

# EUROPEAN CENTRAL BANK

## DECISION OF THE EUROPEAN CENTRAL BANK

of 3 July 2007

### laying down the Rules on Procurement

(ECB/2007/5)

(2007/497/EC)

THE EXECUTIVE BOARD OF THE EUROPEAN CENTRAL BANK,

- (3) The ECB respects the general principles of procurement law as reflected in the Procurement Directive and the Financial Regulation,

Having regard to Article 11.6 of the Statute of the European System of Central Banks and of the European Central Bank,

HAS DECIDED AS FOLLOWS:

Having regard to Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank <sup>(1)</sup>, and in particular Article 19 thereof,

#### CHAPTER I

#### GENERAL RULES

##### Article 1

#### Definitions

For the purposes of this Decision, the following definitions shall apply:

Whereas:

- (1) The European Central Bank (ECB) is committed to the principle of cost-efficiency and seeks the best value for money from the procurement of goods, services and works.
- (2) 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> (Procurement Directive) and 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>(3)</sup> (Financial Regulation) do not apply to the ECB.
- (a) 'contracts' are contracts for pecuniary interest concluded in writing between the ECB with one or more suppliers and having as their object the execution of works, the supply of products or the provision of services;
- (b) 'works contracts' are contracts having as their object either the execution, or both the design and execution, of works. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function;
- (c) 'supply contracts' are contracts, other than those referred to in paragraph b, having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products. A contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'supply contract';

<sup>(1)</sup> OJ L 80, 18.3.2004, p. 33.

<sup>(2)</sup> OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

<sup>(3)</sup> OJ L 248, 16.9.2002, p. 1. Regulation as amended by Regulation (EC, Euratom) No 1995/2006 (OJ L 390, 30.12.2005, p. 1).

- (d) 'service contracts' are contracts other than works or supply contracts having as their object the provision of services. A contract having as its object both products and services shall be considered to be a 'service contract' if the estimated value of the services in question exceeds that of the products covered by the contract. A contract having as its object services including activities related to works that are only incidental to the principal object of the contract shall be considered to be a service contract;
- (e) A 'framework agreement' is an agreement between the ECB and one or more suppliers, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged;
- (f) A 'supplier' is any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works, products or services;
- (l) An 'electronic auction' is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods;
- (m) 'invitation to tender' is the invitation sent to candidates or suppliers to submit a tender and specifying the procedure, the ECB's requirements and the contractual terms and conditions;
- (n) 'written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means;
- (o) 'days' mean calendar days.

A supplier who has submitted an application to participate in a restricted or negotiated procedure or a competitive dialogue shall be designated a 'candidate'. A supplier who has submitted a tender shall be designated a 'tenderer';

- (g) 'open procedure' is a tender procedure where any interested supplier may submit a tender;
- (h) 'restricted procedure' means a procedure in which any supplier may request to participate and whereby only those candidates invited by the ECB may submit a tender;
- (i) 'negotiated procedure' means a procedure in which the ECB consults the suppliers of its choice and negotiates the terms of contract with one or more of them;
- (j) 'competitive dialogue' is a procedure in which any supplier may request to participate and whereby the ECB conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements;
- (k) A 'dynamic purchasing system' is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the ECB. The system is limited in duration and open throughout its validity to any supplier which satisfies the selection criteria and has submitted an indicative tender that complies with the specification;

## Article 2

### Scope

1. The ECB shall tender supply, service and works contracts for its own account in accordance with the rules laid down in this Decision.
2. The ECB may also carry out in accordance with this Decision joint tender procedures for its own account and for the account of one or several national central banks (NCBs) and/or Community institutions and bodies and/or international organisations. In such cases, the ECB shall specify in the tender documentation which other contracting authorities participate in the tender procedure and the envisaged structure of the contractual relationships.
3. This Decision shall not apply to contracts for:
  - (a) the provision of services and the supply of goods by NCBs to the ECB in the fulfilment of their Eurosystem/ESCB public tasks;
  - (b) procurement procedures organised by NCBs or Community institutions and bodies or international organisations in which the ECB participates provided that the rules governing these procurement procedures are in line with the general principles of procurement law;
  - (c) agreements with other Community institutions and bodies or international organisations that the ECB enters into in the fulfilment of its public tasks;

- (d) the procurement of banknotes which is governed by Guideline ECB/2004/18 of 16 September 2004 on the procurement of euro banknotes <sup>(1)</sup>;
- (e) the issue, sale, purchase or transfer of securities or other financial instruments and financial services in connection with these transactions;
- (f) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;
- (g) employment contracts between the ECB and its staff concluded in accordance with the ECB's Conditions of Employment;
- (h) arbitration and conciliation services; and
- (i) research and development services unless the benefits related to the services accrue exclusively to the ECB for its own use and the services provided are wholly remunerated by the ECB.

