

Commission Delegated Regulation (EU) No 1268/2012 of 29 October
2012 on the rules of application of Regulation (EU, Euratom)
No 966/2012 of the European Parliament and of the Council on the
financial rules applicable to the general budget of the Union (repealed)

PART ONE

COMMON PROVISIONS

TITLE V

PROCUREMENT

CHAPTER 1

General provisions

Section 1

Scope and award principles

Article 121

Definitions and scope (Article 101 of the Financial Regulation)

1 Building contracts cover the purchase, long lease, usufruct, leasing, rental or hire purchase, with or without option to buy, of land, existing buildings or other real estate.

2 Supply contracts cover the purchase, leasing, rental or hire purchase, with or without option to buy, of products. A contract for the supply of products and, incidentally, for siting and installation shall be considered a supply contract.

3 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 or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' shall mean the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function.

4 Service contracts cover all intellectual and non-intellectual services other than those covered by supply contracts, works contracts and building contracts.

A contract covering two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.

In the case of mixed contracts consisting of services and supplies, the main object shall be determined by a comparison of the values of the respective services or supplies.

Any references to nomenclatures in the context of public procurement shall be made using the ‘Common Procurement Vocabulary (CPV)’ as set out in Regulation (EC) No 2195/2002 of the European Parliament and of the Council⁽¹⁾.

5 The terms ‘work contractor’, ‘supplier’ and ‘service provider’ covers 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. The term ‘economic operator’ shall mean ‘work contractors’, ‘suppliers’ and ‘service providers’. ‘Tenderers’ shall mean economic operators who have submitted a tender. ‘Candidates’ shall mean those who have asked to be allowed to take part in a restricted procedure, a competitive dialogue, or a negotiated procedure. ‘Vendors’ shall mean economic operators registered in a list of vendors according to Article 136(1)(b).

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.

6 Departments of the Union 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, for the execution of works or for the implementation of building contracts.

7 Technical assistance shall mean support and capacity-building activities necessary for the implementation of a programme or an action, in particular preparatory, management, monitoring, evaluation, audit and control activities.

8 All exchanges with contractors, including the conclusion of contracts and any amendments thereto, may be done through electronic exchange systems set up by the contracting authority.

9 These systems shall meet the following requirements:

- a only authorised persons may have access to the system and to documents transmitted through it;
- b only authorised persons may electronically sign or transmit a document through the system;
- c authorised persons must be identified through the system by established means;
- d the time and date of the electronic transaction must be determined precisely;
- e the integrity of documents must be preserved;
- f the availability of documents must be preserved;
- g where appropriate, the confidentiality of documents must be preserved;
- h the protection of personal data in accordance with the requirements of Regulation (EC) No 45/2001 must be ensured.

10 Data sent or received through such a system shall enjoy legal presumption of the integrity of the data and the accuracy of the date and time of sending or receiving the data indicated by the system.

A document sent or notified through such a system shall be considered as equivalent to a paper document, shall be admissible as evidence in legal proceedings, shall be deemed original and shall enjoy legal presumption of its authenticity and integrity, provided it does not contain any dynamic features capable of automatically changing it.

The electronic signatures referred to in point (b) of paragraph 9 shall have the equivalent legal effect of handwritten signatures.

Article 122

Framework contracts and specific contracts(Article 101 of the Financial Regulation)

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

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 contractors of the framework contract.

When awarding specific contracts, the parties may not make substantial changes to the framework contract.

2 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.

In duly justified circumstances, contracting authorities may consult in writing the contractor, requesting it to supplement its tender if necessary.

3 Where a framework contract is to be concluded with several economic operators, it shall be concluded with at least three operators, provided that there is a sufficient number of economic operators who satisfy the selection criteria or a sufficient number of admissible tenders which meet the award criteria.

A framework contract with several economic operators may take the form of separate contracts which contain identical terms.

Specific contracts based on framework contracts concluded with several economic operators shall be awarded in accordance with the following arrangements:

- a in case of framework contracts without reopening of competition by application of the terms laid down in the framework contract;
- b in case of framework contracts with reopening of competition, 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 third subparagraph, contracting authorities shall consult in writing the contractors of the framework 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.

