

Selection Criteria

1. The Agency shall draw up clear and non-discriminatory selection criteria.

2. The selection criteria shall be applied in every procurement procedure for the purposes of assessing the financial, economic, technical and professional capacity of the candidate or the tenderer.

The Agency may lay down minimum capacity levels below which candidates may not be selected.

3. Any tenderer or candidate may be asked to prove that he is authorised to perform the contract under national law, as evidenced by inclusion in a trade or professional register, or a sworn declaration or certificate, membership of a specific organisation, express authorisation, or entry in the VAT register.

4. The Agency shall specify in the contract notice or in the call for expressions of interest or the invitation to submit a tender, the references chosen to test the status and the legal capacity of tenderers or candidates.

5. The information requested by the Agency as proof of the financial, economic, technical and professional capacity of the candidate or tenderer and the minimum capacity levels required in accordance with paragraph 2 may not go beyond the subject of the contract and shall take account of the legitimate interests of the

economic operators as regards in particular the protection of the firm's technical and business secrets.

6. For contracts with a value of less than or equal to EUR 60 000 under the functioning budget and with a value of less than or equal to EUR 137,000 under the operational budget, the Agency may, depending on the analysis of risks of the authorising officer, choose not to ask candidates or tenderers to provide documentary proof of their financial and economic, technical and professional capacity. In that case no prepayment or interim payment may be made.

7. The Agency may, in view of the specific requirements for the proper performance of a contract, request to obtain the following additional information in relation to the candidates or tenderers and their subcontractors, if any: a valid facility security clearance in place at the appropriate level and security clearances for those persons that will participate in the performance of the contract, information about their technological or industrial basis within the territory of any of the pMS. These requirements shall be indicated in the contract notice or in the call for expressions of interest or in the invitation to submit a tender.

8. For contracts related to defence, the Agency may encourage, on a transparent and non discriminatory basis, consortia made of economic operators satisfying to the conditions set forth in Article 7, paragraph 2, and promote principles similar to the Agency's Code of Best Practices in the Supply Chain in order to encourage increased competition and fair opportunities for all suppliers, including for small and medium-sized enterprises (SMEs) down the supply chain. Reference to principles similar to the Agency's Code of Best Practices in the Supply Chain may be specified in the contract notice or in the call for expressions of interest or in the invitation to submit a tender.

Article 43

Economic and Financial Capacity

1. Proof of economic and financial capacity may in particular be furnished by one or more of the following documents:

- (a) appropriate statements from banks or evidence of professional risk indemnity insurance;
- (b) the presentation of balance sheets or extracts from balance sheets for at least the last two years for which accounts have been closed, where publication of the balance sheet is required under the company law of the country in which the economic operator is established;
- (c) a statement of overall turnover and turnover concerning the works, supplies or services covered by the contract during a period which may be no more than the last three financial years.

2. If, for some exceptional reason which the Agency considers justified, the tenderer or candidate is unable to provide the references requested by the Agency, he may prove his economic and financial capacity by any other means which the Agency considers appropriate.

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the Agency that it will have at its disposal the

resources necessary for performance of the contract, for example by producing an undertaking on the part of those entities to place those resources at its disposal.

Under the same conditions, a consortium of economic operators as referred to in Article 7, paragraph 2, may rely on the capacities of members of the consortium or of other entities.

Article 44

Technical and Professional Capacity

1. The technical and professional capacity of economic operators shall be evaluated and verified in accordance with paragraphs 2 and 3. In procurement procedures for supplies requiring siting or installation operations, services and/or works, such capacity shall be assessed with regard in particular to their know-how, efficiency, experience and reliability.

2. Evidence of the technical and professional capacity of service provider or contractor may, depending on the nature, quantity or scale and purpose of the supplies, services or works to be provided, be furnished on the basis of the following documents:

- (a) the educational and professional qualifications of the service provider or contractor and/or its managerial staff and, in particular, those of the person or persons responsible for providing the services or carrying out the works;
- (b) a list:
 - (i) of the principal services provided and supplies delivered in the past three years, with the sums, dates and recipients, public or private;
 - (ii) of the works carried out in the last five years, with the sums, dates and place. The list of the most important works shall be accompanied by certificates of satisfactory execution, specifying whether they have been carried out in a professional manner and have been fully completed;
- (c) a description of the technical equipment, tools and plant to be employed by the service provider or contractor for performing a service or works contract;
- (d) a description of the technical equipment and the measures employed to ensure the quality of supplies and services, and a description of the service provider or contractor's study and research facilities;
- (e) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider or contractor, especially those responsible for quality control;
- (f) in respect of supplies: samples, descriptions and/or authentic photographs and/or certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of the products with the specifications or standards in force;
- (g) a statement of the average annual manpower and the number of managerial staff of the service provider or contractor in the last three years;
- (h) an indication of the proportion of the contract which the service provider or contractor may intend to subcontract.