#### Article 3

##### General principles

Any procurement procedure shall be carried out in accordance with the general principles of transparency and publicity, equal access and equal treatment, as well as the principles of non-discrimination and fair competition.

#### Article 4

##### Thresholds

1. Contracts the estimated value of which, net of VAT, equals or exceeds the threshold amounts set out in paragraph 3, shall be tendered in accordance with the procedures laid down in Chapter II.
2. Contracts the estimated value of which, net of VAT, is below the threshold amounts shall be tendered in accordance with the procedures laid down in Chapter III.
3. The following threshold amounts shall apply:
  - (a) EUR 211 000 for supply and service contracts;

- (b) EUR 5 300 000 for works contracts.

#### Article 5

##### Calculation of the estimated value of a contract

1. The calculation of the value of a contract shall be based on the total amount payable, net of VAT, as estimated by the ECB. The calculation shall include all ancillary costs, in particular costs in relation to option clauses, renewals of the contract, premium payments, interest, commission, travel and accommodation costs, prizes or payments to candidates or tenderers.
2. The estimate must be valid at the moment at which the ECB decides on the appropriate procurement procedure.
3. No procurement may be split up with the intention of avoiding the application of the procedures set out in this Decision.
4. The calculation of the estimated value of works contracts shall take account of the total costs related to the execution of the work including the value of supplies necessary for executing the works and placed at the contractor's disposal by the ECB. The costs related to the design and planning of the work shall also be included if they form part of the works contract.
5. With regard to contracts for the continuous supply of goods and services, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:
  - (a) in the case of fixed-term contracts: the total value for the full term;
  - (b) in the case of contracts without a fixed term: the monthly value multiplied by 48.
6. In the case of successive supply, service or works contracts of the same type the calculation of the estimated contract value shall be based on the total actual value of the successive contracts awarded during the preceding 12 months. The estimate shall be adjusted, if possible, to take account of the changes in quantity or value which are expected to occur in the course of the 12 months following the initial contract.

<sup>(1)</sup> OJ L 320, 21.10.2004, p. 21.

7. If a contract is divided into several lots, or if several contracts to be awarded are strictly interrelated and have the same tasks as their objective, the total value of all lots or individual contracts shall be considered. If the total value is equal to or exceeds the threshold amounts set out in Article 4(3), the procedures laid down in Chapter II of this Decision shall apply to all lots and contracts. The ECB may, however, apply the procedure laid down in Article 29 or, if applicable, in Article 31 in respect of lots/individual contracts the estimated value of which is less than EUR 80 000, net of VAT, for supplies and services and less than EUR 1 million, net of VAT, for works, provided that the total estimated value of all lots exempted does not exceed 20 % of the total estimated value of all lots.

8. The value of framework contracts shall be calculated on the basis of the maximum estimated value, net of VAT, of all the contracts envisaged for the total term of the framework agreement.

#### Article 6

##### Exceptions

1. In the following cases the ECB may award a contract directly to one supplier or deviate from specific procedural requirements:

- (a) when, for mandatory reasons, the contract can be awarded only to a particular supplier. The reasons may be of technical, artistic or legal nature, but not of economic nature;
- (b) when, for reasons of extreme urgency brought about by events unforeseeable for the ECB, the time limits for the procurement procedures cannot be complied with;
- (c) when the ECB has classified the contract as secret or when the performance of the contract must be accompanied by special security measures, in accordance with the ECB's rules on security or when the protection of the ECB's essential interests so requires;
- (d) in the case of supplies when the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;
- (e) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations.

2. Irrespective of the contract value, the ECB may tender a contract in accordance with Article 29 if the main object of the contract is one of the following services:

- (a) hotel and restaurant services;
- (b) legal services;
- (c) personnel placement and supply services;
- (d) investigation and security services;
- (e) education and vocational education services;
- (f) recreational, cultural and sporting services.

#### Article 7

##### Duration and extensions

1. The term of a contract shall as a rule not exceed four years except in duly justified cases.
2. If a contract is concluded for a fixed-term, its term may be extended beyond that initial term under the following conditions:
  - (a) the contract notice or, in the case of a procedure under Chapter III, the request for a proposal, provided for the possibility of extensions; and
  - (b) the possible extensions are duly justified; and
  - (c) the possible extensions were taken into account when calculating the value of the contract in accordance with Article 5 of this Decision.

The totality of all extensions shall not exceed the term of the initial contract.

3. Otherwise, the term of a fixed-term contract may only be extended under the conditions laid down in Article 6.

*Article 8***Additional supplies, services and works**

1. The ECB may order additional supplies, services or works from the contractor to whom the initial contract was awarded provided that:

- (a) the tender documentation provided for additional supplies, services or works as an option; and
- (b) the additional supplies, services or works were taken into account when calculating the value of the contract in accordance with Article 5 of this Decision.

