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COUNCIL DECISION 2004/658/CFSP

of 13 September 2004

on the financial provisions applicable to the general budget of the European Defence Agency

(OJ L 300, 25.9.2004, p. 52)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Council Decision 2005/821/CFSP of 21 November 2005	L 305	43	24.11.2005

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COUNCIL DECISION 2004/658/CFSP

of 13 September 2004

on the financial provisions applicable to the general budget of the European Defence Agency

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of a European Defence Agency and in particular Article 18(1) thereof [1],

Whereas:

(1) Joint Action 2004/551/CFSP provides that the financial provisions applicable to the general budget shall be approved by the Council, acting by unanimity. The Steering Board shall, within one year of the adoption of that Joint Action review and amend these provisions, as necessary.

(2) The Steering Board, when reviewing these provisions, should respect the provisions of 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 [2], and should also address the issue of contracts to be concluded by the Agency in the fields where Directive 2004/18/EC does not apply and where a Member State may take national measures under Article 296 TEC.

(3) Joint Action 2004/551/CFSP furthermore provides that the Steering Board, acting on a proposal from the Chief Executive, shall as necessary adopt the implementing rules regarding the implementation and control of the general budget, notably as regards public procurement, without prejudice to relevant Community rules. The Steering Board shall ensure, in particular, that security of supply and protection both of defence secret and intellectual property rights requirements are taken into account in a proper manner.

(4) The financial provisions and rules referred to in the Annex are not applicable to ad hoc projects and programmes as referred to in Articles 20 and 21 of Joint Action 2004/551/CFSP. The Steering Board should endeavour to establish provisions and rules for ad hoc projects and programmes.

(5) The European Defence Agency's initial general budget for 2004 is focused on start- up arrangements and financial provisions should be provided without delay to allow for its smooth implementation,

HAS DECIDED AS FOLLOWS:

Article 1

The financial provisions applicable to the implementation and control of the European Defence Agency's general budget are laid down in the Annex to this Decision. ►**M1** The Steering Board shall review or amend as necessary these financial provisions before 31 December 2006. ◄

Article 2

This Decision shall take effect on the day of its adoption.

[1] OJ L 245, 17.7.2004, p. 17.
[2] OJ L 134, 30.4.2004, p. 114.

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Article 3

This Decision shall be published in the Official *Journal of the European Union*.

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ANNEX

FINANCIAL PROVISIONS APPLICABLE TO THE GENERAL BUDGET OF THE EUROPEAN DEFENCE AGENCY (Agency)

TITLE I

ANNUALITY

Article 1

1. The Chief Executive may make transfers from one title to another within a total limit of 10 % of the appropriations for the financial year, from one chapter to another, from one article to another.

2. Three weeks before making the transfers referred to in paragraph 1, the Chief Executive shall inform the Steering Board of his/her intentions. In the event of duly justified reasons raised during this period by a Member States, the Steering Board shall take a decision.

3. The Chief Executive may make transfers within articles and propose other transfers to the Steering Board.

Article 2

1. Appropriations which have not been used at the end of the financial year for which they were entered shall be cancelled.

2. However, commitment appropriations not yet committed at the close of the financial year may be carried over in respect of:

(a) amounts corresponding to commitment appropriations for which most of the preparatory stages of the commitment procedure have been completed by 31 December. These amounts may then be committed up to 31 March of the following year;

(b) amounts which are necessary when a programme or project was established in the final quarter of the financial year and the Agency has been unable to commit the appropriations provided for this purpose by 31 December.

3. Appropriations for payment may be carried over in respect of amounts needed to cover existing commitments or commitments linked to commitment appropriations carried over, when the appropriations provided for the relevant lines in the budget for the following financial year do not cover requirements. The Agency shall first use the appropriations authorised for the current financial year and shall not use the appropriations carried over until the former are exhausted.

4. Appropriations placed in reserve and appropriations for staff expenditure may not be carried over.

5. Earmarked revenue not used and appropriations available at 31 December arising from earmarked revenue referred to in Article 15 of Joint Action 2004/551/CFSP shall be carried over automatically and may only be used for the specific purpose to which it is assigned. The appropriations available corresponding to earmarked revenue carried over must be used first.

6. The Chief Executive shall submit proposals to the Steering Board on carry-overs by 15 February. The Steering Board shall take a decision by 15 March.

TITLE II

IMPLEMENTATION OF THE GENERAL BUDGET

CHAPTER 1

Financial actors

Section 1

Principle of segregation of duties

Article 3

The duties of authorising officer and accounting officer shall be segregated and mutually incompatible.

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Section 2

Authorising officer

Article 4

1. The Chief Executive shall perform the duties of authorising officer on behalf of the Agency.

2. The Agency shall lay down in its internal administrative rules the staff of an appropriate level to whom the Chief Executive may delegate in compliance with the conditions in the Agency's rules of procedure the duties of authorising officer, the scope of the powers delegated and the possibility for the persons to whom these powers are delegated to subdelegate them.

3. The powers of authorising officer shall be delegated or subdelegated only to persons referred to in Article 11(3)(3.1) of Joint Action 2004/551/CFSP.

4. Authorising officers by delegation or subdelegation may act only within the limits set by the instrument of delegation or subdelegation. The responsible authorising officer by delegation or subdelegation may be assisted in his/her task by one or more members of staff entrusted, under his/her responsibility, to carry out certain operations necessary for implementation of the budget and presentation of the accounts.

Article 5

1. The authorising officer shall be responsible for implementing revenue and expenditure in accordance with the principles of sound financial management and for ensuring that the requirements of legality and regularity are complied with.

2. To implement expenditure, the authorising officer by delegation or by subdelegation shall make budgetary commitments and legal commitments, shall validate expenditure and authorise payments and shall undertake the preliminaries for the implementation of appropriations.