4 In sectors subject to a rapid price and technological evolution, framework contracts without reopening of competition shall contain a clause either on a mid-term review or on a benchmarking system. After the mid-term review, if the conditions initially laid down are no longer adapted to the price or technological evolution, the contracting authority may not use the framework contract concerned and shall take appropriate measures to terminate it.

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

Section 2

Publication

Article 123

Advertising of contracts covered by Directive 2004/18/EC(Article 103 of the Financial Regulation)

1 Publication for contracts with a value equal to or above the thresholds laid down in Article 170(1) shall consist in a contract notice, without prejudice to Article 134, and an award notice. A prior information notice shall be compulsory only where the contracting authority intends to make use of the possibility of shortening time limits for receipt of tenders in accordance with Article 152(4).

2 The prior information notice is the notice by which the contracting authorities make known, by way of indication, the estimated total value and subject of contracts and framework contracts which they intend to award during a financial year, but excluding contracts under the negotiated procedure without prior publication of a contract notice.

The prior information notice shall be published either by the Publications Office of the European Union (hereinafter ‘Publications Office’) or by the contracting authorities themselves on their buyer profile.

The compulsory prior information notice shall be sent to the Publications Office or published on the buyer profile as soon as possible and in any event by no later than 31 March of each financial year.

Contracting authorities which publish the prior information notice on their buyer profile shall send to the Publications Office, 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 prior 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 131. Without prejudice to contracts concluded after a negotiated procedure as referred to in Article 134, the contract notice shall be compulsory for the contracts with an estimated value equal to or above the thresholds laid down in Article 170(1).

It shall not be compulsory for specific contracts based on framework contracts.

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 146(2). They shall set out the selection criteria referred to in Article 146 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 128(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 131, 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.

Where appropriate, contracting authorities shall specify in the contract notice that the procurement procedure is an interinstitutional procurement procedure. In such cases, the contract notice shall indicate the institutions, executive agencies or bodies referred to in Article 208 of the Financial Regulation which are involved in the procurement procedure, the institution responsible for the procurement procedure and the global volume of the contracts for all those institutions, executive agencies or bodies.

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 170(1), 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 Publications Office no later than 48 calendar days 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 Publications Office no later than 48 days after the end of each quarter.

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

In case of interinstitutional procedures, the award notice shall be sent by the contracting authority responsible for the procedure.

The award notice shall also be sent to the Publications Office in the case of a contract or a framework contract with a value equal to or above the thresholds laid down in Article 170(1) and awarded pursuant to a negotiated procedure without prior publication of a contract notice, in sufficient time for the publication to occur before the signature of the contract, in accordance with the terms and conditions set out in Article 171(1).

Without prejudice to Article 21, information relating to the value and contractors of specific contracts based on a framework contract during a financial year shall be published on the internet website of the contracting authority no later than 30 June following the end of that financial year if, as a result of the conclusion of a specific contract or of the aggregate volume of the specific contracts, the thresholds referred to in Article 170(1) are exceeded.

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

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Article 124

Advertising of contracts not covered by Directive 2004/18/EC(Article 103 of the Financial Regulation)

1 Contracts with a value below the thresholds laid down in Article 170(1) shall be advertised by appropriate means in order to ensure competitive tendering and impartiality of the procurement procedure. Such advertising shall involve:

- a a contract notice as referred to in Article 123(3), or a notice of a call for expressions of interest for contracts covering a similar subject with a value greater than the amount referred to in Article 137(1);
- b appropriate *ex ante* publicity on internet for contracts with a value greater than the amount referred to in Article 137(2).

2 A list of contractors to whom building contracts and contracts declared secret in accordance with Article 134(1)(j) of this Regulation 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 European Parliament and Council. In the case of the Commission, it shall be annexed to the summary of the annual activity reports referred to in Article 66(9) of the Financial Regulation.

3 Information relating to contracts with a value greater than the amount referred to in Article 137(1) that have not been the subject of an individual award notice shall be sent to the Publications Office. The annual lists of contractors shall be sent by no later than 30 June of the following financial year.