2. In addition, the ECB may order from the initial contractor additional supplies, services or works which become necessary for the fulfilment of the purpose of the contract due to unforeseen circumstances, provided that:

- (a) the additional supplies, services or works cannot be technically or economically separated from the initial contract without major inconvenience; or
- (b) the supplies, services or works, although separable from the performance of the initial contract, are strictly necessary for its completion.

However, the aggregate value of additional supplies, services or works shall as a rule not exceed 50 % of the amount of the initial contract.

3. If the conditions set out in paragraphs 1 and 2 are not met, contracts for additional supplies, services or works may only be awarded in accordance with Articles 4 and 6 of this Decision.

## CHAPTER II

**PUBLIC TENDER PROCEDURES**

## SECTION I

***Types of procedure****Article 9***Overview**

1. The ECB shall award contracts the estimated value of which exceeds the threshold amounts set out above by open procedure. In justified cases the ECB may apply a restricted procedure, a negotiated procedure or competitive dialogue under the conditions set out below.

2. The ECB may also set up framework agreements or dynamic purchasing systems and award contracts on that

basis in accordance with the conditions set out below in Articles 15 and 16 respectively.

3. The procedures set out in paragraphs 1 and 2 may be supplemented by an electronic auction as described below in Article 17.

4. The ECB may also carry out design contests. The procedure for the design contest shall be laid down in the contest notice and comply with the general principles for design contests.

*Article 10***Publication of procurement opportunities**

1. If the ECB intends to carry out a tender procedure in accordance with the rules laid down in this Chapter II it shall publish a contract notice in the *Official Journal of the European Union* and via the ECB website. Whenever appropriate, the ECB may place advertisements in other relevant media. Announcements on the website and/or other media shall not precede publication of the notice in the Official Journal. In the case of discrepancies between the different versions of the notice, the version published in the Official Journal is authentic and shall take precedence over other versions.

2. The ECB may also publish a prior information notice indicating the estimated total value of contracts, by category of service or groups of products, and the essential characteristics of works contracts which it intends to award during a budgetary year. In such a case, the time limits for the submission of applications and tenders in accordance with Article 18(4) may be shortened for all procurements indicated in the notice.

*Article 11***Open procedure**

1. On publication of a contract notice, all interested suppliers may request the delivery of the invitation to tender if not made available by electronic means. The ECB shall provide the invitation to tender within six days from the receipt of the request provided that the request was made in good time before the time limit for the submission of tenders.

2. Interested tenderers shall submit their tender within the time limits set by the ECB and include all documentation requested by the ECB.

3. The ECB shall award the contract to the tenderer who best meets the award criteria set out in the contract notice/invitation to tender.

*Article 12***Restricted procedure**

1. The ECB may apply the restricted procedure if:
  - (a) the ECB's requirements can be defined in such detail that tenders can be compared against each other and the contract can be awarded without further negotiations with the tenderers; and
  - (b) it is necessary to restrict the number of tenders for administrative reasons or because of the nature of the procurement.
2. On publication of a contract notice interested suppliers may apply for participation in the restricted procedure. They must submit their application within the deadline specified in the contract notice and provide the documentation requested by the ECB.
3. The ECB shall verify the eligibility of candidates and evaluate the applications against the selection criteria set out in the contract notice. The ECB shall invite at least five eligible candidates who satisfy the selection criteria to submit a tender, provided that a sufficient number of candidates meeting the selection criteria is available. The invitation to tender shall be sent in writing and simultaneously to all candidates invited to submit a tender.
4. The tenderers invited shall submit their tender within the time limit set by the ECB and include all documentation requested by the ECB.
5. The ECB shall award the contract to the tenderer best meeting the award criteria set out in the invitation to tender.

*Article 13***Negotiated procedure**

1. The ECB may apply a negotiated procedure in the following exceptional cases:
  - (a) when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing; or
  - (b) where the nature of the services is such that specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender

according to the rules governing open or restricted procedures.

2. The ECB may also use the negotiated procedure where no acceptable tenders have been obtained in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered. The ECB may refrain from publishing a new contract notice if it includes in the negotiated procedure exclusively all the tenderers who participated in the previous procedure, met the selection criteria and submitted their tenders in accordance with the formal tender requirements. If no tenders have been obtained or no tenders that meet the formal tender requirements the ECB may also start a negotiated procedure without notice in accordance with Article 29.

3. On publication of a contract notice, interested suppliers may apply for participation in the negotiated procedure. They must submit their application within the deadline specified in the contract notice and provide the documentation requested by the ECB.