3. Implementation of revenue shall comprise drawing up estimates of amounts receivable, establishing entitlements to be recovered and issuing recovery orders. It shall involve waiving established entitlements where appropriate.

4. The authorising officer by delegation shall put in place, in compliance with the minimum standards adopted by the Agency and having due regard to the risks associated with the management environment and the nature of the actions financed, the organisational structure and the internal management and control procedures suited to the performance of his/her duties, including where appropriate *ex post* verifications. Before an operation is authorised, the operational and financial aspects shall be verified by members of staff other than the one who initiated the operation. The initiation and the *ex ante* and *ex post* verification of an operation shall be separate functions.

5. All staff responsible for controlling the management of financial operations shall have the necessary professional skills. They shall respect a specific code of professional standards established by the Agency.

6. Any member of staff involved in the financial management and control of transactions, who considers that a decision he/she is required by his/her superior to apply or to agree to is irregular or contrary to the principles of sound financial management or the professional rules he/she is required to observe shall inform the authorising officer by delegation in writing and, if the latter fails to take action, the panel referred to in Article 13(4). In the event of any illegal activity, fraud or corruption which may harm the interests of the Agency, the authorising officer shall inform the authorities and bodies designated by the applicable legislation.

7. The authorising officer shall report to the Steering Board on the performance of his/her duties in the form of an annual activity report together with financial and management information. This report shall indicate the results of the operations by reference to the objectives set, the risks associated with these operations, the use made of the resources provided and the way the internal control system functions. The internal auditor shall take note of the annual report and any other pieces of information identified.

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Section 3

Segregation of duties of initiation and verification of an operation

Article 6

1. Initiation of an operation shall mean all the operations which are normally carried out by the staff referred to in Article 5(4) and (5) and which are preparatory to the adoption of the acts implementing the budget by the competent authorising officer, by delegation or subdelegation.

2. *Ex ante* verification of an operation shall mean all the *ex ante* checks put in place by the authorising officer responsible by delegation or subdelegation in order to verify its operational and financial aspects.

3. Each operation shall be subject at least to an *ex ante* verification. The purpose of that verification shall be to ascertain that:

(a) the expenditure and revenue are in order and comply with the provisions applicable, in particular those of the budget and the relevant regulations and of any acts adopted in implementation of the Treaties, the legislation applicable and, where appropriate, the terms of contracts;

(b) the principle of sound financial management is applied.

4. The *ex post* verifications on documents and, where appropriate, on the spot shall check that operations financed by the budget are correctly implemented and in particular that the criteria referred to in paragraph 3 are complied with. These verifications may be organised on a sample basis using risk analysis.

5. The officials or other staff responsible for the verifications referred to in paragraphs 2 and 4 shall be different from those performing the tasks of initiation referred to in paragraph 1 and shall not be their subordinates.

Section 4

Management and internal control procedures

Article 7

The management and internal control systems and procedures shall be designed to:

(a) achieve the objectives of the policies, programmes and actions of the Agency in accordance with the principle of sound financial management;

(b) comply with the rules of EU law and minimum control standards established by the Agency;

(c) safeguard the Agency's assets and information;

(d) prevent and detect irregularities, errors and fraud;

(e) identify and prevent management risks;

(f) ensure reliable production of financial and management information;

(g) keep supporting documents relating to and subsequent to budget implementation and budget implementation measures;

(h) keep documents relating to advance guarantees for the Agency and keep a log to enable such guarantees to be adequately monitored.

Section 5

Accounting officer

Article 8

The Agency shall appoint an accounting officer from amongst the staff referred to in Article 11(3)(3.1) of Joint Action 2004/551/CFSP. The accounting officer shall, obligatorily, be appointed by the Steering Board on the grounds of his/her particular competence as evidenced by diplomas or by equivalent professional experience.

Article 9

1. The accounting officer shall be responsible in the Agency for:

(a) proper implementation of payments, collection of revenue and recovery of amounts established as being receivable;

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(b) preparing and presenting the accounts;

(c) keeping the accounts;

(d) laying down the accounting rules and methods and the chart of accounts;

(e) laying down and validating the accounting systems and where appropriate validating systems laid down by the authorising officer to supply or justify accounting information;

(f) treasury management.

2. The accounting officer shall obtain from authorising officers, who shall guarantee its reliability, all the information necessary for the production of accounts which give a true image of the Agency assets and of budgetary implementation.

3. Save as otherwise provided in Article 11, the accounting officer shall alone be empowered to manage monies and other assets. He/she shall be responsible for their safekeeping.

Article 10

The accounting officer may, in the performance of his duties, delegate certain tasks to subordinates referred to in Article 11(3)(3.1) of Joint Action 2004/551/CFSP. The instrument of delegation shall lay down the tasks entrusted to the delegatees.

Section 6

Imprest administrator

Article 11

For the payment of small sums and for the collection of revenue other than participating Member States' contributions, imprest accounts may be set up which shall be endowed by the Agency's accounting officer and shall be placed under the responsibility of imprest administrators designated by the Agency's accounting officer.

CHAPTER 2

Liability of the financial actors

Section 1

General rules

Article 12

1. Without prejudice to any disciplinary action, authorising officers by delegation or subdelegation may at any time have their delegation or subdelegation withdrawn temporarily or definitively by the authority which appointed them.

2. Without prejudice to any disciplinary action, the accounting officer may at any time be suspended temporarily or definitively from his/her duties by the authority which appointed him/her.

3. Without prejudice to any disciplinary action, imprest administrators may at any time be suspended temporarily or definitively from their duties by the authority which appointed them.