- (i) for public works contracts and public service contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract.

Where the services or supplies referred to in point (b)(i) are provided to the Agency, evidence of performance shall be in the form of certificates issued or countersigned by the competent authority.

3. Where the services or products to be supplied are complex or, exceptionally, are required for a special purpose, evidence of technical and professional capacity may be secured by means of a check carried out by the Agency or on its behalf by a competent official body of the country in which the service provider or contractor is established, subject to that body's agreement. Such checks shall concern the service provider or contractor's technical capacity and production capacity and, if necessary, its study and research facilities and quality control measures.

3a. Where the Agency requires the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, the Agency shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification.

3b. Where the Agency requires the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, the Agency shall refer to the Community Eco-Management and Audit Scheme (EMAS) provided for in Regulation (EC) No 761/2001 of the European Parliament and of the Council¹ or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. The Agency shall recognise equivalent certificates from bodies established in other Member States. It shall also accept other evidence of equivalent environmental management measures from economic operators.

4. The service provider or contractor may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It shall in that case prove to the Agency that it will have at its disposal the resources necessary for performance of the contract, for example by producing an undertaking on the part of those entities to place those resources at its disposal.

Under the same conditions, a consortium of economic operators as referred to in Article 7, paragraph 2, may rely on the capacities of members of the consortium or of other entities.

Article 45

Award Arrangements and Award Criteria

1. Without prejudice to Article 10, contracts shall be awarded in one of the following two ways:

¹ OJ L 114, 24.4.2001, p.1.

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

3. The Agency shall specify, in the contract notice or in the specifications or in the descriptive document, the weighting it will apply to each of the criteria for determining best value for money. That weighting may be expressed as a range with an appropriate maximum spread.

The weighting applied to price in relation to the other criteria shall not result in the neutralisation of price in the choice of contractor, without prejudice to the scales laid down by the Agency for the remuneration of certain services, such as those provided by experts for evaluation purposes.

If, in exceptional cases, weighting is technically impossible, particularly on account of the subject of the contract, the Agency shall merely specify the decreasing order of importance in which the criteria are to be applied.

4. For contracts related to defence, the fundamental criterion for the selection of the contractor will be the most economically advantageous solution for the particular requirement, taking into account inter alia considerations of costs (both acquisition and life cycle), technical compliance, quality assurance and delivery schedule as well as, where relevant, security of supply and the approach proposed for the selection of sources of supply having regard to the principles of the CoBPSC.

Article 46

Use of Electronic Auctions

1. In open, restricted or negotiated procedures in the case referred to in Article 32 (1)(a) the Agency may decide that the award of a public contract shall be preceded by an electronic auction, as referred to in Article 54 of Directive 2004/18/EC, when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as referred to in Article 20 and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 29.

The electronic auction shall be based either solely on prices, in which case the contract is awarded to the lowest price, or on the prices and/or the values of the features of the tenders indicated in the specification, in which case the contract is awarded to the tender offering best value for money.

2. If the Agency decides to hold an electronic auction, it shall state that fact in the contract notice.

The specification shall include the following details:

- (a) the features, the values for which will be the subject of electronic auction, provided that those features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

3. Before proceeding with an electronic auction, the Agency shall make a full initial evaluation of the tenders in accordance with the award criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

4. When the contract is to be awarded on the basis of the tender offering best value for money, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in the first subparagraph of Article 45 (3).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria fixed to determine the tender offering best value for money, as indicated in the contract notice or in the specification; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

5. Throughout each phase of an electronic auction the Agency shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. The Agency may also communicate other information concerning other prices or values submitted, provided that that is stated in the specification. It may also at any time announce the number of participants in that phase of the auction. In no case, however, may the Agency disclose the identities of the tenderers during any phase of an electronic auction.