4. The ECB shall verify the eligibility of candidates and evaluate the applications against the selection criteria set out in the contract notice. The ECB shall invite at least three eligible candidates who satisfy the selection criteria to submit a tender, provided that a sufficient number of candidates meeting the selection criteria is available. The invitation to tender shall be sent in writing and simultaneously to all candidates invited to submit a tender.

5. Following the evaluation of the tenders, the ECB may negotiate with tenderers in order to bring their tender in line with the ECB's requirements. The ECB may start negotiations either:

- (a) with the best-ranked tenderer. If the negotiations with the best-ranked tenderer fail, the ECB may take up negotiations with the next ranked tenderer; or
- (b) simultaneously with all tenderers having submitted a tender that essentially meets the ECB's technical and commercial requirements. In that case, the number of tenderers admitted to the negotiations may be reduced in successive stages by applying the award criteria set out in the contract notice or the invitation to tender.

Before starting negotiations, the ECB shall inform all tenderers on how the negotiations will be conducted.

6. The scope of the negotiations may include the tenderers' technical offers, commercial offers and the contractual terms and conditions provided that the scope of the tender procedure is not substantially altered. The ECB may also invite tenderers to submit a revised tender. During the negotiations the ECB shall ensure the equal treatment of all tenderers invited for negotiations.

7. Once the negotiations are closed, the ECB shall award the contract to the tenderer best meeting the award criteria set out in the contract notice or the invitation to tender.

#### Article 14

##### **Competitive dialogue**

1. The ECB may carry out a competitive dialogue in the case of particularly complex contracts where it is not possible to define the ECB's requirements in a way that the contract could be awarded through an open or restricted procedure.

2. On publication of a contract notice, interested suppliers may apply for participation in the dialogue. They must submit their application within the deadline specified in the contract notice and provide the documentation requested by the ECB.

3. The ECB shall verify the eligibility of candidates and evaluate the applications against the selection criteria set out in the contract notice. The ECB shall invite at least three eligible candidates to participate in the dialogue and provide them with a request for a proposal setting out the ECB's needs. The aim of the dialogue is to identify and define the solution best suited to satisfying the ECB's needs. The ECB may discuss all aspects of the contract with the chosen candidates.

4. During the dialogue, the ECB shall ensure equal treatment of all candidates. Furthermore, the ECB shall not reveal to the other candidates solutions proposed or other confidential information communicated by a candidate participating in the dialogue without their written agreement.

5. The ECB shall continue the dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs. If so provided for in the contract notice or the request for a proposal, the ECB may carry out the dialogue in successive stages to reduce the number of solutions to be discussed during the dialogue stage. The ECB shall select the solutions to be considered by applying the award criteria set out in the contract notice or the request for a proposal.

6. Having declared that the dialogue is concluded, the ECB shall ask the candidates participating in the dialogue to submit their final tenders on the basis of the solutions presented and specified during the dialogue.

7. The ECB shall evaluate the tenders received against the award criteria laid down in the contract notice or the request for a proposal. The ECB may request the tenderers to clarify or specify certain aspects of their tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender and does not risk distorting competition or causing discrimination. Once the evaluation is completed, the ECB shall award the contract to the most economically advantageous tender.

#### Article 15

##### **Framework agreements**

1. The ECB may use framework agreements in cases where it regularly concludes contracts for similar supplies, services or works without being able to define the exact delivery times and/or the detailed requirements.

2. For the purpose of concluding a contract that is a framework agreement, the ECB shall follow the procedures set out above for all phases up to the award of the framework agreement. If the ECB intends to conclude a framework agreement with several suppliers it shall award at least three agreements provided that a sufficient number of suppliers meet the selection and award criteria. The contract notice shall specify the scope and number of framework agreements to be awarded.

The contracts based on the framework agreement shall be awarded in accordance with the procedures laid down in this Article.

3. Where a framework agreement is concluded with a single supplier, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement. Insofar as necessary, the ECB may request the supplier in writing to supplement their initial tender. Such supplementary offers shall not entail substantial changes to terms and conditions laid down in the framework agreement.

4. Where framework agreements are concluded with several suppliers, contracts may be awarded either:

(a) by application of the criteria laid down in the framework agreements without reopening a competition; or

(b) where no such criteria are defined, the ECB may reopen a competition among the suppliers with which a framework agreement exists.

In the latter case, the ECB shall award the contract in accordance with the following procedure:

- the ECB shall invite the suppliers in writing to submit a tender within the time limit specified in the request for a proposal. The request for a proposal shall also specify the criteria on the basis of which the contract will be awarded, and
- the suppliers must submit their tenders in writing within the time limit set by the ECB, and
- the ECB shall award the contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the request for a proposal.

#### Article 16

##### Dynamic purchasing systems

1. The ECB may procure commonly used goods, services and works through dynamic purchasing systems. Unless specified otherwise in this Article, the procedure shall follow the open procedure rules.