4. The provisions of this chapter are without prejudice to the criminal-law liability which the persons referred to in this Article may incur as provided in the applicable national law and in the provisions in force on the protection of the European Communities' financial interests and on the fight against corruption involving officials of the European Communities or officials of Member States.

5. Each authorising officer, accounting officer or imprest administrator shall be liable to disciplinary action and payment of compensation. In the event of illegal activity, fraud or corruption which may harm the interests of the Agency, the matter will be submitted to the authorities and bodies designated by the applicable legislation.

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Section 2

Rules applicable to authorising officers by delegation or subdelegation

Article 13

1. The authorising officer may be required to make good, in whole or in part, any damage suffered by the Agency as a result of serious misconduct on his/her part in the course of or in connection with the performance of his/her duties, in particular if he/she determines entitlements to be recovered or issues recovery orders, commits expenditure or signs a payment order without complying with these financial provisions. The same shall apply where, through serious misconduct, he/she fails to draw up a document establishing an amount receivable or if he/she fails to issue a recovery order or is, without justification, late in issuing it, or if he/she fails to issue a payment order or is, without justification, late in issuing it, thereby rendering the Agency liable to civil action by third parties.

2. An authorising officer by delegation or subdelegation who considers that a decision which it is his/her responsibility to take is irregular or contrary to the principles of sound financial management shall inform the delegating authority in writing. If the delegating authority then gives a reasoned instruction in writing to the authorising officer by delegation or subdelegation to take the decision in question, the authorising officer may not be held liable.

3. In the event of subdelegation, within his/her services, the authorising officer by delegation continues to be responsible for the effectiveness of the internal management and control systems put in place and for the choice of the authorising officer by subdelegation.

4. The Agency shall set up a specialised financial irregularities panel which shall function independently and determine whether a financial irregularity has occurred and what the consequences, if any, should be. On the basis of the opinion of this panel, the Agency shall decide whether to initiate proceedings entailing liability to disciplinary action or to payment of compensation. If the panel detects systemic problems, it shall send a report with recommendations to the authorising officer and to the authorising officer by delegation, provided the latter is not the person involved, as well as to the internal auditor.

Section 3

Rules applicable to accounting officers and imprest administrators

Article 14

An accounting officer may be required to make good, in whole or in part, any damage suffered by the Agency as a result of serious misconduct on his/her part in the course of or in connection with the performance of his/her duties. He/she may in particular render himself liable by any of the following forms of misconduct:

(a) he/she loses or damages monies, assets and documents in his/her keeping;

(b) he/she wrongly alters bank accounts or postal giro accounts;

(c) he/she recovers or pays amounts which are not in conformity with the corresponding recovery or payment orders;

(d) he/she fails to collect revenue due.

Article 15

An imprest officer may be required to make good, in whole or in part, any damage suffered by the Agency as a result of serious misconduct on his/her part in the course of or in connection with the performance of his/her duties. He/she may in particular render himself liable by any of the following forms of misconduct:

(a) he/she loses or damages monies, assets and documents in his/her keeping;

(b) he/she cannot provide proper supporting documents for the payments he/she has made;

(c) he/she makes payments to persons other than those entitled;

(d) he/she fails to collect revenue due.

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CHAPTER 3

Revenue operations

Section 1

Making available the Agency's revenue

Article 16

An estimate of revenue constituted by miscellaneous revenue and the participating Member States' contributions shall be entered in the general budget in euro. The participating Member States' contributions shall cover the total appropriations entered in the general budget after miscellaneous revenue have been deducted.

Section 2

Estimate of amounts receivable

Article 17

1. An estimate of the amount receivable shall be made by the authorising officer responsible in respect of any measure or situation which may give rise to or modify an amount owed to the Agency.

2. The authorising officer responsible shall issue a recovery order in respect of these amounts.

Section 3

Establishment of amounts receivable

Article 18

1. Establishment of an amount receivable is the act by which the authorising officer by delegation or subdelegation:

(a) verifies that the debt exists;

(b) determines or verifies the reality and the amount of the debt;

(c) verifies the conditions in which the debt is due.

2. The Agency's revenue and any amount receivable that is identified as being certain, of a fixed amount and due, must be established by a recovery order to the accounting officer followed by a debit note to the debtor, both drawn up by the authorising officer responsible.

3. Amounts wrongly paid shall be recovered.

Section 4

Authorisation of recovery

Article 19

1. The authorisation of recovery is the act whereby the authorising officer by delegation or subdelegation responsible instructs the accounting officer, by issuing a recovery order, to recover an amount receivable which he/she has established.

2. The Agency may formally establish an amount as being receivable from persons other than States by means of a decision the enforcement of which shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out.

Section 5

Recovery and default interest

Article 20

1. The accounting officer shall act on recovery orders for amounts receivable duly established by the authorising officer by delegation or subdelegation responsible. He/she shall exercise due diligence to ensure that the Agency receives its revenue and shall see that its rights are safeguarded.

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The accounting officer shall recover amounts by offsetting them against equivalent claims that the Agency has on any debtor who himself/herself has a claim on the Agency that is certain, of a fixed amount and due.

2. Where the responsible authorising officer is planning to waive recovery of an established amount receivable, he/she shall ensure that the waiver is in order and complies with the principle of sound financial management and proportionality in accordance with the procedures and the criteria laid down in the implementing rules. The waiver decision must be substantiated.

Article 21

1. Any amount receivable not repaid on the due date shall bear interest in accordance with paragraphs 2 and 3.

2. The interest rate for amounts receivable not repaid on the due date shall be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union*, in force on the first calendar day of the month in which the due date falls, increased by:

(a) seven percentage points where the obligating event is a public supply and service contract;

(b) three and a half percentage points in all other cases.

3. Interest shall be calculated from the calendar day following the due date specified in the debit note up to the calendar day on which the debt is repaid in full.

