

## Commission Regulation (EC, Euratom) No 1261/2005 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of the Financial Regulation (20 July 2005)

**Caption:** Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

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## **Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Treaty establishing the European Atomic Energy Community,

Having regard to Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities <sup>(1)</sup>, and in particular Article 183 thereof,

Having consulted the European Parliament, the Council, the Court of Justice of the European Communities, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions, the Ombudsman and the European Data Protection Supervisor,

Whereas:

(1) Regulation (EC, Euratom) No 1605/2002, hereinafter "the Financial Regulation", provides that, for their own contracts, the Community institutions are to comply with the rules, contained in the Directives, applicable to the Member States. 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 <sup>(2)</sup> amended these rules. Where relevant, the amendments made by Directive 2004/18/EC should therefore be incorporated into Commission Regulation (EC, Euratom) No 2342/2002 <sup>(3)</sup>, which essentially transposes the rules of Council Directive 92/50/EEC <sup>(4)</sup>, concerning the award of public service contracts, into the internal financial rules of the institutions.

(2) Those amendments concern in particular the new possibilities for electronic award procedures, including the new dynamic purchasing system for commonly used items, the competitive dialogue procedure, the rules governing contracts declared to be secret and the use of framework agreements – which for practical reasons should continue to be referred to as framework contracts for the purposes of implementing the Community budget, thus making it possible for the parties to a framework agreement to be required to compete for the award of specific contracts – and the added emphasis given to social and environmental dimensions in the evaluation of tenders. The thresholds applicable have also been revised for service contracts not subject to the agreement of the World Trade Organisation. Directive 2004/18/EC also harmonises the provisions applicable to the three main categories of contract, with reference in particular to advertising, technical specifications and the calculation of the value of the contracts.

(3) Furthermore, the provisions relating to the means of identifying interest on pre-financing payments have proved too restrictive. It should therefore be made permissible for any accounting method to be used to identify such interest.

(4) Article 31 of Regulation (EC, Euratom) No 2342/2002 sets out the list of basic acts for the purposes of Article 49 of the Financial Regulation, but does not cover the whole range of legal instruments available to the Council in the field of the common foreign and security policy. The list should therefore be extended to include decisions relating to the conclusion of international agreements and decisions on urgent action of limited duration to deal with crisis situations.

(5) It is also appropriate to lay down a procedure for informing unsuccessful candidates and tenderers in procurement procedures conducted by the institutions on their own account. Such information should be provided before the contract is signed and should give the unsuccessful candidates and tenderers the reasons why their application or tender has been rejected. The introduction of such an information procedure is

designed to make the institutions subject to an obligation imposed on the Member States by the Court of Justice of the European Communities.

(6) Experience has shown that the procedures currently laid down in relation to low-value contracts and contracts for legal services, which are stricter than what is required under Directive 2004/18/EC, have in practice proved too cumbersome. They should therefore be made more flexible, in particular as concerns publicity measures and, subject to the authorising officers risk appraisal, the supporting documents to be provided. In the latter case the contracting authority should always be able to justify the choice.

(7) Following the liberalisation of the postal sector, the discrimination that has always existed between registered post and delivery by courier services should be removed, as in both instances a slip is issued when items are deposited which can serve as proof of the date of dispatch of tenders.

(8) Provision should be made for the Community institutions to use the vocabulary laid down in Regulation No 2195/2002 of the European Parliament and the Council of 5 November 2002 on the common procurement vocabulary <sup>(5)</sup>.

(9) The 31 January deadline set for the adoption of the annual work programme for grants is proving extremely tight, or even impossible to meet, in particular where basic acts or pilot projects are adopted late or for reasons connected with committee procedures. A deadline should therefore be set which is not as tight, although the programme should continue to constitute ex ante publicity and to be an essential condition for budget implementation.

(10) The provisions concerning the nature of the audits required in support of requests for payment and the thresholds applying in that connection have proved to be ambiguous or unnecessarily complex. They should therefore be simplified and rationalised.

(11) In the field of humanitarian aid, grant beneficiaries are generally tied to the Commission by partnership agreements which provide for general and regular audit and control arrangements. In the light of his analysis of management risks, the authorising officer may consider that those arrangements offer guarantees equivalent to those offered by the audit of the accounts of an action, which is required in support of requests for payment of the balance. It is appropriate, in those circumstances and in order to simplify management, to allow the authorising officer not to request an audit for payments of balances.

(12) With a view to enhancing effectiveness in the use of Community funds, it would be appropriate to allow wider access to flat-rate financing, in return for which beneficiaries should be made more accountable, with greater obligations as to results.

(13) Regulation (EC, Euratom) No 2342/2002 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

#### **Article 1**

Regulation (EC, Euratom) No 2342/2002 is amended as follows:

1. in Article 4(2), the introductory phrase and point (a) are replaced by the following:

"Authorising officers shall ensure that, in agreements concluded with beneficiaries and intermediaries:

(a) such pre-financing is paid to bank accounts or sub-accounts which allow the funds and related interest to be identified; otherwise the accounting methods of the beneficiaries or intermediaries must make it possible to identify the funds paid by the Community and the interest or other benefits yielded by those funds;"

2. in Article 31, paragraph 2 is replaced by the following:

"2. In the field of the common foreign and security policy, a basic act may take one of the forms specified in Articles 13(2), 14, 23(2) and 24 of the Treaty on European Union.