2. For the purposes of setting up a dynamic purchasing system, the ECB shall:

- (a) publish a contract notice stating that a dynamic purchasing system is being used and containing a reference to the Internet address where the tender conditions can be found; and
- (b) offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the tender conditions and to any additional documents; and
- (c) indicate in the tender conditions, amongst other matters, the selection and award criteria, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications.

3. The system shall be open throughout its duration to any supplier who satisfies the selection criteria and has submitted an indicative tender that complies with the tender conditions. Tenderers may improve their indicative tenders at any time

provided that they continue to comply with the tender conditions. No charges shall be levied from the tenderers.

4. On receipt of indicative tenders, the ECB shall verify within a reasonable time the tenderers' eligibility and compliance with the selection criteria. It shall also check whether the indicative tenders meet the tender conditions. The ECB shall inform the tenderers at the earliest possible opportunity of their admittance to the dynamic purchasing system or of their rejection.

5. Each specific contract the value of which is above the thresholds set out in Article 4(3) shall be the subject of a separate invitation to tender. Before issuing this invitation, the ECB shall publish a simplified contract notice in the Official Journal inviting all interested suppliers 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. The ECB may not proceed with tendering until it has completed evaluation of all the indicative tenders received by that time limit.

6. On completion of the evaluation, the ECB shall invite all tenderers admitted to the system to submit a tender within a reasonable time. The ECB shall award the contract to the tenderer which submitted the best tender 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.

7. If the value of a specific contract is below the thresholds set out in Article 4(3) the ECB may invite five or three tenderers admitted to the system in accordance with the procedure set out in Article 29.

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

#### Article 17

##### Electronic auctions

1. Except for competitive dialogues, the ECB may supplement the tender procedures set out above by an electronic auction provided that the specifications can be established with precision.

The electronic auction shall be based:

- (a) either solely on prices when the contract is awarded to the lowest price; or



(b) on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender.

2. If the ECB intends to carry out an electronic auction it shall state that fact in the contract notice. Furthermore, the invitation to tender shall include, *inter alia*, the following details:

- (a) the features, the values for which will be the subject of electronic auction, provided that such 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. The electronic auction shall only be initiated after the submission and initial evaluation of the tenders. 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 most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer. The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic rerankings 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 most economically advantageous tender, as indicated in the contract

notice or in the tender documents; 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 ECB shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. It may also communicate other information concerning other prices or values submitted, provided that that is stated in the tender documents. It may also at any time announce the number of participants in that phase of the auction. The ECB shall, however, not disclose the identities of the tenderers during any phase of an electronic auction.

6. The ECB shall close an electronic auction after expiry of the time limit indicated in the invitation to participate in the auction. The time limit may be expressed as a specific date and time or as a time period that has to elapse after submission of the last offer with new prices or values. The ECB shall specify in the invitation the timetable for any auctions carried out in phases.

7. After closing an electronic auction the ECB shall award the contract on the basis of the results of the electronic auction.

#### Article 18

##### **Time limits for receipt of applications and for receipt of tenders**

1. When fixing the time limits for the receipt of tenders and applications, the ECB shall take account in particular of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.

2. In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice is sent.

3. In the case of restricted procedures, negotiated procedures and the competitive dialogue:

(a) the minimum time limit for receipt of applications shall be 37 days from the date on which the contract notice is sent; and

(b) the minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation to tender is sent.

4. When the ECB has published a prior information notice in accordance with Article 10(2), which was sent at least 52 days before the contract notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days.

5. Where contract notices are drawn up and transmitted by electronic means in accordance with the format and procedures for transmission prescribed by the Office for Official Publications of the European Communities, the time limits for the receipt of tenders and applications may be shortened by seven days.

6. The time limits for receipt of tenders may be reduced by five days if the ECB offers unrestricted and direct access by electronic means to the invitation to tender from the date of publication of the contract notice and if the text of the notice specifies the Internet address at which this documentation is accessible. This reduction may be added to that referred to in paragraph 5.

7. If, in an open procedure, the invitation to tender, although requested in good time, is not supplied within six days, or where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the invitation to tender, the time limits for the receipt of tenders shall be extended so that all suppliers have sufficient time to prepare tenders.

8. In the case of restricted procedures and negotiated procedures, the ECB may apply an accelerated procedure, where urgency renders impracticable the time limits laid down in this Article. In such case the following minimum time limits shall apply:

(a) a time limit for the receipt of applications which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic means, in accordance with the format and procedure for sending notices; and

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

9. Prior to the expiry date, the ECB may extend the time limits set out in the contract notice or tender documentation if it modifies the tender documentation or in other duly justified cases.