4. Any partial payments shall first cover the interest determined in accordance with paragraphs 2 and 3.

5. In the case of fines, where the debtor provides a financial guarantee which is accepted by the accounting officer in lieu of provisional payment, the interest rate applicable from the due date shall be the rate referred to in paragraph 2 increased by only one and a half percentage points.

CHAPTER 4

Expenditure operations

Article 22

1. Every item of expenditure shall be committed, validated, authorised and paid.

2. The commitment of the expenditure shall be preceded by a financing decision adopted by the Agency or the authorities to which powers have been delegated by the Agency.

Section 1

Commitment of expenditure

Article 23

1. The budgetary commitment is the operation reserving the appropriation necessary to cover subsequent payments to honour a legal commitment. The legal commitment is the act whereby the authorising officer enters into or establishes an obligation which results in a charge. The budgetary commitment and the legal commitment shall be adopted by the same authorising officer, save in duly substantiated cases as provided for in the implementing rules.

2. The budgetary commitment is individual when the beneficiary and the amount of the expenditure are known. The budgetary commitment is global when at least one of the elements necessary to identify the individual commitment is still not known. The budgetary commitment is provisional when it is intended to cover routine administrative expenditure and either the amount or the final beneficiaries are not definitively known.

3. Budgetary commitments for actions extending over more than one financial year may be broken down over several years into annual instalments only where the basic act so provides and for administrative expenditure. Where the budgetary commitment is thus divided into annual instalments, the legal commitment shall stipulate this, except in the case of expenditure on staff.

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Article 24

1. In respect of any measure which may give rise to expenditure chargeable to the budget, the authorising officer responsible must first make a budgetary commitment before entering into a legal obligation with third parties.

2. Global budget commitments shall cover the total cost of the corresponding individual legal commitments concluded up to 31 December of year n + 1.

Subject to Article 23(3), individual legal commitments relating to individual or provisional budgetary commitments shall be concluded by 31 December of year n.

At the end of the periods referred to in the first and second subparagraphs, the unused balance of these budgetary commitments shall be decommitted by the authorising officer responsible.

The amount of each individual legal commitment adopted following a global commitment shall, prior to signature, be registered by the authorising officer responsible in the budgetary accounts and booked to the global commitment.

3. The legal commitments entered into for actions extending over more than one financial year and the corresponding budgetary commitments shall, save in the case of staff expenditure, have a final date for implementation set in compliance with the principle of sound financial management.

Any parts of such commitments which have not been executed six months after that date shall be decommitted and the appropriations concerned shall be cancelled.

Where a legal commitment has not then resulted in a payment after a period of three years, the authorising officer responsible shall decommit it.

Article 25

1. When adopting a budgetary commitment, the authorising officer responsible shall ensure that:

(a) the expenditure has been charged to the correct item in the budget;

(b) the appropriations are available;

(c) the expenditure conforms to the provisions of the Treaties, of the budget, of the present provisions and the applicable legislation;

(d) the principle of sound financial management has been complied with.

2. When registering a legal commitment, the authorising officer shall ensure that:

(a) the commitment is covered by the corresponding budgetary commitment;

(b) the expenditure is regular and conforms to the provisions of the Treaties, of the budget of the present provisions and the applicable legislation;

(c) the principle of sound financial management has been complied with.

Section 2

Validation of expenditure

Article 26

Validation of expenditure is the act whereby the authorising officer responsible:

(a) verifies the existence of the creditor's entitlement;

(b) determines or verifies the reality and the amount of the claim;

(c) verifies the conditions in which payment is due.

Section 3

Authorisation of expenditure

Article 27

Authorisation of expenditure is the act whereby the authorising officer responsible, having verified that the appropriations are available and by issuing a payment order, instructs the accounting officer to pay an amount of expenditure which he/she has validated.

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Section 4

Payment of expenditure

Article 28

1. Payment shall be made on production of proof that the relevant action is in accordance with the provisions of the basic act or the contract and shall cover one or more of the following operations:

(a) payment of the entire amount due;

(b) payment of the amount due in any of the following ways:

(i) pre-financing, which may be divided into a number of payments;

(ii) one or more interim payments;

(iii) payment of the balance of the amount due.

2. A distinction shall be made in the accounts between the different types of payment referred to in paragraph 1 at the time they are made.

Article 29

1. Payment of expenditure shall be made by the accounting officer within the limits of the funds available.

2. Payments other than those made from an imprest account as provided for in Article 11 shall require the joint signature of the accounting officer or an accounting officer by delegation and the authorising officer or an authorising officer by delegation.

Section 5

Time limits for expenditure operations

Article 30

1. Sums due shall be paid within no more than 45 calendar days from the date on which an admissible payment request is registered by the authorised department of the authorising officer responsible; the date of payment shall mean the date on which the Agency's account is debited.

The payment request is not admissible if at least one essential requirement is not met.

2. The payment period referred to in paragraph 1 shall be 30 calendar days for payments relating to service or supply contracts, save where the contract provides otherwise.

3. For contracts or agreements under which payment depends on approval of a report, time for the purposes of the payment periods referred to in paragraphs 1 and 2 shall not begin to run until the report in question has been approved, either explicitly with the beneficiary being informed, or implicitly because the time allowed by the contract for approval has expired without being suspended by means of a formal document sent to the beneficiary.

The time allowed for approval may not exceed:

(a) 20 calendar days for straightforward contracts relating to the supply of goods and services;

(b) 45 calendar days for other contracts and grant agreements;

(c) 60 calendar days for contracts involving technical services which are particularly complex to evaluate.