6. The Agency shall close an electronic auction in one or more of the following ways:

- (a) in the invitation to take part in the auction, the Agency shall indicate the date and time fixed in advance;

- (b) when the Agency receives no more new prices or new values which meet the requirements concerning minimum differences. In that event, the it shall state in the invitation to take part in the auction the time which it will allow to elapse after receiving the last submission before the Agency closes the electronic auction;
- (c) when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When the Agency has decided to close an electronic auction in accordance with point (c), possibly in combination with the arrangements laid down in point (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

7. After closing an electronic auction, the Agency shall award the contract in accordance with Article 45 on the basis of the results of the electronic auction.

The Agency may not have improper recourse to electronic auctions nor may it use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.

Article 47

Abnormally Low Tenders

1. If, for a given contract, tenders appear to be abnormally low, the Agency shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received. These details may relate in particular to compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed.

The Agency may, in particular, take into consideration explanations relating to:

- (a) the economics of the manufacturing process, of the provision of services or of the construction method;
- (b) the technical solutions chosen or the exceptionally favourable conditions available to the tenderer;
- (c) the originality of the tender.

2. Where the Agency establishes that a tender is abnormally low as a result of State aid provided, it may reject the tender on that ground alone only if the tenderer is unable to prove, within a reasonable time determined by the Agency, that the aid in question has been awarded definitively and in accordance with the procedures and decisions specified in the Community rules on State aid.

Article 48

Time-Limits for Receipt of Tenders and Requests to Participate

1. The time limits for the receipt of tenders and requests to participate, laid down in calendar days by the Agency, shall be long enough to allow interested parties a reasonable and appropriate period to prepare and submit their tenders, taking

particular account of the complexity of the contract or the need to visit the site or consult on the spot the documents annexed to the specifications.

2. In open procedures for contracts with a value equal to or above the thresholds set in Article 36, the time limit for receipt of tenders shall be no less than 52 days from the date on which the contract notice is dispatched.

3. In restricted procedures, including cases of use of the competitive dialogue referred to in Article 30, and in negotiated procedures with publication of a contract notice for contracts with a value equal to or above the thresholds set in Article 36, the time limit for receipt of requests to participate shall be no less than 37 days from the date on which the contract notice is dispatched.

In restricted procedures for contracts with a value equal to or above the thresholds set in Article 36, the time limit for receipt of tenders shall be no less than 40 days from the date on which the invitation to tender is dispatched.

However, in the restricted procedures and the negotiated procedures after a call for expressions of interest referred to in Article 33, the time limit for receipt of tenders shall be no less than 21 days from the date on which the invitation to tender is dispatched.

4. Where the Agency, in accordance with Article 21 (2), has sent a pre-information notice for publication or has itself publish a pre-information notice on its buyer profile, the time-limit for the receipt of tenders may generally be reduced to 36 days but shall in no circumstances be less than 22 days from the date of dispatch of the contract notice or the invitation to tender.

The shortened time limits referred to in the first subparagraph shall be permitted only if the pre-information notice satisfies the following conditions:

- (a) it contains all the information required for the contract notice, insofar as that information is available at the time the notice is published;
- (b) it was sent for publication between fifty-two days and twelve months before the date on which the contract notice was sent.

5. The time limits for receipt of tenders may be shortened by five days if unrestricted and direct access is available by electronic means to all documents constituting the call for tenders from the date of publication of the contract notice or the call for expressions of interest.

Article 49

Time Allowed for Access to Invitation to Tender Documents

1. Provided that the request was made in good time before the deadline for submission of tenders, the specifications or descriptive documents in the procedure referred to in Article 30 and additional documents shall be sent, within six calendar days of the receipt of the request, to all economic operators who have requested the specifications or expressed interest in taking part in a dialogue or in submitting a tender, subject to the provisions of paragraph 4. The Agency is not bound to reply to requests for documents made less than five working days before the deadline for submission of tenders.

2. Provided that the request was made in good time before the deadline for submission of tenders or of requests to participate, additional information relating to the call for tenders or the call for requests to participate shall be supplied simultaneously to all economic operators who have shown interest to participate in the procedure, no later than six days before the relevant deadline or, in the case of requests for information received less than eight calendar days before the deadline, as soon as possible after receipt of the request. The Agency is not bound to reply to requests for additional information made less than five working days before the relevant deadline.

3. If, for whatever reason, the specifications and the additional documents or information cannot be supplied within the time-limits set in paragraphs 1 and 2, or where tenders can be made only after a visit to the site or after on-the-spot consultation of the documents annexed to the specifications, the time-limits for receipt of tenders referred to in Article 48 shall be extended to enable all economic operators to acquaint themselves with all the requisite information for preparing tenders. That extension shall be advertised in appropriate manner, in accordance with Articles 21 to 24.