## SECTION 2

### *Conduct of the procedure*

#### Article 19

#### **Communication with candidates and tenderers**

1. During the tender procedure, candidates and tenderers shall communicate only with the contact person(s) indicated by the ECB. The ECB shall specify in the contract notice and/or invitation to tender the means of communication to be used. The means of communication shall be generally available and non-discriminatory.

2. Candidates/tenderers shall submit their applications/tenders in writing in accordance with the requirements set out in the contract notice/invitation to tender.

3. The ECB may carry out electronic tender procedures in line with the general requirements for electronic procurement as reflected in Article 42 of the Procurement Directive in connection with its Annex X. In such case, the contract notice shall specify in particular the formal requirements to be observed by the candidates/tenderers and how to access the electronic platform. The ECB may determine that it will accept only electronic applications/tenders.

4. Candidates or tenderers may submit in writing questions concerning the contract notice, the invitation to tender or the supporting documents to the ECB in accordance with the conditions laid down in the contract notice or the invitation to tender. The ECB shall reply to such questions within reasonable time limits, and shall communicate the answers to all candidates/tenderers on an anonymous basis if they are of relevance to all of them.

5. The ECB shall ensure that the information provided by candidates and tenderers is treated and stored in accordance with the principle of confidentiality and, to the extent personal data is provided, with Regulation (EC) No 45/2001 of the European Parliament and of the Council on data protection <sup>(1)</sup>.

#### Article 20

#### **Requests for additional documentation and clarification**

After the ECB has opened applications or tenders, it may request candidates and tenderers to supplement the documentation provided or to clarify specific points. Such requests must not distort fair competition between or give rise to unequal treatment of the candidates/tenderers and must not lead to an alteration of the terms of the applications or tenders.

<sup>(1)</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

*Article 21***Rectification of tender documentation**

1. If the ECB discovers, before the expiry of the time limits for the submission of applications or tenders, an error, a lack of precision, an omission or any other type of error in the text of the contract notice, invitation to tender or supporting documents, it shall rectify the error and inform all candidates or tenderers in an appropriate manner.

2. If candidates or tenderers consider that the ECB's requirements laid down in the contract notice, the invitation to tender or supporting documents are incomplete, inconsistent or illegal they shall notify their concerns to the ECB in writing. The candidate/tenderer must notify its concerns without undue delay after they became aware of the irregularity or could have become aware of it. The ECB may then either correct or supplement the requirements as requested or reject the request indicating the reasons therefore. Objections to the ECB's requirements which were not communicated to the ECB without undue delay may not be raised at a later stage.

*Article 22***Invitation to tender**

1. As a rule, the invitation to tender shall contain at least:

- (a) a reference to the contract notice published;
- (b) the formal tender requirements, in particular the time limit for the receipt of the tenders, the address to which the tenders must be sent, the language or languages in which the tenders must be drawn up, the form in which the tender shall be submitted and the period during which a tender must remain valid; and
- (c) options concerning supplementary works, services and supplies, as well as the number of possible renewals and extensions, if any; and
- (d) the list of documents to be submitted by the tenderers; and
- (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if they are not given in the contract notice.

2. The invitation to tender shall include:

- (a) a copy of the specifications defining the ECB's requirements or, in the case of a competitive dialogue, a copy of the request for a proposal defining the ECB's needs; and
- (b) a copy of the draft contract, of the ECB's general terms and conditions or of the document specifying the key features of the contract; and
- (c) any other documentation which the ECB considers to be of relevance.

If these documents are made available by electronic means the invitation to tender shall specify how the tenderers can access them.

*SECTION 3***Evaluation***Article 23***General**

1. The ECB shall evaluate all tenders against the award criteria as referred to in Article 26 after having:

- verified the formal tender requirements, and
- verified the eligibility of tenderers as referred to in Article 24, and
- assessed the fulfilment of the selection criteria referred to in Article 25.

2. The ECB shall award the contract to the tenderer best meeting the award criteria.

3. The applications and tenders shall not be opened before expiry of the date for submission. The applications and tenders shall be opened in the presence of at least two members of staff; the opening shall be minuted. Unless specified otherwise, candidates or tenderers may not attend the opening.

4. The evaluation process and outcome shall be documented in an evaluation report.

## Article 24

**Eligibility of candidates/tenderers**

1. Subject to the following paragraphs, all natural or legal persons resident or located in the EU are eligible to participate in tender procedures. Tender procedures shall also be open on equal terms to all natural and legal persons resident or located in a third country which has ratified the World Trade Organisation Agreement on Government Procurement or has concluded with the EU a bilateral agreement on procurement under the conditions laid down in the said agreements. Suppliers from other third countries may be admitted to participate at the ECB's sole discretion.

2. Temporary groupings of suppliers may participate in tender procedures under the conditions set out in the contract notice or the invitation to tender. The ECB may require temporary groupings to adopt a specific legal form if the contract is awarded to them, if this form is necessary for the proper performance of the contract.