In crisis situations, as referred to in Article 168(2) of this Regulation, and for actions of limited duration, a basic act may also take the form specified in Articles 13(3) and 23(1) of the Treaty on European Union.";

3. Article 116 is amended as follows:

(a) in paragraph 2, the second sentence is replaced by the following:

"A contract for the supply of products and, incidentally, for siting and installation shall be considered a supply contract.";

(b) in paragraph 3, the first sentence is replaced by the following:

"Works contracts cover either the execution, or both the execution and design, of works or a work related to one of the activities referred to in Annex I to Directive 2004/18/EC of the European Parliament and of the Council (\*) or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

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(\*) OJ L 134, 30.4.2004, p. 114.";

(c) in paragraph 4, the second sentence is replaced by the following:

"Those services are listed in Annexes IIA and IIB to Directive 2004/18/EC.";

(d) in paragraph 5, the following subparagraphs are added:

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

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

(e) the following paragraph 5a is inserted:

"5a. The description of the various types of contract is based on the reference nomenclature constituted by the common procurement vocabulary (CPV) within the meaning of Regulation (EC) No 2195/2002 of the European Parliament and of the Council (\*).

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

(\*) OJ L 340, 16.12.2002, p. 1.";

(f) paragraphs 6 and 7 are replaced by the following:

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

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

7. Departments of the Community institutions shall be considered to be contracting authorities, save where they conclude between themselves administrative arrangements for the provision of services, the supply of products or the execution of works.";

4. Articles 117 and 118 are replaced by the following:

"*Article 117*

### **Framework contracts and specific contracts**

(Article 88 of the Financial Regulation)

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

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

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

Contracting authorities may not use framework contracts improperly or in such a way that the purpose or effect is to prevent, restrict or distort competition.

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

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

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

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

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

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

(a) by application of the terms laid down in the framework contract without reopening competition;

(b) where not all the terms are laid down in the framework contract, after the parties have again competed on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, on the basis of other terms referred to in the specification for the framework contract.

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

5. Only specific contracts based on framework contracts shall be preceded by a budgetary commitment.

#### *Article 118*

#### **Advertising of contracts covered by Directive 2004/18/EC, with the exception of contracts referred to in Annex IIB thereto**

(Article 90 of the Financial Regulation)

1. Publication for contracts with a value equal to or above the thresholds laid down in Articles 157 and 158 shall consist in a pre-information notice, a contract notice or simplified contract notice and an award notice.

2. The pre-information notice is the notice by which the contracting authorities make known, by way of indication, the estimated total value of contracts and framework 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, but excluding contracts under the negotiated procedure without prior publication of a contract notice. The pre-information notice shall be compulsory only where the estimated total value of the contracts is equal to or above the thresholds laid down in Article 157 and the contracting authority intends to make use of the possibility of shortening time limits for receipt of tenders in accordance with Article 140(4).

The pre-information notice shall be published either by the Office for Official Publications of the European Communities (OPOCE) or by the contracting authorities themselves on their buyer profile as referred to in point (2)(b) of Annex VIII to Directive 2004/18/EC.

The pre-information notice shall be sent to OPOCE or published on the buyer profile as soon as possible and in any event 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.

Contracting authorities which publish the pre-information notice on their buyer profile shall send to OPOCE, electronically and using the format and transmission procedures specified in point (3) of Annex VIII to Directive 2004/18/EC, a notice announcing the publication of a pre-information notice on a buyer profile.

3. The contract notice is the means by which the contracting authorities make known their intention to launch a procedure for the award of a contract or framework contract or to set up a dynamic purchasing system in accordance with Article 125a. The contract notice shall be compulsory for contracts with an estimated value equal to or above the thresholds laid down in points (a) and (c) of Article 158(1), without prejudice to contracts concluded after a negotiated procedure, as referred to in Article 126. It shall not be compulsory for specific contracts based on framework contracts.

Contracting authorities which wish to award a specific contract based on a dynamic purchasing system shall make known their intention by means of a simplified contract notice.

In an open procedure the contract notice shall specify the date, time and, where appropriate, place of the meeting of the opening committee, which shall be open to the tenderers.

Contracting authorities shall state whether or not they authorise variants and shall specify the minimum capacity levels they demand if they make use of the possibility provided for in the second subparagraph of Article 135(2). They shall set out the selection criteria referred to in Article 135 that they intend to use, the minimum number of candidates they plan to invite to tender and, where appropriate, the maximum number, and the objective and non-discriminatory criteria they intend to apply in order to limit the number, in accordance with the second subparagraph of Article 123(1).

Where there is unrestricted, direct and full access to the call for tenders by electronic means, in particular in the dynamic purchasing systems referred to in Article 125a, the Internet address at which these documents can be consulted shall appear in the contract notice.

Contracting authorities wishing to organise a contest shall issue a notice announcing their intention.



4. The award notice shall give the outcome of the procedure for the award of contracts, framework contracts or contracts based on a dynamic purchasing system. In the case of contracts with a value equal to or above the thresholds laid down in Article 158, the award notice shall be compulsory. It shall not be compulsory for specific contracts based on framework contracts.

The award notice shall be sent to the OPOCE no later than 48 calendar days after the procedure is closed, that is to say, from the date on which the contract or framework contract is signed. However, notices relating to contracts based on a dynamic purchasing system may be grouped together on a quarterly basis. In such cases, they shall be sent to the OPOCE no later than 48 days after the end of each quarter.

Contracting authorities which have held a design contest shall send the OPOCE a notice of the results of the contest.