4. In the open procedure, including the dynamic purchasing systems referred to in Article 29 if there is unrestricted and full direct access by electronic means to the entire call for tenders and any additional documents, paragraph 1 shall not apply. The contract notice referred to in Article 21(3) shall give the Internet address at which those documents can be consulted.

In such cases, any additional documents and information shall also be made freely, fully and directly accessible as soon as they are supplied to all the economic operators who have requested the specifications or expressed interest in submitting a tender.

Article 50

Time-Limits in Urgent Cases

1. Where duly substantiated urgency renders impracticable the minimum time-limits laid down in Article 48(3) for restricted procedures and negotiated procedures where a contract notice is published as well as for the negotiated procedure without publication for contracts related to defence, the Agency may set the following time limits, expressed in calendar days:

- (a) a time limit for the receipt of requests to participate, which may not be less than 15 days from the date on which the contract notice was dispatched or ten days if the notice is sent to the Office for Official Publications of the European Communities electronically;
- (b) a time limit for the receipt of tenders, which may not be less than 10 days from the date of the invitation to tender.

2. In restricted procedures and fast-track negotiated procedures, additional information on the specifications shall, provided it has been requested in good time, be communicated to all candidates or tenderers no later than four calendar days before the deadline for receipt of tenders.

Article 51

Methods of Communication

1. The arrangements for the submission of tenders and requests to participate shall be determined by the Agency, which may choose an exclusive method of submission. Tenders and requests to participate may be submitted by letter or electronic means. Requests to participate may also be submitted by fax. Requests to participate submitted by fax or electronic mail shall be confirmed by letter before expiry of the time-limits set in Article 48.

The means of communication chosen shall be non-discriminatory in nature and shall not have the effect of restricting the access of economic operators to the award procedure.

The means of communication chosen shall be such as to ensure that the following conditions are satisfied:

- (a) each submission contains all the information required for its evaluation;
- (b) the integrity of data is preserved;
- (c) the confidentiality of tenders is preserved and the Agency examines the content of tenders only after the time limit set for submitting them has expired.

The Agency may require that electronic tenders be accompanied by an advanced electronic signature within the meaning of Directive 1999/93/EC of the European Parliament and of the Council¹.

1a. Where the Agency authorises submission of tenders and requests to participate by electronic means, the tools used and their technical characteristics shall be non-discriminatory in nature, generally available and interoperable with the information and communication technology products in general use. The information relating to the specifications required for presentation of tenders and requests to participate, including encryption, shall be made available to the tenderers or candidates.

Moreover, the devices for the electronic receipt of tenders and requests to participate shall conform to the requirements of Annex X to Directive 2004/18/EC.

2. Where submission is by letter, candidates or tenderers may choose to submit requests to participate or tenders:

- (a) either by registered post for which purposes the relevant date shall be the effective date of receipt (during business hours) by the Agency of the registered post; or
- (b) by hand-delivery to the premises of the Agency by the candidate or tenderer in person or by an agent, including courier service, for which purposes the Agency shall specify the department to which requests to participate or tenders are to be delivered against a signed and dated receipt and that the relevant date shall be the effective date of receipt (during business hours) by the Agency.

3. In order to maintain secrecy and to avoid any difficulties where tenders are sent by post, the invitation to tender must include the following provision:

‘Tenders must be submitted in a sealed envelope itself enclosed within a second sealed envelope. The inner envelope must bear, in addition to the name of the department to which it is addressed, as indicated in the invitation to tender, the words

¹ OJ L 13, 19.1.2000, p. 12.

Invitation to tender - Not to be opened by the mail service. If self-adhesive envelopes are used, they must be sealed with adhesive tape and the sender must sign across that tape.'

Article 52

Opening of Tenders and Requests to Participate

1. All requests to participate and tenders that satisfy the requirements of Article 51(1) and (2) shall be opened.

2. Where the value of a contract exceeds a value of EUR 60,000, the authorising officer responsible shall appoint a committee to open the tenders.

The opening committee shall be made up of at least three persons representing at least two organisational entities of the Agency with no hierarchical link between them, at least one of which does not come under the authorising officer responsible. Those persons shall avoid any conflict of interests.

3. Where requests to participate or tenders are submitted by post or express courier or are hand-delivered, one or more members of the opening committee shall initial the documents proving the date and time of receipt of each tender.