3. The ECB shall exclude candidates or tenderers from participation in a tender procedure if they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, money laundering, involvement in a criminal organisation or any other illegal activity detrimental to the financial interests of the Communities, of the ECB or of the NCBs.

4. The ECB may exclude candidates or tenderers from participation at any time if they:

(a) 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) have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*;

(c) have been guilty of grave professional misconduct;

(d) 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) have been declared by a court or an arbitration tribunal to be in serious breach of contract for failure to comply with their contractual obligations following another tender procedure;

(f) their management, staff or agents are subject to a conflict of interest;

(g) they are guilty of misrepresentation in supplying the information required by the ECB;

(h) they contact other candidates or tenderers with the purpose of restraining competition.

5. Candidates or tenderers must certify that they are not in one of the situations listed above and/or provide the evidence specified in the contract notice or invitation to tender. If such circumstances arise in the course of the procedure the candidate/tenderer concerned shall inform the ECB without undue delay thereof.

## Article 25

**Selection criteria**

1. The ECB shall specify in the contract notice the selection criteria for assessing the candidate's/tenderer's capacity to perform the contract. The selection criteria shall relate to the candidate's or tenderer's economic, financial, technical or professional capacity.

2. The ECB may lay down minimum capacity levels below which it cannot select candidates or tenderers. These minimum levels shall be specified in the contract notice.

3. Furthermore, the ECB may ask candidates or tenderers to prove that they are 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 ECB shall specify in the contract notice the documents to be submitted by candidates or tenderers as proof of their financial, economic, technical and professional capacity. The documentation requested shall not go beyond the subject of the contract and shall take account of the legitimate interests of the suppliers as regards in particular the protection of their technical and business secrets.

5. If, for some exceptional reason which the ECB considers justified, the tenderer or candidate is unable to provide the documents requested, it may prove its capacity by any other means which the ECB considers appropriate.

6. A supplier 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 ECB that it will have at its disposal the resources necessary for performance of the contract. Under the same conditions, a temporary grouping of suppliers may rely on the capacities of participants in the group.

#### Article 26

##### Award criteria

1. The ECB shall specify in the contract notice or the invitation to tender whether it intends to award the contract to the tenderer who submits the most economically advantageous tender or to the tenderer offering the lowest price.

2. Where the award is made to the most economically advantageous tender, the ECB shall specify in the contract notice or the invitation to tender or, in the case of a competitive dialogue, in the request for a proposal:

- (a) the qualitative criteria against which the tenders will be evaluated. Such criteria must be linked to the subject-matter of the contract in question and may include for example quality, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion; and
- (b) the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the ECB, weighting is not possible for demonstrable reasons, it shall indicate the criteria in descending order of importance.

#### Article 27

##### Abnormally low tenders

1. The ECB may reject tenders which appear to be abnormally low in relation to the goods, works or service offered.

2. Before rejecting such tenders, the ECB shall request in writing the details of the constituent elements of the tender which it considers relevant. The details may relate in particular to:

- (a) the economics of the manufacturing process, of the provision of services or of the construction method; or
- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer; or
- (c) the originality of the tender; or
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed.

The ECB shall verify those constituent elements taking into account the explanations and the evidence received.

3. If the tenderer has obtained State aid, the ECB may reject the tender on that ground alone unless the tenderer is able to prove, within a sufficient time limit fixed by the ECB, that the aid was granted legally in accordance with the procedures and decisions specified in the Community rules on State aid.

#### Article 28

##### Notification of decisions on the selection and award

1. At its earliest convenience, the ECB shall notify its decision in writing to all candidates or tenderers whose applications or tenders are rejected.

2. The notification shall be issued at least 15 days prior to the signature of the contract by the ECB.

3. Candidates and tenderers may within 15 days on receipt of the notification request the ECB to provide the reasons for rejecting their application or their tender. Unsuccessful tenderers whose tender was admissible may also ask for the name of the successful tenderer as well as the key characteristics and relative advantages of its offer.

4. However, the ECB may decide to withhold certain information where the release of such information would affect other suppliers' legitimate commercial interests, would hinder application of the law or would otherwise be contrary to the public interest.

5. In addition, the ECB shall publish an award notice in the Official Journal on the outcome of the procurement procedure. The notice shall be sent within 48 days after signature of the contract.

### CHAPTER III

#### PROCUREMENTS BELOW THE THRESHOLDS

##### Article 29

##### Procedure without publication of a notice

1. Contracts the total estimated value of which is below the thresholds specified in Article 4(3) and service contracts listed in Article 6(2) shall be awarded in accordance with the following procedure.

2. If the value of the contract exceeds or is equal to EUR 50 000 for goods and services or EUR 500 000 for works the ECB shall invite at least five suitable suppliers, if available, to submit a tender within the time limit set by the ECB.