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

5. Article 119 is amended as follows:

(a) the title is replaced by the following:

*"Article 119*

Advertising of contracts not covered by Directive 2004/18/EC, and of the contracts referred to in Annex IIB thereto(Article 90 of the Financial Regulation)";

(b) paragraph 1 is amended as follows:

(i) the first sentence is replaced by the following:

"Contracts with a value below the thresholds laid down in Article 158 and the service contracts referred to in Annex IIB to Directive 2004/18/EC shall be advertised by appropriate means in order to ensure competitive tendering and impartiality of the procurement procedure.";

(ii) point (b) is replaced by the following:

"(b) the annual publication of a list of contractors, specifying the subject and the value of the contract awarded, for contracts with a value equal to or greater than EUR 13800.";

(iii) the following subparagraph is added:

"The publication provided for in point (b) of the first subparagraph shall not be compulsory for specific



contracts based on a framework contract.";

(c) paragraph 2 is replaced by the following:

"2. A list of contractors to whom building contracts and contracts declared secret in accordance with Article 126(1)(j) are awarded shall be published only once a year, with an indication of the subject and value of the contracts awarded. That list shall be sent to the budgetary authority. In the case of the Commission, it shall be annexed to the summary of the annual activity reports referred to in Article 60(7) of the Financial Regulation.";

6. in Article 120(1), the second subparagraph is replaced by the following:

"The period specified in the first subparagraph shall be reduced to five calendar days in the case of the fast-track procedures referred to in Article 142.";

7. in Article 122, paragraph 2 is replaced by the following:

"2. Calls for tenders are open where all interested economic operators may submit a tender. That applies also in the case of the dynamic purchasing systems referred to in Article 125a.

Calls for tenders are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 and invited simultaneously and in writing by the contracting authorities may submit a tender or a solution under the competitive dialogue procedure referred to in Article 125b.

The selection phase may be repeated for each individual contract, also in the case of a competitive dialogue, or may involve drawing up a list of potential candidates under the restricted procedure referred to in Article 128.";

8. Article 123 is amended as follows:

(a) paragraph 2 is replaced by the following:

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

The number of candidates invited to tender must be sufficient to ensure genuine competition.

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

- (a) contracts involving very small amounts, as referred to in Article 129(3);
- (b) contracts for legal services within the meaning of Annex IIB of Directive 2004/18/EC;
- (c) contracts declared secret, as referred to in Article 126(1)(j).";

(b) the following paragraph 3 is added:

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

9. in Article 124, the following paragraph is added:

"Where contracting authorities may, in accordance with Article 127, award contracts using a negotiated procedure after publishing a contract notice, they may arrange for the negotiated procedure to be conducted in stages so as to reduce the number of tenders to be negotiated, while applying the award criteria set out in the contract notice or specification. The contract notice or specification shall state that use is to be made of this possibility.";

10. in Article 125(3), the following subparagraph is added:

"Candidates may be asked by the selection board to answer the questions recorded in the report in order to clarify a project. A full report of the resulting dialogue shall be drawn up.";

11. the following Articles 125a and 125b are inserted:

*"Article 125a*

### **Dynamic purchasing system**

(Article 91 of the Financial Regulation)

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

2. For the purposes of setting up the dynamic purchasing system, contracting authorities shall publish a

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

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

3. Contracting authorities shall give any economic operator, throughout the duration of the dynamic purchasing system, the possibility of submitting an indicative tender with a view to being admitted to the system under the conditions referred to in paragraph 1. They shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime.

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

4. Each specific contract shall be the subject of an invitation to tender. Before issuing this invitation, contracting authorities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, within a time limit that may not be less than 15 days from the date on which the simplified notice is sent. Contracting authorities may not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline.

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

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

Contracting authorities may not resort to this system to prevent, restrict or distort competition.

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

#### *Article 125b*

### **Competitive dialogue**

(Article 91 of the Financial Regulation)

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

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

2. Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

3. Contracting authorities shall open a dialogue with the candidates satisfying the selection criteria set out in Article 135 in order to identify and define the means best suited to satisfying their needs.

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

Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document if provision is made for this possibility in the contract notice or the descriptive document.

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

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

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

5. The contracting authorities may specify prices or payments to the participants in the dialogue.";

12. Article 126 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) the introductory phrase and point (a) are replaced by the following:

"Contracting authorities may use the negotiated procedure without prior publication of a contract notice, whatever the estimated value of the contract, in the following cases:

(a) where no tenders, or no suitable tenders, or no applications have been submitted in response to an open procedure or restricted procedure after the initial procedure has been completed, provided that the original terms of the contract as specified in the call for tenders referred to in Article 130 are not substantially altered;"

(ii) point (c) is replaced by the following:

"(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the contracting authorities, it is impossible to comply with the time limits set for the other procedures and laid down in Articles 140, 141 and 142;"

(iii) points (e) and (f) are replaced by the following:

"(e) for additional services and works not included in the project initially envisaged or in the initial contract but which, through unforeseen circumstances, have become necessary for the performance of the services or works, subject to the conditions set out in paragraph 2;

(f) for new services or works consisting in the repetition of similar services or works entrusted to the economic operator awarded the initial contract by the same contracting authority, provided that these services or works conform to a basic project and that this project was the subject of an initial contract awarded under the open or restricted procedure, subject to the conditions set out in paragraph 3;"

(iv) in point (g), the following points are added:

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

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

(v) point (i) is replaced by the following:

"(i) for contracts for legal services within the meaning of Annex IIB to Directive 2004/18/EC, provided that

such contracts are appropriately advertised;"

(vi) the following point (j) is added:

"(j) for contracts declared to be secret by the institution or by the authorities delegated by the institution, or for contracts whose performance must be accompanied by special security measures, in accordance with the administrative provisions in force or when the protection of the essential interests of the Communities or of the Union so requires.";

(vii) the following subparagraph is added:

"Contracting authorities may also use the negotiated procedure without prior publication of a contract notice in the case of contracts with a value below EUR 13800.";

(b) in paragraph 3, the first sentence is replaced by the following:

"In the cases referred to in point (f) of the first subparagraph of paragraph 1, the option of using the negotiated procedure shall be pointed out as soon as the first operation is put out to competitive tender, and the total estimated amount for the subsequent services or work shall be taken into consideration in calculating the thresholds referred to in Article 158.";

13. Article 127 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) the introductory phrase and points (a) and (b) are replaced by the following:

"Contracting authorities may use the negotiated procedure after having published a contract notice, whatever the estimated value of the contract, in the following cases:

(a) where tenders which are irregular or unacceptable, by reference in particular to the selection or award criteria, are submitted in response to an open or restricted procedure, or a competitive dialogue, which has been completed, provided that the original terms of the contract as specified in the call for tenders referred to in Article 130 are not substantially altered, without prejudice to the application of paragraph 2;

(b) in exceptional cases involving work, supplies or services where the nature or the risks do not permit prior overall pricing by the tenderer;"

(ii) point (e) is replaced by the following:

"(e) for the service contracts referred to in Annex IIB to Directive 2004/18/EC, subject to points (i) and (j) of the first subparagraph of Article 126(1) of this Regulation and the second subparagraph thereof.";

(b) paragraph 2 is replaced by the following:

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

14. in Article 129, paragraphs 3 and 4 are replaced by the following:

"3. Contracts with a value of less than EUR 3500 may be awarded on the basis of a single tender.

4. Payments of amounts lower than EUR 200 in respect of items of expenditure may consist simply in payment against invoices, without prior acceptance of a tender.";

15. Article 130 is amended as follows:

(a) in paragraph 1, points (a) and (b) are replaced by the following:

"(a) the invitation to tender or to negotiate or to take part in the dialogue under the procedure referred to in Article 125b;

(b) the attached specification or, in the case of a competitive dialogue as referred to in Article 125b, a document describing the needs and requirements of the contracting authority, or the reference for the Internet address at which such specification or document can be consulted.";

(b) paragraph 2 is amended as follows:

(i) the introductory phrase and points (a) and (b) are replaced by the following:



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

(a) specify the rules governing the lodging and presentation of tenders, including in particular the closing date and time for submission, any requirement as to the use of a standard reply form, the documents to be attached, including those in evidence of financial, economic, technical and professional capacity referred to in Article 135 if they are not specified in the contract notice, and the address to which they must be sent;

(b) state that submission of a tender implies acceptance of the specification 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;"

(ii) the following point (e) is added:

"(e) specify, in the case of a competitive dialogue, the date set and the address for the start of the consultation phase.";

(c) paragraph 3 is amended as follows:

(i) points (a) and (b) are replaced by the following:

"(a) specify the exclusion and selection criteria applying to the contract, save in the restricted procedure, including after a competitive dialogue, and in the negotiated procedures following publication of a notice, referred to in Article 127; in such cases those criteria shall appear solely in the contract notice or the call for expressions of interest;

(b) specify the award criteria and their relative weighting or, where appropriate, the decreasing order of importance, if this is not specified in the contract notice;"

(ii) point (d) is replaced by the following:

"(d) state the minimum requirements which variants must meet in the procedures referred to in Article 138(2) under which the contract is awarded to the tender offering best value for money, where the contracting authority has stated in the contract notice that such variants are permitted.";

(iii) the following point (g) is added:

"(g) specify, in the dynamic purchasing systems referred to in Article 125a, the nature of the purchases envisaged, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications.";

16. Article 131 is amended as follows:

(a) in paragraph 2, point (c) is replaced by the following:

"(c) wherever possible, the accessibility criteria for people with disabilities or the design for all users;"

(b) in paragraph 3, point (b) is replaced by the following:

"(b) in terms of performance or of functional requirements, which may include environmental characteristics and shall be sufficiently detailed to enable tenderers to determine the purpose of the contract and the contracting authorities to award the contract; or";

(c) in paragraph 4, the following subparagraph is added:

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

(d) in paragraph 5, the following subparagraph is added:

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

(e) the following paragraphs 5a and 5b are inserted:

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

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

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

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

17. Article 134 is replaced by the following:

*"Article 134*

## **Evidence**

(Articles 93 to 96 of the Financial Regulation)

1. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in one of the situations described in point (a), (b) or (e) of Article 93(1) of the Financial Regulation, 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. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in point (d) of Article 93(1) of the Financial Regulation, a recent certificate issued by the competent authority of the State concerned.

2. Where the document or certificate referred to in paragraph 1 is not issued in the country concerned and for the other cases of exclusion referred to in Articles 93 and 94 of the Financial Regulation, 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.

For contracts with a value of less than EUR 50000, the contracting authority may, depending on its analysis of risks, ask candidates or tenderers to provide only a declaration on their honour that they are not in one of the situations referred to in Articles 93 and 94 of the Financial Regulation.

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.