They shall also initial:

(a) either each page of each tender; or

(b) the cover page and the pages containing the financial details of each tender, the integrity of the initial tender being guaranteed by any appropriate technique employed by a department that is independent of the authorising department.

Where the contract is awarded under the automatic award procedure in accordance with point (a) of Article 45(1), the prices quoted in tenders satisfying the requirements shall be made public.

The members of the committee shall sign the written record of the opening of the tenders received, which shall identify those tenders which satisfy the requirements and those which do not, and which shall give the grounds on which tenders were rejected for non-compliance, by reference to the methods of submitting tenders referred to in Article 51.

Article 53

Committee for the Evaluation of Tenders and Requests to Participate

1. All requests to participate and tenders declared as satisfying the requirements shall be evaluated and ranked by an evaluation committee set up for each of the two stages on the basis of the pre-announced exclusion and selection criteria and the award criteria respectively.

The evaluation committee shall be appointed by the authorising officer responsible to give an advisory opinion for contracts with a value above the threshold referred to in Article 34(2).

2. The evaluation committee shall be made up of at least three persons representing at least two organisational entities of the Agency concerned with no hierarchical link

between them, at least one of which does not come under the authorising officer responsible. Those persons shall avoid any conflict of interests. The evaluation committee may be composed of the same members as the committee opening the tenders.

Outside experts may assist the committee by decision of the authorising officer responsible. The authorising officer responsible shall ensure that these experts have no conflict of interest.

3. Requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

However, the evaluation committee or the Agency may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within the time-limit it specifies.

4. In the case of abnormally low tenders referred to in Article 47, the evaluation committee shall request any relevant information concerning the composition of the tender.

Article 54

Article 296 TEC

The present financial provisions shall not affect existing measures taken by Member States under Article 296 of the Treaty establishing the European Community or under Articles 10 and 14 of the Directive 2004/18/EC.

CHAPTER 3

Rules for Financial Contributions from the Operational Budget

Article 55

Scope

1. The Agency shall be entitled to contribute, from its operational budget, to projects intended to help achieve an objective forming part of the Agency's annual work programme, developed and co-financed by private or public entities of any of the participating Member States or in cooperation with any other European institution or international organization.

2. The Steering Board will decide on the amount of the operational budget to be used through financial contributions. One project may give rise to the award of only one Agency financial contribution.

3. Financial contributions from the Agency shall be covered by a written agreement with the beneficiary.

4. Financial contributions shall be awarded following calls for proposals except in such cases where the European Commission or another European or international organisation or entity has entered into an agreement with a particular economic

operator in the field of security research or defence and it is appropriate for the Agency to award a financial contribution to the same economic operator.

5. A financial contribution may be awarded for a project which has already begun only where the applicant can demonstrate the need to start the project before the agreement is signed. In such cases, expenditure eligible for financing may not have been incurred prior to the date of submission of the financial contribution application, save in duly substantiated exceptional cases. No financial contribution may be awarded retrospectively for projects already completed.

6. Financial contributions may not finance the entire costs of the project. The project must involve co-financing. The beneficiary shall supply evidence of the co-financing provided, either by way of own resources, or in the form of financial transfers from third parties. The authorising officer may, in duly substantiated exceptional cases, accept co-financing in kind. In such cases the value of such contributions must not exceed the costs actually borne and duly supported by accounting documents.

7. The financial contribution may not have the purpose or effect of producing a surplus of receipts over the costs of the project in question when the request is made for final payment of a financial contribution for a project.

8. The following provisions shall apply, *mutatis mutandis*, to the procedure for awarding a financial contribution and signing the agreement with the beneficiary: articles 2.1, 7, 9, 10, 12, 15, 16, 17, 18, 19, 22, 40, 41, 42, 43, 44, 48, 50, 51, 52 and 53, where the regime to be applied for financial contributions shall be, if applicable, the regime for contracts related to defence.

Article 56

Evaluation of Proposals

1. Proposals shall be evaluated, on the basis of pre-announced selection and award criteria published in the call for proposals, by an evaluation committee set up for that purpose, with a view to determining which proposals may be financed.

2. The selection criteria shall be published in the call for proposals and shall be such as to make it possible to assess the applicant's financial and operational capacity to complete the proposed project. The applicant must have stable and sufficient sources of funding to maintain his activity throughout the period during which the project is being carried out or the year for which the financial contribution is awarded and to participate in its funding. The applicant must have the professional competencies and qualifications required to complete the proposed project.