4. The authorising officer responsible may suspend the time limit for payment by informing creditors, at any time during the period referred to in paragraph 1, that the payment request cannot be met, either because the amount is not due or because the appropriate supporting documents have not been produced. If information comes to the notice of the authorising officer responsible which puts in doubt the eligibility of expenditure appearing in a payment request, the authorising officer may suspend the time limit for payment for the purpose of further verification, including an on-the-spot check, in order to ascertain, prior to payment, that the expenditure is indeed eligible. The authorising officer shall inform the beneficiary in question as soon as possible.

Time for the purposes of the remainder of the payment period shall begin to run again from the date on which the properly formulated payment request is first registered.

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5. On expiry of the time limits laid down in paragraphs 1 and 2, the creditor may, within two months of receiving late payment, demand interest in accordance with the following provisions:

(a) the interest rates shall be those referred to in the first subparagraph of Article 21(2);

(b) the interest shall be payable for the period elapsing from the calendar day following expiry of the time-limit for payment up to the day of payment.

The first subparagraph shall not apply to Member States.

CHAPTER 5

IT systems

Article 31

Where revenue and expenditure operations are managed by means of computer systems, documents may be signed by a computerised or electronic procedure.

CHAPTER 6

Internal auditor

Article 32

The Agency shall establish an internal auditing function which must be performed in compliance with the relevant international standards. The internal auditor appointed by the Agency shall be answerable to the latter for verifying the proper operation of budgetary implementation systems and procedures. The internal auditor may neither be authorising officer nor accounting officer.

Article 33

1. The internal auditor shall advise the Agency on dealing with risks, by issuing independent opinions on the quality of management and control systems and by issuing recommendations for improving the conditions of implementation of operations and promoting sound financial management.

The internal auditor shall be responsible in particular:

(a) for assessing the suitability and effectiveness of internal management systems and the performance of departments in implementing policies, programmes and actions by reference to the risks associated with them;

(b) for assessing the suitability and quality of the internal control and audit systems applicable to every budgetary implementation operation.

2. The internal auditor shall perform his/her duties on all the Agency's activities and departments. He/she shall enjoy full and unlimited access to all information required to perform his/her duties, if necessary on the spot, including in the Member States and in third countries.

3. The internal auditor shall report to the Agency on his/her findings and recommendations. The Agency shall ensure that action is taken on recommendations resulting from audits. The internal auditor shall also submit to the Agency an annual internal audit report indicating the number and type of internal audits carried out, the recommendations made and the action taken on those recommendations.

4. Each year the Chief Executive shall forward a report to the Steering Board summarising the number and type of internal audits carried out, the recommendations made and the action taken on those recommendations.

Article 34

Special rules applicable to the internal auditor shall be laid down by the Agency and shall be such as to guarantee that he/she is totally independent in the performance of his/her duties and to establish his responsibility.

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TITLE III

PROCUREMENT

CHAPTER 1

General provisions

Section 1

Scope and award principles

Article 35

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.

Article 36

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 38(1)(d).

Section 2

Publication

Article 37

1. All contracts exceeding the thresholds provided for in the Directives of the European Parliament and of the Council on the coordination of procedures for the award of public supply, service and works contracts 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 66.

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, 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 66 shall be advertised as appropriate.

Section 3

Procurement procedures

Article 38

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

(a) the open procedure;

(b) the restricted procedure;

(c) contests;

(d) the negotiated procedure.

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Article 39

The Directives of the European Parliament and of the Council on the coordination of procedures for the award of public supply, service and works contracts shall lay down the thresholds which determine:

(a) the publication arrangements referred to in Article 37;

(b) the choice of procedures referred to in Article 38;

(c) the corresponding time limits.

Section 4

Call for tenders

Article 40

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 41

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.

Article 42

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 43

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 contracting authority 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 contracting authority 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 or grant award 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. Candidates or tenderers must certify that they are not in one of the situations listed in paragraph 1.

Article 44

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

(a) are subject to a conflict of interest;

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(b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.

Article 45

The Agency shall establish a central database containing details of candidates and tenderers who are in one of the situations described in Articles 43 and 44. 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 43 and 44.

Article 46

Administrative or financial penalties may be imposed by the contracting authority on candidates or tenderers who are in one of the cases of exclusion provided for in Articles 43 and 44, 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 and grants 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 43(1)(f) and by the candidate or tenderer in the cases referred to in Article 44 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 47

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 48

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 contracting authority may require tenderers, as provided in the implementing rules, to lodge a security in advance as a guarantee that the bids made will not be withdrawn.

3. With the exception of the contracts involving small amounts referred to in Article 66(3), applications and tenders shall be opened by an opening board appointed for this purpose. Any tender or application declared by the board not to satisfy the conditions laid down shall be rejected.

4. All applications or tenders declared by the opening board 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 49

While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers shall satisfy conditions ensuring transparency and equal treatment. They may not lead to amendment of the conditions of the contract or the terms of the original tender.

Article 50

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 contracting authority 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

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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 would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.

Article 51

The contracting authority 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 shall be substantiated and be brought to the attention of the candidates or tenderers.

Section 5

Guarantees and control

Article 52

The contracting authority may and, in certain cases provided for in implementing rules, 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 payment of pre-financing.

Article 53

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.

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.

CHAPTER 2

Implementing modalities

Article 54

1. A framework contract is a contract concluded between the Agency acting as a contracting authority and an economic operator for the purpose of laying down the essential terms governing a series of specific contracts to be awarded during a given period, in particular as regards the duration, subject, prices, conditions of performance and the quantities envisaged.

The contracting authority may also conclude multiple framework contracts, which are separate contracts with identical terms awarded to a number of suppliers or service providers. The specifications referred to in Article 69 shall then specify the maximum number of operators with whom the contracting authority shall conclude contracts.

The duration of framework contracts may not exceed four years, save in exceptional cases justified in particular by the subject of the framework contract.