4 Information relating to contracts with a value greater than the amount referred to in Article 137(2) shall be published on the internet site of the institution no later than 30 June of the following financial year.

Article 125

Publication of notices(Article 103 of the Financial Regulation)

1 The Publications Office shall publish the notices referred to in Articles 123 and 124 in the *Official Journal of the European Union* no later than 12 calendar days after their dispatch.

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 154.

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

Article 126

Other forms of advertising(Article 103 of the Financial Regulation)

In addition to the advertising provided for in Articles 123, 124 and 125, contracts may be advertised in any other way, notably in electronic form. Any such advertising shall refer to the notice published in the *Official Journal of the European Union*, as provided for in Article 125, if one has been published, and may not precede the publication of that notice, which alone is authentic.

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

Section 3

Procurement procedures

Article 127

Types of procurement procedure(Article 104 of the Financial Regulation)

1 Contracts shall be awarded by call for tender, using the open, restricted or negotiated procedure after publication of a contract notice or by negotiated procedure without prior publication of a contract notice, where appropriate following a contest.

2 Procurement procedures 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 131.

Procurement procedures are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 146 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 132.

The selection phase may be repeated for each individual contract, also in the case of a competitive dialogue, or may involve drawing up a list of potential candidates under the procedure referred to in Article 136(1)(a).

3 In a negotiated procedure, the contracting authorities shall consult tenderers of their choice who satisfy the selection criteria laid down in Article 146, and negotiate the terms of their tenders with one or more of them.

In negotiated procedures where a contract notice is published, as referred to in Article 135, the contracting authorities shall simultaneously and in writing invite the selected candidates to negotiate.

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

Article 128

Number of candidates in restricted or negotiated procedures(Article 104 of the Financial Regulation)

1 In a restricted procedure and the procedures referred to in points (a) and (b) of Article 136(1), the number of candidates invited to submit a tender may not be less than five, provided that a sufficient number of candidates satisfy the selection criteria.

The contracting authority may also provide for a maximum number of candidates, depending on the subject of the contract and on the basis of objective and non-discriminatory selection criteria. In such cases, the range and criteria shall be indicated

in the contract notice or the call for expressions of interest referred to in Articles 123 and 124.

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

2 In negotiated procedures and 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 low values, as referred to in Article 137(2);
- b contracts for legal services according to the CPV nomenclature;
- c contracts declared secret, as referred to in Article 134(1)(j).

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 were not initially invited to be part of the procedure, or candidates who do not have the required capacities.

Article 129

Arrangements for negotiated procedures(Article 104 of the Financial Regulation)

Contracting authorities shall negotiate with tenderers the tenders they have submitted in order to adapt them to the requirements set out in the contract notice referred to in Article 123 or in the specifications and in any additional documents and in order to find the tender offering best value for money.

During the negotiation, the contracting authorities shall ensure equal treatment for all tenderers.

Where contracting authorities may, in accordance with Article 135, 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.

Article 130

Contests(Article 104 of the Financial Regulation)

1 The rules for the organisation of a contest shall be communicated to those interested in taking part.

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

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

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

3 The proposals of the selection board, based on the merits of each project, and its observations, shall be recorded in a report signed by its members.

Candidates shall remain anonymous until the selection board has given its opinion.

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

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

Article 131

Dynamic purchasing system(Article 104 of the Financial Regulation)

1 The dynamic purchasing system 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 132

Competitive dialogue(Article 104 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 146 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 the candidate 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.

Article 133

Joint procurement(Article 104 of the Financial Regulation)

In the case of a joint procurement procedure between one institution and the contracting authority from one or more Member States, EFTA States or Union candidate countries, the procedural provisions applicable to the institution shall apply.

Where the share pertaining to or managed by the contracting authority of a Member State in the total estimated value of the contract is equal to or above 50 %, or in other duly justified cases, the institution may decide that the procedural rules applicable to the contracting authority from a Member State shall apply, provided that they can be considered as equivalent to those of the institution.