4. Where they have doubts concerning the personal situation of candidates or tenderers, contracting authorities may themselves apply to the competent authorities referred to in paragraph 1 to obtain any information they consider necessary about that situation.";

18. Article 135 is amended as follows:

(a) paragraph 5 is replaced by the following:

"5. The information requested by the contracting authority as proof of the financial, economic, technical and professional capacity of the candidate or tenderer and the minimum capacity levels required in accordance with paragraph 2 may not go beyond the subject of the contract and shall take account of the legitimate interests of the economic operators as regards in particular the protection of the firm's technical and business secrets.";

(b) the following paragraph 6 is added:

"6. For contracts with a value of less than EUR 50000, the contracting authority may, depending on its analysis of risks, choose not to ask candidates or tenderers to provide documentary proof of their financial and economic, technical and professional capacity. In that case no pre-financing or interim payment may be made.";

(19) Article 136 is amended as follows

(a) in paragraph 1, the introductory phrase is replaced by the following:

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

(b) in paragraph 3, the following subparagraph is added:

"Under the same conditions, a consortium of economic operators as referred to in Article 116(6) may rely on the capacities of members of the consortium or of other entities.";

20. Article 137 is amended as follows:

(a) paragraph 2 is amended as follows:

(i) the introductory phrase is replaced by the following:

"Evidence of the technical and professional capacity of economic operators 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 one or more of the following documents:"

(ii) point (d) is replaced by the following:

"(d) a description of the technical equipment and the measures employed to ensure the quality of supplies and services, and a description of the firm's study and research facilities;"

(iii) the following point (i) is added:

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

(b) the following paragraphs 3a and 3b are inserted:

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

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

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<sup>(\*)</sup> OJ L 114, 24.4.2001, p. 1.";

(c) in paragraph 4, the following subparagraph is added:

"Under the same conditions, a consortium of economic operators as referred to in Article 116(6) may rely on the capacities of members of the consortium or of other entities.";

21. in Article 138(3), the first and second subparagraphs are replaced by the following:

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

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

22. the following Article 138a is inserted:

*"Article 138a*

### **Use of electronic auctions**

(Article 97(2) of the Financial Regulation)

1. In open, restricted or negotiated procedures in the case referred to in Article 127(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction, as referred to in Article 54 of Directive 2004/18/EC, when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework contract as referred to in Article 117(4)(b) of this Regulation and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 125a.

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

2. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice.

The specification shall include the following details:

(a) the features, the values for which will be the subject of electronic auction, provided that those features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

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

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

4. When the contract is to be awarded on the basis of the tender offering best value for money, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in the first subparagraph of Article 138(3).

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

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

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

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

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

(b) when they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting authorities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction;

(c) when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When the contracting authorities have decided to close an electronic auction in accordance with point (c),



possibly in combination with the arrangements laid down in point (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

7. After closing an electronic auction, contracting authorities shall award the contract in accordance with Article 138 on the basis of the results of the electronic auction.

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

23. in Article 139(1), the following sentence is added in the first subparagraph:

"These details may relate in particular to compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed.";

24. Article 140 is amended as follows:

(a) paragraphs 2, 3 and 4 are replaced by the following:

"2. In open procedures for contracts with a value equal to or above the thresholds set in Article 158, the time limit for receipt of tenders shall be no less than 52 days from the date on which the contract notice is dispatched.

3. In restricted procedures, including cases of use of the competitive dialogue referred to in Article 125b, and in negotiated procedures with publication of a contract notice for contracts with a value equal to or above the thresholds set in Article 158, the time limit for receipt of requests to participate shall be no less than 37 days from the date on which the contract notice is dispatched.

In restricted procedures for contracts with a value equal to or above the thresholds set in Article 158, the time limit for receipt of tenders shall be no less than 40 days from the date on which the invitation to tender is dispatched.

However, in the restricted procedures after a call for expressions of interest referred to in Article 128, 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 contracting authorities, in accordance with Article 118(2), have sent a pre-information notice for publication or have themselves published a pre-information notice on their buyer profile, the time limit for the receipt of tenders may generally be reduced to 36 days but shall in no circumstances be less than 22 days from the date of dispatch of the contract notice or the invitation to tender.

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

(a) it contains all the information required for the contract notice, insofar as that information is available at the time the notice is published;

(b) it was sent for publication between 52 days and 12 months before the date on which the contract notice was sent."

(b) the following paragraph 5 is added:

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

25. Article 141 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

"1. Provided that the request was made in good time before the deadline for submission of tenders, the specification or descriptive documents in the procedure referred to in Article 125b and additional documents shall be sent, within six calendar days of the receipt of the request, to all economic operators who have requested the specification or expressed interest in taking part in a dialogue or submitting a tender, subject to the provisions of paragraph 4. Contracting authorities are not bound to reply to requests for documents made less than five working days before the deadline for submission of tenders.

2. Provided that the request was made in good time before the deadline for submission of tenders, additional information relating to the specification or the descriptive documents or additional documents shall be supplied simultaneously to all economic operators who have requested the specification or expressed interest in taking part in a dialogue or 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. Contracting authorities are not bound to reply to requests for additional information made less than five working days before the deadline for submission of tenders.";

(b) paragraph 4 is replaced by the following:

"4. In the open procedure, including the dynamic purchasing systems referred to in Article 125a, if there is unrestricted and full direct access by electronic means to the entire call for tenders and any additional documents, paragraph 1 shall not apply. The contract notice referred to in Article 118(3) shall give the Internet address at which those documents can be consulted.";

26. Article 142 is replaced by the following:

"Article 142

### **Time limits in urgent cases**

(Article 98(1) of the Financial Regulation)

1. Where duly substantiated urgency renders impracticable the minimum time limits laid down in Article 140(3) for restricted procedures and negotiated procedures where a contract notice is published, contracting authorities 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 is dispatched or 10 days if the notice is sent to OPOCE electronically;

(b) a time limit for the receipt of tenders which may not be less than 10 days from the date of dispatch of the invitation to tender.