3. The award criteria shall be such as to enable financial contributions to be awarded to the projects which maximise the overall effectiveness of the Agency's annual work programme which they implement. Those criteria shall be defined in such a way as to ensure also that the Agency funds are properly managed and that it will be possible subsequently to carry out an evaluation.

4. Upon completion of its evaluation, the authorising officer responsible shall, on the basis of the evaluation made, select the beneficiary and determine the financial contribution.

Article 57

Content of Calls for Proposals

1. Calls for proposals shall specify:
 - (a) the objectives pursued;
 - (b) the eligibility, selection and award criteria and the relevant supporting documents;
 - (c) the arrangements for financing by the Agency;
 - (d) the arrangements and final date for the submission of proposals and the possible start-up date for the projects and the planned date for closing the award procedure.
2. Calls for proposals shall be published on the Internet site of the European Defence Agency and as appropriate, by any other medium, including the Official Journal of the European Communities, in order to provide maximum publicity among potential beneficiaries.

Article 58

Applications for Financial Contributions

1. Applications shall be made in the form specified, and in accordance with the criteria laid down, in the call for proposals.
2. The application shall show that the applicant exists as a legal person and has the financial and operational capacity to complete the proposed project. For that purpose the authorising officer shall request a declaration from potential beneficiaries on their honour. The profit and loss account, the balance sheet for the last financial year for which the accounts have been closed and any other supporting document requested in the call for proposals shall, depending on the analysis of management risks conducted by the authorising officer responsible, also be attached to the application.
3. The budget for the project or the operating budget attached to the application must have revenue and expenditure in balance and show clearly the costs which are eligible for financing from the Agency budget.
4. For financial contributions of over EUR 25,000, the application shall be accompanied by an external audit report produced by an approved auditor. That report shall certify the accounts for the last financial year available and give an assessment of the financial viability of the applicant. The provisions of this subparagraph shall apply only to the first application made by a beneficiary to an authorising officer in any one budget year. The authorising officer responsible may, depending on his analysis of management risks, waive that obligation for public bodies and European institutions or international organisations.
5. The applicant shall indicate the sources and amounts of any other funding received or applied for in the same financial year for the same project or for any other project and for routine activities.

Article 59

Content of Financial Contribution Agreement

1. The financial contribution agreement shall in particular lay down:
 - (a) the subject;
 - (b) the beneficiary;
 - (c) the duration, namely:
 - (i) the date of its entry into force and its termination;
 - (ii) the starting date and the duration of the project;
 - (d) the maximum amount of the financial contribution; and
 - (e) a detailed description of the project;
 - (f) the general terms and conditions applicable to all agreements of this type, such as IPR, determination of the applicable law, the court competent to hear disputes and acceptance by the beneficiary of audits by the European Defence Agency and its Auditors and of the ex post publication rules referred to in Article;
 - (g) the estimated financial contribution and details of the eligible costs of the project;
 - (h) the pace of payments taking into account the financial risks involved, the duration and progress of the project and the costs incurred by the beneficiary;
 - (i) the responsibilities of the beneficiary, in particular in terms of sound financial management and submission of activity and financial reports;
 - (j) the arrangements and time-limits for approving those reports and for payment by the European Defence Agency;
 - (k) provisions for the European Defence Agency and its Auditors to exercise their powers of control, on documents and on the premises, over all contractors and subcontractors who have received the Agency's funds.

Article 60

Supporting Documents for Requests for Payments

1. For each financial contribution, where financing is split, each new payment shall be subject to consumption of at least 70% of the total amount of any earlier pre-financing. The statement of the beneficiary's outlay shall be produced in support of any request for a new payment.
2. The beneficiary shall certify on his honour that information contained in requests for payments is full, reliable and true. He shall also certify that the costs incurred can be considered eligible in accordance with the financial contribution agreement and that requests for payment are substantiated by adequate supporting documents that can be checked.
3. An external audit of the financial statements and underlying accounts, produced by an approved auditor, may be demanded by the authorising officer responsible in support of any payment on the basis of his analysis of risks. In the case of a financial contribution for a project or of an operating financial contribution, the

audit report shall be attached to the request for payment. Its purpose is to certify that the costs declared by the beneficiary in the financial statements on which the request for payment is based are real, exact and eligible in accordance with the financial contribution agreement.

Depending on his analysis of risks, the authorising officer responsible may also waive the obligation of an external audit in the case of public bodies and of other European institutions and international organisations.

4. The amount of the financial contribution shall not become final until after the institution has accepted the final reports and accounts, without prejudice to subsequent checks.