The institution and the contracting authority from Member States, EFTA States or Union candidate countries, concerned by the joint procurement procedure shall agree in particular upon the practical modalities for the evaluation of the requests for participation or the tenders, the award of the contract, the law applicable to the contract and the competent court for hearing disputes.

Article 134

Use of a negotiated procedure without prior publication of a contract notice(Article 104 of the Financial Regulation)

1 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 request to participate 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 tender documents referred to in Article 138 are not substantially altered;
- b where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract can be awarded only to a particular economic operator;
- c in so far as is strictly necessary where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the contracting authorities, it is impossible to comply with the time limits set for the other procedures and laid down in Articles 152, 153 and 154;
- d where a service contract follows a contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates; in the latter case, all successful candidates shall be invited to participate in the negotiations;

- e for additional services and works not included in the project initially envisaged 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;
- g for supply contracts:
 - (i) in the case of additional deliveries which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting authority to acquire equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts may not exceed three years;
 - (ii) where the products are manufactured purely for the purpose of research, experiment, study or development, with the exception of commercial viability tests and large-scale production aimed at recovering research and development costs;
 - (iii) in respect of supplies quoted and purchased on a commodity market;
 - (iv) in respect of purchases on particularly advantageous terms, either from a supplier which is definitively winding up its business activities, or from the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national law;
- h for building contracts, after prospecting the local market;
- i for contracts for legal services according to the CPV nomenclature, provided that such contracts are appropriately advertised;
- 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 Union so requires.

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

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

The aggregate value of additional contracts may not exceed 50 % of the amount of the initial contract.

3 In the cases referred to in point (f) of paragraph 1 of this Article, 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 170(1). That procedure may be

used only during the execution of the original contract and at the latest during the three years following its signing.

Article 135

Use of a negotiated procedure after prior publication of a contract notice(Article 104 of the Financial Regulation)

1 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 138 are not substantially altered, without prejudice to the application of paragraph 2 of this Article;
- b in exceptional cases involving work, supplies or services where the nature or the risks do not permit prior overall pricing by the tenderer;
- c where the nature of the service to be procured, in particular in the case of financial services and intellectual services, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender in accordance with the rules governing open or restricted procedures;
- d for works contracts, where the works are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs;
- e for the service contracts referred to in Annex IIB to Directive 2004/18/EC, subject to points (i) and (j) of Article 134(1) of this Regulation and the second paragraph thereof.
- f for research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority;
- g for service contracts for the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time.

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.

Article 136

Procedure involving a call for expressions of interest(Article 104 of the Financial Regulation)

1 For contracts with a value not exceeding that referred to in Article 170(1) and without prejudice to Articles 134 and 135, contracting authorities may use a call for expressions of interest to do either of the following:

- a to pre-select candidates to be invited to submit tenders in response to future restricted invitations to tender;
- b to collect a list of vendors to be invited to submit requests to participate or tenders.

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2 The list drawn up following a call for expressions of interest shall be valid for the following period:

- a not more than three years from the date on which the notice referred to in point (a) of Article 124(1) is sent to the Publications Office in the case referred to in point (a) of paragraph 1 of this Article;
- b not more than five years from the date on which the notice referred to in point (a) of Article 124(1) is sent to the Publications Office in the case of vendors' list referred to in point (b) of paragraph 1 of this Article.

The list referred to in the first subparagraph may include sub-lists.

Any interested person may submit an application at any time during the period of validity of the list, with the exception of the last three months of that period.

3 Where a contract is to be awarded, the contracting authority shall invite all candidates or vendors entered on the relevant list or sub-list to do either of the following:

- a to submit a tender in the case referred to in point (a) of paragraph 1;
- b to submit, in case of the list referred to in point (b) of paragraph 1, either of the following:
 - (i) tenders including documents relating to exclusion and selection criteria;
 - (ii) documents relating to exclusion and selection criteria and, in a second step, tenders, for those fulfilling these criteria.

Article 137

Low-value contracts(Article 104 of the Financial Regulation)

1 A negotiated procedure without prior publication of a contract notice with consultation of at least three candidates may be used for contracts with a low value not exceeding EUR 60 000.