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

27. Article 143 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. The arrangements for the submission of tenders and requests to participate shall be determined by the contracting authority, which may choose an exclusive method of submission. Tenders and requests to participate may be submitted by letter or by electronic means. Requests to participate may also be submitted by fax.

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

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

(a) each submission contains all the information required for its evaluation;

(b) the integrity of data is preserved;

(c) the confidentiality of tenders is preserved and the contracting authorities examine the content of tenders only after the time limit set for submitting them has expired.

Where necessary for the purposes of legal proof, the appointing authorities may decide that requests to participate submitted by fax must be confirmed by letter or electronically as soon as possible and at all

events before the final date set in Articles 140 and 251.

Contracting authorities may require that electronic tenders be accompanied by an advanced electronic signature within the meaning of Directive 1999/93/EC of the European Parliament and of the Council (\*).

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(\* OJ L 13, 19.1.2000, p. 12.";

(b) the following paragraph 1a is inserted:

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

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

(c) paragraph 2 is replaced by the following:

"2. Where submission is by letter, tenderers may choose to submit tenders:

(a) either by post or by courier service, in which case the call for tenders shall specify that the evidence shall be constituted by the date of dispatch, the postmark or the date of the deposit slip;

(b) by hand-delivery to the premises of the institution by the tenderer in person or by an agent; for which purposes the call for tenders shall specify, in addition to the information referred to in Article 130(2)(a), the department to which tenders are to be delivered against a signed and dated receipt.";

28. Article 145 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. All requests to participate and tenders that satisfy the requirements of Article 143 shall be opened.";

(b) in paragraph 2, the second and third subparagraphs are replaced by the following:

"The opening committee shall be made up of at least three persons representing at least two organisational entities of the institution concerned with no hierarchical link between them, at least one of which does not come under the authorising officer responsible. To avoid any conflict of interests, those persons shall be subject to the obligations laid down in Article 52 of the Financial Regulation. In the representations or local units referred to in Article 254 or isolated in a Member State, if there are no separate entities, the requirement of organisational entities with no hierarchical link between them shall not apply.";

(c) in paragraph 3, the first subparagraph is replaced by the following:

"3. Where tenders are submitted by post, one or more members of the opening committee shall initial the documents proving the date and time of dispatch of each tender.";

29. Article 146 is amended as follows:

(a) in paragraph 1, the first subparagraph is replaced by the following:

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

(b) paragraph 2 is amended as follows:

(i) the first and second subparagraphs are replaced by the following:

"The evaluation committee shall be made up of at least three persons representing at least two organisational entities of the institution concerned with no hierarchical link between them, at least one of which does not come under the authorising officer responsible. To avoid any conflict of interests, those persons shall be subject to the obligations laid down in Article 52 of the Financial Regulation.

In the representations and local units referred to in Article 254 or isolated in a Member State, if there are no separate entities, the requirement of organisational entities with no hierarchical link between them shall not apply.";

(ii) the following fourth subparagraph is added:

"Outside experts may assist the committee by decision of the authorising officer responsible. The authorising officer responsible shall ensure that these experts satisfy the obligations laid down in Article 52 of the Financial Regulation.";

(c) paragraph 3 is amended as follows:

(i) the second subparagraph is replaced by the following:

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

(ii) the following third subparagraph is added:

"Requests to participate and tenders which are not excluded and which meet the selection criteria shall be considered admissible.";

30. Article 147 is amended as follows:

(a) the title is replaced by the following:

**"Results of the evaluation**

(Article 99 of the Financial Regulation)";

(b) in paragraph 2, the introductory phrase and point (a) are replaced by the following:

"The written record referred to in paragraph 1 shall contain at least the following:

(a) the name and address of the contracting authority, and the subject and value of the contract, the framework contract or the dynamic purchasing system;"

(c) paragraph 3 is amended as follows:

(i) point (a) is replaced by the following:

"(a) the name and address of the contracting authority, and the subject and value of the contract, the framework contract or the dynamic purchasing system;"

(ii) point (f) is replaced by the following:

"(f) in the case of negotiated procedures and competitive dialogue, the circumstances referred to in Articles 125b, 126, 127, 242, 244, 246 and 247 which justify their use;"

31. in Article 148, the following paragraph 5 is added:

"5. In the case of contracts for legal services within the meaning of Annex IIB to Directive 2004/18/EC, the contracting authority may enter into the necessary contacts with tenderers to check the selection and/or

award criteria.";

32. Article 149 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract or framework contract or admission to a dynamic purchasing system, including the grounds for any decision not to award a contract or framework contract, or set up a dynamic purchasing system, for which there has been competitive tendering or to recommence the procedure.";

(b) the following paragraph 3 is added:

"3. In the case of contracts awarded by the Community institutions on their own account, under Article 105 of the Financial Regulation, the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and individually, as soon as possible after the award decision and within the following week at the latest, by mail and fax or email, that their application or tender has not been accepted; specifying in each case the reasons why the tender or application has not been accepted.

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

Unsuccessful tenderers or candidates may request additional information about the reasons for their rejection in writing by mail, fax or email, and all tenderers who have put in an admissible tender may obtain information about the characteristics and relative merits of the tender accepted and the name of the successful tenderer, without prejudice to the second subparagraph of Article 100(2) of the Financial Regulation. The contracting authority shall reply within no more than fifteen calendar days from receipt of the request.