The Agency may not make undue use of framework contracts or use them in such a way that the purpose or effect is to prevent, restrict or distort competition.

2. Specific contracts based on the framework contracts shall be awarded in accordance with the terms laid down in the framework contract.

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

Section 1

Publication

Article 55

1. In the case of contracts covered by the public procurement Directives, 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, where the

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estimated total value is equal to or greater than the thresholds laid down in Article 67.

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.

3. The contract notice shall be the means by which the Agency makes known their 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 68.

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.

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 68, the award notice shall be compulsory. It shall not be compulsory for specific contracts awarded under a framework contract.

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.

5. The notices shall be drawn up in accordance with the models annexed to Directive 2001/78/EC ([1]).

Article 56

1. Contracts with a value below the thresholds provided for in Articles 67 and 68 and the service contracts referred to in Annex IB to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts ([2]) 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 55 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 65(1);

(b) the annual publication of a list of contractors, specifying the subject and the value of the contract awarded.

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. That list shall be sent to the Steering Board.

3. Information relating to contracts with a value equal to or greater than the amount referred to in Article 65(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 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 57

1. The Office for Official Publications of the European Communities shall publish the notices referred to in Articles 55 and 56 in the *Official Journal of the European Union* no later than twelve calendar days after their dispatch.

That period shall be reduced to five calendar days in the case of the fast-track procedures referred to in Article 81 and if the notices have been prepared and sent electronically.

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

([1]) OJ L 285, 29.10.2001, p. 1.
([2]) OJ L 209, 24.7.1992, p. 1. Directive repealed by Directive 2004/18/EC of the European Parliament and of the Council (OJ L 134, 30.4.2004, p. 114).

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Article 58

1. In addition to the advertising provided for in Articles 55, 56 and 57, 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 57, 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*.

Section 2

Procurement procedures

Article 59

1. Contracts shall be awarded by call for tender, using the open, restricted or negotiated procedure, 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 tender shall be open where all interested economic operators may submit a tender. Calls for tender shall be restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 74 and invited simultaneously and in writing by the Agency may submit a tender.

The selection phase may be repeated for each individual contract or may involve drawing up a list of potential candidates under the procedure referred to in Article 65.

3. In a negotiated procedure, the Agency shall consult tenderers of their choice who satisfy the selection criteria laid down in Article 74, 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 64, the Agency shall simultaneously and in writing invite the selected candidates to negotiate.

4. Contests are procedures which enable the contracting authority 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 60

1. In a restricted procedure, including the procedure referred to in Article 65, 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 contracting authority 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 55 and 56.

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

2. In negotiated procedures the number of candidates invited to negotiate 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 second subparagraph shall not apply to contracts involving very small amounts, as referred to in Article 66(3).

Article 61

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 55, 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.

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Article 62

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.

4. The contracting authority 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 63

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

(a) where no tenders or no suitable tenders 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 documents relating to the invitation to tender referred to in Article 69 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 and likely to jeopardise the Agency's interests, it is impossible to comply with the time-limits set for the other procedures and laid down in Articles 79, 80 and 81;

(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 considered nor in the contract first concluded but which, through unforeseen circumstances independent of the contracting authority, have become necessary for the performance of the services or works, subject to the conditions set out in paragraph 2;

(f) for additional contracts consisting in the repetition of similar services or works entrusted to the contractor awarded an earlier contract by the Agency, provided that the subject of the contract conforms to a basic project and that the first contract was awarded under the open or restricted procedure;

(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 contracting authority 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;

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

(i) for contracts with a value below the threshold laid down in Article 66(2).

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2. For the additional services and works referred to in point (e) of paragraph 1, the contracting authority 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 contracting authority; or

(b) where such services or works, although separable from the performance of the original contract, are strictly necessary for its completion.

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 paragraph 1, the option of using the negotiated procedure shall be pointed out as soon as the first contract is put out to competitive tender, and the total estimated cost of the additional contracts shall be taken into consideration in calculating the thresholds referred to in Article 68. That procedure may be used only during the three years following conclusion of the original contract.

Article 64

1. The Agency may use the negotiated procedure after having published a contract notice in the following cases:

(a) in the event of the submission of tenders which are irregular or unacceptable, by reference in particular to the selection or award criteria, in response to an open or restricted procedure which has been completed, provided that the original terms of the contract as specified in the documents relating to the invitation to tender referred to in Article 69 are not substantially altered;

(b) for service and works contracts, in exceptional cases where the nature of the services or works or the risks attaching thereto 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 1B to Directive 92/50/EEC, subject to point (i) of Article 63(1).

2. In the cases referred to in point (a) of paragraph 1, the Agency may refrain from publishing a contract notice if they include in the negotiated procedure all the tenderers who satisfy the selection criteria and who, during the previous procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

Article 65

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 of a value of EUR 50 000 or more, subject to Articles 63 or 64.

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 56(1) is sent to the Office for Official Publications of the European Communities. 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.

3. Where a specific contract is to be awarded, the contracting authority 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 66

1. A restricted procedure with at least five candidates being consulted but without a call for expressions of interest may be used for contracts with a value of less than EUR 50 000, subject to Articles 63 or 64.

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2. The negotiated procedure with at least three candidates may be used for contracts with a value of less than EUR 13 800.

3. Contracts with a value of less than EUR 1 050 may be awarded on the basis of a single tender by a negotiated procedure.

4. Payments made from imprest accounts or for expenditure related to communications activities engaged in by the Agency may consist simply in the payment of costs against invoices, without prior acceptance of a tender, where the expenditure is less than EUR 200.

Article 67

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

(a) EUR 750 000 for the supply and service contracts listed in Annex IA to Directive 92/50/EEC;

(b) EUR 5 923 624 for works contracts.