If, following consultation of the candidates, the contracting authority receives only one tender that is administratively and technically valid, the contract may be awarded provided that the award criteria are met.

2 Contracts with a very low value not exceeding EUR 15 000 may be awarded on the basis of a single tender following a negotiated procedure without prior publication of a contract notice.

3 Payments of amounts not exceeding EUR 1 000 in respect of items of expenditure may consist simply in payment against invoices, without prior acceptance of a tender.

Article 138

Tender documents(Article 105 of the Financial Regulation)

1 The tender documents shall include at least:

- a the invitation to tender or to negotiate or to take part in the dialogue under the procedure referred to in Article 132;
- b the attached specification or, in the case of a competitive dialogue as referred to in Article 132, a document describing the needs and requirements of the contracting

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- authority, or the reference for the internet address at which such specification or document can be consulted;
- c the draft contract based on the model contract.

Point (c) of the first subparagraph shall not apply to cases where, due to exceptional and duly justified circumstances, the model contract cannot be used.

The tender documents shall contain a reference to the advertising measures taken under Articles 123 to 126.

- 2 The invitation to tender or to negotiate or to take part in the dialogue shall at least:
 - a specify the rules governing the lodging and presentation of tenders, including in particular the closing date and time for submission, any requirement as to the use of a standard reply form, the documents to be attached, including those in evidence of financial, economic, technical and professional capacity referred to in Article 146 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;
 - c specify the period during which a tender will remain valid and may not be varied in any respect;
 - d forbid any contact between the contracting authority and the tenderer during the procedure, save, exceptionally, under the conditions laid down in Article 160, and, where provision is made for an on-the-spot visit, specify the arrangements for such a visit;
 - e specify, in the case of a competitive dialogue, the date set and the address for the start of the consultation phase.
- 3 The specifications shall at least:
 - a specify the exclusion and selection criteria applying to the contract, save in a competitive dialogue, in the restricted procedure and in the negotiated procedure following publication of a notice as referred to in Article 135; in such cases those criteria shall appear solely in the contract notice or the call for expressions of interest;
 - b specify the award criteria and their relative weighting or, where appropriate, the decreasing order of importance, if this is not specified in the contract notice;
 - c set out the technical specifications referred to in Article 139;
 - d state the minimum requirements which variants must meet in the procedures referred to in Article 149(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;
 - e state that the Protocol on the Privileges and Immunities of the European Union or, where appropriate, the Vienna Convention on Diplomatic Relations or Vienna Convention on Consular Relations applies;
 - f specify the evidence of access to contracts, as set out in Article 172;
 - g specify, in the dynamic purchasing systems referred to in Article 131, the nature of the purchases envisaged, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications.
- 4 The model contract shall in particular:
 - a specify the liquidated damages for failure to comply with its clauses;

- b specify the details which must be contained in invoices or in the relevant supporting documents in accordance with Article 102;
- c state that, when the institutions are contracting authorities, Union law is the law which applies to the contract, complemented, where necessary, by a national law as specified in the contract.
- d specify the competent court for hearing disputes.

For the purposes of point (c) of the first subparagraph of this paragraph, in case of contracts referred to in Article 121(1), the draft contract may refer exclusively to national law.

5 The contracting authorities may demand information from the tenderer on any part of the contract that the tenderer may intend to subcontract to third parties and on the identity of any subcontractors. In addition to the information referred to in Article 143, the contracting authority may also require the candidate or tenderer to submit information on the financial, economic, technical and professional capacities, as referred to in Articles 146, 147 and 148, of the envisaged subcontractor, in particular when subcontracting represents a significant part of the contract.

Article 139

Technical specifications(Article 105 of the Financial Regulation)

1 Technical specifications must afford equal access for candidates and tenderers and not have the effect of creating unjustified obstacles to competitive tendering.

They shall define the characteristics required of a product, service or material or work with regard to the purpose for which they are intended by the contracting authority.