The contracting authority may not sign the contract or framework contract with the successful tenderer until two calendar weeks have elapsed from the day after the simultaneous dispatch of the rejection and award decisions. If necessary it may suspend signing of the contract for additional examination if justified by the requests or comments made by unsuccessful tenderers or candidates during the two calendar weeks following the rejection or award decisions or any other relevant information received during that period. In that event all the candidates or tenderers shall be informed within three working days following the suspension decision.";

33. the title of Article 154 is replaced by the following:

*"Article 154*

### **Identification of the appropriate level for the calculation of thresholds**



(Articles 104 and 105 of the Financial Regulation)";

34. in Article 155, paragraph 2 is replaced by the following:

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

Where the overall value of lots is equal to or exceeds the thresholds laid down in Article 158, Article 90(1) and Article 91(1) and (2) of the Financial Regulation shall apply to each of the lots, save those with an estimated value of less than EUR 80000 in the case of service or supply contracts, or less than one million euro in the case of works contracts, provided that the aggregate amount of those lots does not exceed 20 % of the aggregate value of all the lots making up the contract in question.";

35. Article 156 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. For the purposes of calculating the estimated amount of a contract, the contracting authority shall include the contractors total estimated remuneration.

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

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

(b) the following paragraph 1a is inserted:

"1a. For framework contracts and dynamic purchasing systems the value to be taken into account shall be the maximum value of all the contracts envisaged during the total lifetime of the framework contract or dynamic purchasing system.";

(c) paragraph 2 is amended as follows:

(i) point (a) is replaced by the following:

"(a) in the case of insurance services, the premium payable and other forms of remuneration;"

(ii) point (c) is replaced by the following:

"(c) in the case of design contracts, the fees, commissions payable and other forms of remuneration.";

36. Article 157 is replaced by the following:

*"Article 157*

#### **Thresholds for pre-information notices**

(Article 105 of the Financial Regulation)

The thresholds referred to in Article 118 for publication of a pre-information notice shall be:

- (a) EUR 750000 for the supply and service contracts listed in Annex IIA to Directive 2004/18/EC;
- (b) EUR 5923000 for works contracts.";

37. in Article 158, the title and paragraph 1 are replaced by the following:

*"Article 158*

#### **Thresholds for application of the procedures under Directive 2004/18/EC**

(Article 105 of the Financial Regulation)

1. The thresholds referred to in Article 105 of the Financial Regulation shall be:

- (a) EUR 154000 for the supply and service contracts listed in Annex IIA to Directive 2004/18/EC, with the exception of the research and development contracts listed in category 8 of that Annex;
- (b) EUR 236000 for the service contracts listed in Annex IIB to Directive 2004/18/EC and for the research and development service contracts listed in category 8 of Annex IIA to Directive 2004/18/EC;
- (c) EUR 5923000 for works contracts.";

38. in Article 164, paragraph 1 is amended as follows:

(a) point (d)(ii) is replaced by the following:

"(ii) the maximum rate of funding of the costs of the action or approved work programme, save in cases of

contributions of a flat-rate amount and scales of unit costs referred to in Article 181(1);"

(b) point (g) is replaced by the following:

"(g) the estimated budget and details of the eligible costs of the action or approved work programme, save in cases of contributions of a flat-rate amount and scales of unit costs referred to in Article 181(1);"

39. in Article 165, paragraph 2 is replaced by the following:

"2. Paragraph 1 shall not apply to study, research or training scholarships paid to natural persons, nor to prizes awarded following contests, nor in cases of contributions of a flat-rate amount and scales of unit costs referred to in Article 181(1).";

40. Article 166 is replaced by the following:

*"Article 166*

### **Annual programming**

(Article 110(1) of the Financial Regulation)

1. An annual work programme for grants shall be prepared by each authorising officer responsible and adopted by the Commission. It shall be published on the grants Internet site of the Commission as soon as possible at the start of the year and by no later than 31 March each financial year.

The work programme shall specify the basic act, the objectives, the schedule of calls for proposals with the indicative amount and the results expected.

2. Any substantial change in the work programme in the course of the year shall also be adopted and published as provided for in paragraph 1.";

41. in Article 168(1), point (d) is replaced by the following:

"(d) to bodies identified by a basic act, within the meaning of Article 49 of the Financial Regulation as set forth in greater detail in Article 31 of this Regulation, as beneficiaries of a grant.";

42. in Article 169(2), point (c) is replaced by the following:

"(c) the amount awarded and, save in cases of contributions of a flat-rate amount and scales of unit costs

referred to in Article 181(1), the rate of funding of the costs of the action or approved work programme.";

43. in Article 172, paragraph 1 is replaced by the following:

"1. The beneficiary shall supply evidence of the co-financing provided, either by way of own resources, or in the form of financial transfers from third parties, or in kind, save in cases of contributions of a flat-rate amount and scales of unit costs referred to in Article 181(1).";

44. Article 180 is amended as follows:

(a) the following paragraph 1a is inserted:

"1a. The beneficiary shall, without prejudice to Article 104, certify on his honour that information contained in requests for payments is full, reliable and true. He shall also certify that the costs incurred can be considered eligible in accordance with the grant agreement and that requests for payment are substantiated by adequate supporting documents that can be checked.";

(b) paragraph 2 is amended as follows:

(i) the first and second subparagraphs are replaced by the following:

"An external audit of the financial statements and underlying accounts, produced by an approved auditor, may be demanded by the authorising officer responsible in support of any payment on the basis of his analysis of risks. In the case of a grant for an action or of an operating grant, the audit report shall be attached to the request for payment. Its purpose is to certify that the costs declared by the beneficiary in the financial statements on which the request for payment is based are real, exact and eligible in accordance with the grant agreement.