If the value of contract is below these thresholds but equal or above EUR 10 000 the ECB shall invite at least three suitable suppliers, if available, to submit a tender.

In both cases, the ECB shall provide the suppliers with a request for a proposal specifying the ECB's requirements and the criteria for the award of the contract. When fixing the time limit for the submission of tenders the ECB shall take account of the complexity of the contract and the time required to prepare a tender.

3. The ECB shall select the suppliers invited to participate in the tender procedure either among the tenderers admitted to a dynamic purchasing system or, where no such system is in place, from a list of registered suppliers or, where no such list is established, on the basis of a proper market analysis. The pre-selection of suitable suppliers is at the sole discretion of the ECB. The lists of registered suppliers shall be open to any interested supplier providing the type of supplies, services and works for which the list is established. The ECB shall regularly advertise by appropriate means the possibility to register for these lists.

4. Alternatively, the ECB may publish a contract notice on its website or using other appropriate media. In that case, the request for a proposal shall be sent to all suppliers that have declared their interest to participate within the time limit set by the ECB.

5. The tenders received shall be evaluated against the criteria set out in the request for a proposal. Following the evaluation

of the written tenders, the ECB may enter negotiations with the tenderers if that possibility was announced in the request for a proposal. The negotiations may be carried out as consecutive negotiations in the order of the tenderers' ranking or as parallel negotiations with all tenderers.

6. The ECB shall award the contract to the tenderer best meeting the criteria set out in the request for a proposal.

7. The procedure shall be carried out in accordance with the general principles set out in Article 3. Articles 19, 20, 21, 24 and 27 shall apply accordingly.

##### Article 30

##### Notification of tenderers and list of contractors

1. Following the award decision, the ECB shall inform the other tenderers within a reasonable time and in writing of the outcome of the tender procedure.

2. Tenderers may within 15 days on receipt of the notification request the ECB to provide the main reasons for rejecting their tender. Article 28(4) shall apply accordingly.

3. The ECB shall publish annually a list of contracts with a value of above EUR 50 000 that were awarded in accordance with Article 29 or for which an exception was granted in accordance with Article 6(1). The list shall specify the name of the contractors to whom contracts were awarded, the subject and the value of the contracts.

##### Article 31

##### Outright award

The ECB may award contracts on the basis of a single tender if the estimated value of the contract is less than EUR 10 000, net of VAT, or if an exception was granted in accordance with Article 6(1).

### CHAPTER IV

#### FINAL PROVISIONS

##### Article 32

##### Cancellation of tender procedures

1. The ECB may cancel a tender procedure at any time before the contract is signed without the candidates or tenderers being entitled to claim any compensation.

2. The ECB's decision to cancel shall respect the general principles set out in Article 3.

3. The ECB shall substantiate the decision and bring it to the attention of the candidates or tenderers.

*Article 33*

**Appeal procedure**

1. In public tender procedures under Chapter II, candidates/tenderers may challenge in writing the ECB's decision to reject their application or tender within 15 days from the receipt of the information specified in Article 28(3) or, if no information is requested, within 15 days from the receipt of the notification. The appeal shall include all supporting information and reasoned objections.

2. The appeal shall be addressed by the ECB's Procurement Review Body (PRB). If the PRB considers that the decision to reject the appellant's application or tender infringes this decision or general principles of procurement law it shall either order that the tender procedure or parts of it are reiterated or take a final decision. Otherwise the appeal shall be rejected. The PRB shall notify the appellant in writing of its decision within one month following the receipt of the appeal. The decision shall state the reasons on which it is based.

3. The appeal shall not have suspensive effect. If deemed appropriate, the PRB may suspend the procurement procedure or the award of the contract.

*Article 34*

**Jurisdiction**

The Court of Justice of the European Communities shall have exclusive jurisdiction in any dispute between the ECB and a

supplier relating to this Decision or a specific procurement procedure. If an appeal procedure is available under Article 33 the appellant shall await the ECB's decision on the appeal before bringing the matter to the Court of Justice. Time limits set out in the Treaty shall begin to run from receipt of the appeal decision.

*Article 35*

**Entry into force**

1. This Decision shall enter into force on 1 August 2007 and shall repeal and replace Administrative Circular 05/2006 of 27 June 2006 on ECB procurement.

2. Tender procedures that were started before the entry into force of this Decision shall be completed in accordance with Administrative Circular 05/2006. For the purpose of this provision a tender procedure is deemed to be started on the day on which the contract notice was sent to the Official Journal or, in cases where no such notice is required, on the day when the ECB invited one or several suppliers to submit a tender.

Done at Frankfurt am Main, 3 July 2007.

*The President of the ECB*  
Jean-Claude TRICHET

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