- 2 The characteristics referred to in paragraph 1 shall include:
- a the quality levels;
 - b environmental performance;
 - c wherever possible, the accessibility criteria for people with disabilities or the design for all users;
 - d the levels and procedures of conformity assessment;
 - e fitness for use;
 - f safety or dimensions, including, for supplies, the sales name and user instructions, and, for all contracts, terminology, symbols, testing and test methods, packaging, marking and labelling, production procedures and methods;
 - g for works contracts, the procedures relating to quality assurance and the rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all the other technical conditions which the contracting authority may impose under general or specific regulations in relation to the finished works and to the materials or parts which they involve.
- 3 The technical specifications shall be formulated in any of the following ways:
- a by reference to European standards, or to European technical approvals or common technical specifications, where such exist, to international standards, to other technical reference systems established by European standardisation bodies or, failing this, their national equivalents; every reference shall be followed by the expression ‘or equivalent’;

- 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;
- c by a mixture of those two formulation methods.

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

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

5 Where the contracting authorities make use of the possibility provided for in point (b) of paragraph 3, of prescribing specifications in terms of performance or of functional requirements, they may not reject a tender which complies with a national standard transposing a European standard, a European technical approval or common technical specifications, an international standard or technical reference systems established by European standardisation bodies, if those specifications relate to the necessary performance or functional requirements.

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.

6 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.

7 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. A recognised body for the purposes of paragraphs 4, 5 and 6 is a test and calibration laboratory or a certification and inspection body which complies with applicable European standards.

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

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

Article 140

Price revision(Article 105 of the Financial Regulation)

1 The tender documents shall clearly state whether a firm, non-revisable price must be quoted.

2 If that is not the case, the tender documents shall lay down the conditions and/or formulas for revision of prices during the lifetime of the contract. In such cases the contracting authority shall take particular account of:

- a the object of the procurement procedure and the economic situation in which it is taking place;
- b the type of tasks and contract and their duration;
- c its financial interests.

Article 141

Illegal activities giving rise to exclusion(Article 106 of the Financial Regulation)

The cases referred to in Article 106(1)(e) of the Financial Regulation shall include all illegal activities detrimental to the Union's financial interests and in particular the following:

- (a) cases of fraud as referred to in Article 1 of the Convention on the protection of the European Communities' financial interests drawn up by the Council Act of 26 July 1995⁽²⁾;
- (b) cases of corruption as referred to in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997⁽³⁾;
- (c) cases of participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA⁽⁴⁾;
- (d) cases of money laundering as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council⁽⁵⁾;
- (e) cases of terrorist offences, offences linked to terrorist activities, and inciting, aiding, abetting or attempting to commit such offences, as defined in Articles 1, 3 and 4 of Council Framework Decision 2002/475/JHA⁽⁶⁾.

Article 142

Application of exclusion criteria and duration of exclusion(Articles 106, 107, 108 and 109 of the Financial Regulation)

1 In order to determine duration of exclusion and to ensure compliance with the principle of proportionality, the institution responsible shall take into account in particular the seriousness of the facts, including their impacts on the Union's financial interests and image and the time which has elapsed, the duration and recurrence of the offence, the intention or degree of negligence of the entity concerned and the measures taken by the entity concerned to remedy the situation.

When determining the period of exclusion, the institution responsible shall give the candidate or tenderer concerned the opportunity to express its views.

Where the duration of the period of exclusion is determined, in accordance with the applicable law, by the authorities or bodies referred to in Article 108(2) and (3) of the Financial Regulation, the Commission shall apply this duration up to the maximum duration laid down in Article 106(4) of the Financial Regulation. The period referred to in Article 106(4) of the Financial Regulation is set at a maximum of five years, calculated from the following dates:

- a from the date of the judgment having the force of *res judicata* in the cases referred to in points (b) and (e) of Article 106(1) of the Financial Regulation;
- b from the date on which the infringement is committed or, in the case of continuing or repeated infringements, the date on which the infringement ceases, in the cases referred to in Article 106(1)(c) of the Financial Regulation where the misconduct relates to contracts with the institution concerned.

For the purposes of point (b) of the third subparagraph, if the grave professional misconduct was established by a decision of a public authority or an international organisation, the date of the decision shall prevail.