An external audit shall be compulsory for interim payments per financial year and for payments of balances in the case of the following:

(a) grants for an action of EUR 750000 or more;

(b) operating grants of EUR 100000 or more.";

(ii) the third subparagraph is deleted;

(iii) the fourth subparagraph is replaced by the following:

"Depending on his analysis of risks, the authorising officer responsible may also waive the obligation of an external audit in the case of:

- (a) public bodies and the international organisations referred to in Article 43;
- (b) the beneficiaries of grants in connection with humanitarian aid and the management of crisis situations, save in respect of payments of balances;
- (c) for payments of balances, beneficiaries of grants in connection with humanitarian aid who have signed a partnership framework agreement, as referred to in Article 163, and who have in place a system of control offering equivalent guarantees for such payments.";

45. Article 181 is replaced by the following:

*"Article 181*

#### **Flat-rate financing**

(Article 117 of the Financial Regulation)

1. In addition to cases of scholarships and prizes, the Commission may authorise the use of contributions of a flat-rate amount of EUR 10000 or less, or of scales of unit costs. It may also, on the basis of the scale annexed to the Staff Regulations or as approved each year by the Commission, authorise daily allowances for mission costs.

2. The various forms of funding referred to in paragraph 1 may be combined for a single beneficiary to cover different categories of eligible costs.

The Commission decision referred to in paragraph 1 shall determine the maximum amount for the total of such funding authorised by grant or type of grant.

3. The grant agreement may authorise flat-rate funding of the beneficiary's indirect costs up to a maximum of 7 % of total eligible direct costs for the action, save where the beneficiary is in receipt of an operating grant financed from the Community budget. The 7 % ceiling may be exceeded by reasoned decision of the Commission.

4. In order to ensure compliance with the principles of co-financing, no-profit and sound financial management, the forms of funding referred to in paragraph 1 and the conditions on which they may be combined shall be assessed and determined by the Commission. They shall be reviewed at least every two years by the authorising officer responsible. The Commission shall confirm or amend accordingly its initial decision as referred to in paragraph 1.";

46. Article 182 is amended as follows:

(a) in paragraph 1, the following subparagraph is added:

"Such a guarantee may also be demanded by the authorising officer responsible, depending on his analysis of risks, in the light of the method of funding laid down in the grant agreement.";

(b) in paragraph 3, the first and second subparagraphs are replaced by the following:

"The guarantee shall be provided by an approved bank or financial institution established in one of the Member States. When the beneficiary is established in a third country, the authorising officer responsible may agree that a bank or financial institution established in that third country may provide the guarantee if he considers that the bank or financial institution offers equivalent security and characteristics as those offered by a bank or financial institution established in a Member State.

At the request of the beneficiary, that guarantee may be replaced by a joint and several guarantee by a third party or by the irrevocable and unconditional joint guarantee of the beneficiaries of an action who are parties to the same grant agreement, after acceptance by the authorising officer responsible.";

(c) in paragraph 4, the following subparagraph is added:

"In the cases referred to in the second subparagraph of paragraph 1, it shall be released only upon payment of the balance.";

47. Article 183 is replaced by the following:

*"Article 183*

### **Suspension and reduction of grants**

(Article 119 of the Financial Regulation)

The authorising officer responsible shall suspend payments in the following cases:

(a) where the agreed action or work programme is not carried out at all, or is not carried out properly, in full or on time;

(b) where amounts exceeding the financing ceilings set in the agreement have been paid;

(c) where the amounts paid in accordance with the grant agreement are higher than the real costs incurred by the beneficiary for the action or where the operating budget reveals a surplus ex post.

Depending on the stage reached in the procedure, the authorising officer shall, after giving the beneficiary or beneficiaries the opportunity to present their comments, either reduce the grant or demand reimbursement pro rata by the beneficiary or beneficiaries.";

48. in Article 234(1), the first sentence is replaced by the following:

"For payments in the currency of the recipient State, accounts denominated in euro shall be opened with a financial institution in the recipient State or in one of the Member States in the name of the Commission or, by common agreement, of the recipient.";

49. in Article 241(3), the third subparagraph is replaced by the following:

"If the contracting authority does not receive at least three valid tenders, the procedure must be cancelled and started again. If the second procedure does not produce three valid tenders, the contracting authority may award the contract on the basis of a single valid tender."

## Article 2

Public procurement and grant award procedures launched before entry into force of this Regulation shall continue to be subject to the rules applicable at the time when those procedures were launched.

## Article 3

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 2005.

*For the Commission*  
Dalia GRYBAUSKAITĖ  
*Member of the Commission*

<sup>(1)</sup> OJ L 248, 16.9.2002, p. 1.

<sup>(2)</sup> OJ L 134, 30.4.2004, p. 114. Directive as amended by Commission Regulation (EC) No 1874/2004 (OJ L 326, 29.10.2004, p. 17).

<sup>(3)</sup> OJ L 357, 31.12.2002, p. 1.

<sup>(4)</sup> OJ L 209, 24.7.1992, p. 1. Directive repealed by Directive 2004/18/EC.

<sup>(5)</sup> OJ L 340, 16.12.2002, p. 1. Regulation as amended by Commission Regulation (EC) No 2151/2003 (OJ L 329, 17.12.2003, p. 1).