Article 68

The thresholds referred to in Article 39 shall be:

(a) EUR 154 014 for the supply and service contracts listed in Annex IA to Directive 92/50/EEC, with the exception of the research and development contracts listed in category 8 of that Annex;

(b) EUR 200 000 for the service contracts listed in Annex IB to Directive 92/50/EEC and for the research and development service contracts listed in category 8 of Annex IA to that Regulation;

(c) EUR 5 923 624 for works contracts.

Article 69

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

(a) the invitation to submit a tender or to negotiate;

(b) the attached specifications, to which shall be annexed the general terms and conditions applicable to contracts;

(c) the model contract.

The documents relating to the invitation to tender shall contain a reference to the advertising measures taken under Articles 55 to 58.

2. The invitation to tender 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 74, 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;

(d) forbid any contact between the contracting authority 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.

3. The specifications shall at least:

(a) specify the exclusion and selection criteria applying to the contract, save in the restricted procedure and in the negotiated procedures following publication of a notice referred to in Article 64; 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, if this is not specified in the contract notice;

(c) set out the technical specifications referred to in Article 70;

(d) state the minimum requirements which variants must meet in the procedures provided for in Article 77(2) under which the contract is awarded to the

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tender offering best value for money, where the contracting authority has not stated in the contract notice that such variants are not permitted;

(e) state that the Protocol on Privileges and Immunities or, where appropriate, the Vienna Convention on Diplomatic Relations or Consular Relations applies;

(f) specify the evidence of access to contracts, as set out in Article 73.

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.

Article 70

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 contracting authority.

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

(a) the quality levels;

(b) environmental performance;

(c) design for all requirements, including accessibility for disabled people;

(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 contracting authority 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; they 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 contracting authority, by any appropriate means, that the tender meets in equivalent manner the requirements set.

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.

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

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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 71

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 contracting authority 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 72

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 and grants 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 43(1), the candidates or tenderers shall be excluded from all contracts and grants 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 43(1), the candidates or tenderers shall be excluded from all contracts and grants 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 43(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 1995 ([1]);

(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 1997 ([2]);

(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 Union ([3]);

([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.

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(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 laundering [1].

Article 73

1. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in one of the situations described in points (a), (b) or (e) of Article 43(1), production of a recent extract from the judicial record or, failing that, a recent equivalent document issued by a judicial or administrative authority in the country of origin or provenance showing that those requirements are satisfied.

2. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in point (d) of Article 43 (1), a recent certificate issued by the competent authority of the country concerned.

Where no such certificate is issued in the country concerned, 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.

3. Depending on the national legislation of the country in which the tenderer or candidate is established, the documents referred to in paragraphs 1 and 2 shall relate to legal persons and/or natural persons including, where considered necessary by the contracting authority, company directors or any person with powers of representation, decision-making or control in relation to the candidate or tenderer.

Article 74

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

2. The following selection criteria shall apply in every procurement procedure:

(a) the eligibility of the tenderer or candidate to take part in the procedure, checks having been carried out on the possible grounds for exclusion referred to in Articles 43 and 44;

(b) criteria for assessing his financial, economic, technical and professional capacity. The contracting authority may lay down minimum capacity levels below which it cannot select candidates.

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 contracting authority as proof of the financial, economic, technical and professional capacity of the candidate or tenderer 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.

Article 75

1. Proof of economic and financial capacity may 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.

[1] 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).

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

Article 76

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 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.

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 contracting authority 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.

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 contracting authority 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.

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Article 77

1. Contracts shall be awarded in one of the following two ways:

(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 contracting authority shall specify, in the contract notice or in the specifications, the weighting it will apply to each of the criteria for determining best value for money.

The weighting applied to price in relation to the other criteria shall not result in the neutralisation of price in the choice of contractor.

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

Article 78

1. If, for a given contract, tenders appear to be abnormally low, the contracting authority 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.

The contracting authority 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 contracting authority 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 contracting authority, 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 79

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, 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 and negotiated procedures where a contract notice is published, 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 above the thresholds set in Article 68, 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.

In the restricted procedures referred to in Article 65, 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 55, have sent for publication a pre-information notice containing all the information required in the contract notice no less than 52 days and no more than 12 months before the date on which the contract notice is dispatched, 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, in the case of open

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procedures, or may be reduced to 26 days from the date of dispatch of the invitation to submit a tender, in the case of restricted procedures.

Article 80

1. Provided that the request was made in good time before the deadline for submission of tenders, the specifications 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 submitting a tender.

2. Provided it has been requested in good time, additional information relating to the specifications shall be supplied simultaneously to all economic operators who have requested the specifications or expressed interest in submitting a tender no later than six days before the deadline for the receipt of tenders or, in the case of requests for information received less than eight calendar days before the deadline for receipt of tenders, as soon as possible after receipt of the request.

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 79 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 55 to 58.

4. If all the invitation to tender documents are freely, fully and directly accessible by electronic means, the contract notice referred to in Article 55(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 81

1. Where duly substantiated urgency renders impracticable the time-limits laid down in Article 79(3), 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;

(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. Provided it has been requested in good time, additional information on the specifications shall be communicated to all candidates no later than four calendar days before the deadline for receipt of tenders.

Section 3

Processing of tenders and requests to participate

Article 82

1. Requests to participate shall be submitted by letter, fax or electronic mail; requests submitted by fax or electronic mail shall be confirmed by letter before expiry of the time-limits set in Article 79.

2. Tenderers may submit tenders:

(a) by post, for which purposes the invitation to tender documents shall specify that the relevant date is to be the date of despatch by registered post, as evidenced by the postmark; or

(b) by hand-delivery to the premises of the Agency by the tenderer in person or by an agent, including courier service; for which purposes the invitation to tender documents shall specify, in addition to the information referred to in point (a) of Article 69(2), the department to which tenders are to be delivered against a signed and dated receipt.