That period of exclusion may be extended to 10 years in the event of a repeated offence within five years of the date referred to in points (a) and (b) of the third subparagraph, subject to paragraph 1.

2 Candidates and tenderers shall be excluded from a procurement and grant procedure as long as they are in one of the situations referred to in points (a) and (d) of Article 106(1) of the Financial Regulation.

Article 143

Evidence(Articles 106 and 107 of the Financial Regulation)

1 Candidates and tenderers shall provide a declaration on their honour, duly signed and dated, stating that they are not in one of the situations referred to in Articles 106 and 107 of the Financial Regulation.

However, in case of restricted procedure, competitive dialogue and negotiated procedure after publication of a contract notice, whenever the contracting authority limits the number of candidates to be invited to negotiate or submit a tender, all the candidates shall provide the certificates referred to in paragraph 3.

Depending on its risk assessment, the contracting authority may refrain from requiring the declaration referred to in the first subparagraph for contracts referred to in Article 137(2). However, for contracts referred to in Articles 265(1), 267(1), and 269(1), the contracting authority may refrain from requiring that declaration for contracts with a value less than or equal to EUR 20 000.

2 The tenderer to whom the contract is to be awarded shall provide, within a time limit defined by the contracting authority and preceding the signature of the contract, the evidence referred to in paragraph 3 of this Article, confirming the declaration referred to in paragraph 1 of this Article in the following cases:

- a for contracts awarded by the institutions on their own account, with a value equal to or greater than the thresholds referred to in Article 170(1);

- b for contracts in the field of external actions with a value equal to or greater than the thresholds laid down in Article 265(1)(a), Article 267(1)(a), or Article 269(1)(a).

For contracts with a value less than the thresholds referred to in points (a) and (b) of the first subparagraph of this paragraph, the contracting authority may, where it has doubts as to whether the tenderer to whom the contract is to be awarded is in one of the situations of exclusion, require him to provide the evidence referred to in paragraph 3.

3 The contracting authority shall accept as satisfactory evidence that the candidate or tenderer to whom the contract is to be awarded is not in one of the situations described in points (a), (b) or (e) of Article 106(1) of the Financial Regulation, a recent extract from the judicial record or, failing that, an equivalent document recently issued by a judicial or administrative authority in the country of origin or provenance showing that those requirements are satisfied. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in point (a) or (d) of Article 106(1) of the Financial Regulation, a recent certificate issued by the competent authority of the State concerned.

Where the document or certificate referred to in paragraph 1 of this Article is not issued in the country concerned and for the other cases of exclusion referred to in Article 106 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.

4 Depending on the national legislation of the country in which the candidate or tenderer is established, the documents referred to in paragraphs 1 and 3 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.

5 Where they have doubts as to whether candidates or tenderers are in one of the situation of exclusion, contracting authorities may themselves apply to the competent authorities referred to in paragraph 3 to obtain any information they consider necessary about that situation.

6 The contracting authority may waive the obligation of a candidate or tenderer to submit the documentary evidence referred to in paragraph 3 if such evidence has already been submitted to it for the purposes of another procurement procedure and provided that the issuing date of the documents does not exceed one year and that they are still valid.

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

7 When requested by the contracting authority, the candidate or tenderer shall submit a declaration on honour from the intended subcontractor that he is not in one of the situations referred to in Articles 106 and 107 of the Financial Regulation.

In case of doubt on this declaration on the honour, the contracting authority shall request the evidence referred to in paragraphs 3 and 4. Paragraph 5 shall apply, where appropriate.

Article 144

Central database(Article 108 of the Financial Regulation)

1 The institutions, executive agencies and bodies referred to in Article 108(1) of the Financial Regulation shall transmit to the Commission, in the format established by the Commission, information identifying third parties which are in one of the situations referred to in Articles 106, 107, 109(1)(b) and 109(2)(a) of the Financial Regulation, the grounds for exclusion and the duration of the period of exclusion.

They shall also transmit information concerning persons with powers of representation, decision making or control over third parties which are legal entities, when these persons have found themselves in one of the situations referred to in Articles 106, 107, 109(1)(b) and 109(2)(a) of the Financial Regulation.