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 Invitation to tender - Not to be opened by the mail service. If self-adhesive

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envelopes are used, they must be sealed with adhesive tape and the sender must sign across that tape.'

Article 83

1. All requests to participate and tenders that satisfy the requirements of Article 82(1) and (2) shall be opened.

2. Where the value of a contract exceeds the threshold laid down in Article 66 (2), the authorising officer responsible shall appoint a committee to open the tenders.

The 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. Those persons shall avoid any conflict of interests.

3. One or more members of the opening committee shall initial the documents proving the date and time of despatch 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 77(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 82.

Article 84

1. All requests to participate and tenders declared as satisfying the requirements shall be evaluated and ranked by an evaluation committee on the basis of the exclusion, selection and award criteria announced in advance.

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 66(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. Those persons shall avoid any conflict of interests. The evaluation committee may be composed of the same members as the committee opening the tenders.

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 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 a specified time-limit.

4. In the case of abnormally low tenders referred to in Article 78, the evaluation committee shall request any relevant information concerning the composition of the tender.

Article 85

The present financial provisions shall not affect existing measures taken by Member States under Article 296 TEC or under Article 4 of Directive 92/50/EEC, Article 2 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1] or Article 2 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [2].

[1] OJ L 199, 9.8.1993, p. 1. Directive repealed by Directive 2004/18/EC.
[2] OJ L 199, 9.8.1993, p. 54. Directive repealed by Directive 2004/18/EC.

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TITLE IV

CONTROL, AUDIT AND PRESENTATION OF ACCOUNTS

Article 86

Every three months the Chief Executive shall present to the Steering Board a report on the implementation of revenue and expenditure during the preceding three months and since the beginning of the financial year.

Article 87

1. An external audit of the expenditure and revenue administered by the Agency shall be carried out following the end of each financial year.

2. Moreover, the Steering Board, on the basis of a proposal by the Chief Executive or a Member State, may at any time appoint external auditors, whose tasks and conditions of employment it shall determine.

3. With a view to external audits, a six-member college of auditors shall be established. Each year the Steering Board shall appoint two members for a non-renewable three years period, from candidates proposed by the Member States. The candidates must be members of a national audit body in a Member State and offer adequate guarantees of security and independence. They shall be available to carry out tasks on behalf of the Agency as needed. In carrying out these tasks:

(a) the members of the college shall continue to be paid by their audit body of origin and shall only receive from the Agency reimbursement of their mission expenses on the same basis as provided for in the rules applicable to officials of the European Communities of an equivalent grade;

(b) they shall neither request nor receive instructions other than from the Steering Board; within its audit mandate, the College of Auditors and its members shall be completely independent and solely responsible for the conduct of the external audit;

(c) they shall only report on their task to the Steering Board;

(d) they shall check that revenue and expenditure administered by the Agency has been implemented in conformity with the applicable legislation and the principles of sound financial management, that is in accordance with the principles of economy, effectiveness and efficiency.

4. Each year, the College of Auditors shall elect its chairman for the forthcoming financial year. It shall adopt the rules applicable to audits carried out by its members in accordance with the highest international standards. The College of Auditors shall approve the audit reports drawn up by its members before their transmission to the Chief Executive and to the Steering Board.

5. The persons responsible for auditing the Agency's revenue and expenditure shall, before carrying out their task, have received clearance for access to classified information up to at least ‘secret UE’ level held by the Council, or equivalent clearance from a Member State, as appropriate. Those persons shall ensure that they respect the confidentiality of the information and protect the data of which they acquire knowledge during their audit task, in accordance with the rules applicable to that information and data.

6. The persons responsible for auditing the Agency's revenue and expenditure shall have access without delay and without giving prior notice to the documents and to the contents of all data supports relating to that revenue and expenditure, and to the premises where those documents and supports are kept. They may make copies. The persons involved in implementing the Agency's revenue and expenditure shall give the Chief Executive and the persons responsible for the audit of that expenditure the necessary assistance in performing their task. The cost of the audits carried out by auditors shall be charged to the Agency's general budget.

Article 88

1. By 31 March following the end of the financial year, the Chief Executive, with the assistance of the accounting officer, shall draw up and submit to the College of Auditors, for examination and opinion, the draft annual management accounts, the draft annual balance sheet and a draft activity report.

2. The annual management accounts shall show for each budget administered by the Agency appropriations, expenditure committed and paid, as well as miscellaneous revenue and revenue from Member States and other parties. The balance sheet shall show as assets all the assets belonging to the Agency, taking account of their depreciation and any losses or decommissioning, and shall show its reserves as liabilities.

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3. The College of auditors shall give its opinion and observations on the documents referred to in paragraph 2 by 15 June following the end of the financial year.

4. By 31 July following the end of the financial year, the Chief Executive shall submit the documents referred to in paragraph 2, with the College of Auditors' opinion and observations accompanied by his replies, to the Steering Board.

5. The Steering Board shall approve the annual management accounts and the balance sheets. It shall grant a discharge to the Chief Executive and the accounting officer for the financial year in question.

6. The annual management accounts and the annual balance sheet, when approved, shall be published in the *Official Journal of the European Union*.

7. All accounts and inventories shall be retained by the accounting officer for a period of five years from the date on which the corresponding discharge was granted.

Article 89

1. The balance from each financial year shall be entered in the budget for the following financial year as revenue in the case of a surplus or as a payment appropriation in the case of a deficit.

2. The estimates of such revenue or payment appropriations shall be entered in the budget for the following year during the annual budgetary procedure.

3. After the accounts for each financial year have been approved, any discrepancy with the estimates shall be entered in the budget for the following year through an amending budget.