The authorities and bodies referred to in paragraphs 2 and 3 of Article 108 of the Financial Regulation shall transmit to the Commission, in the format established by the Commission, information identifying third parties who are in one of the situations referred to in Article 106(1)(e) of the Financial Regulation, where their conduct was detrimental to the Union's financial interests and persons with powers of representation, decision making or control over third parties which are legal entities, such as:

- a the type of their conviction;
- b the duration of the period of exclusion from procurement procedures, where applicable.

2 The institutions, agencies, authorities and bodies referred to in paragraph 1 shall designate the persons authorised to communicate to and receive from the Commission the information contained in the database.

In the case of the institutions, agencies, authorities and bodies referred to in Article 108(1) of the Financial Regulation, the designated persons shall address the information as soon as possible to the accounting officer of the Commission, and request, as appropriate, entry, modification or removal of data in the database.

In the case of the authorities and bodies referred to in Article 108(2) of the Financial Regulation, the designated persons shall address the requisite information to the Commission authorising officer responsible for the programme or action concerned, within three months of the issue of the relevant judgement.

The accounting officer of the Commission shall enter, modify or remove data in the database. He shall, via a secured protocol, provide on a monthly basis validated data contained in the database to the designated persons.

3 The institutions, agencies, authorities and bodies referred to in paragraph 1 shall certify to the Commission that the information communicated by them was established and transmitted in accordance with the principles set out in Regulation (EC) No 45/2001 and in Directive 95/46/EC of the European Parliament and of the Council⁽⁷⁾ concerning the protection of personal data.

In particular, they shall inform in advance all third parties or persons referred to in paragraph 1 that their data may be included in the database and communicated by the Commission to the designated persons referred to in paragraph 2. They shall update, where appropriate, the information transmitted, following rectification or erasure or any modification of data.

Any party entered in the database shall have the right to be informed of the data stored concerning that party, upon request to the accounting officer of the Commission.

4 Member States shall take appropriate measures to assist the Commission in order to manage the database efficiently, in compliance with Directive 95/46/EC.

Appropriate arrangements shall be laid down in the agreements with the authorities of third countries and all bodies referred to in paragraphs 2 and 3 of Article 108 of the Financial Regulation, in order to ensure compliance with these provisions and with the principles concerning the protection of personal data.

Article 145

Administrative and financial penalties(Articles 109 and 131 of the Financial Regulation)

1 Without prejudice to the application of penalties laid down in the contract, candidates or tenderers and contractors who have made false declarations, have made substantial errors or committed irregularities or fraud, or have been found in serious breach of their contractual obligations may be excluded from all contracts and grants financed by the Union budget for a maximum of five years from the date on which the infringement is established as confirmed following a contradictory procedure with the candidate, tenderer or the contractor.

That period may be extended to 10 years in the event of a repeated offence within five years of the date referred to in the first subparagraph.

2 Tenderers or candidates who have made false declarations, have committed substantial errors, irregularities or fraud, may also be subject to financial penalties representing 2 % to 10 % of the total estimated value of the contract being awarded.

Contractors who have been found in serious breach of their contractual obligations may be subject to financial penalties representing 2 % to 10 % of the total value of the contract in question.

That rate may be increased to 4 % to 20 % in the event of a repeat infringement within five years of the date referred to in the first subparagraph of paragraph 1.

3 The institution shall determine the administrative or financial penalties taking into account in particular the elements referred to in Article 142(1).

Article 146

Selection criteria(Article 110(1) of the Financial Regulation)

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

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

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

3 Any tenderer or candidate may be asked to prove that he is authorised to perform the contract under national law, as evidenced by inclusion in a trade or professional register, or a

sworn declaration or certificate, membership of a specific organisation, express authorisation, or entry in the value added tax (hereinafter ‘VAT’) register.

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

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

6 The contracting authority may, depending on his assessment of risks, decide not to require proof of the financial, economic, technical and professional capacity of candidates or tenderers in the case of the following contracts:

- a contracts awarded by the institutions on their own account, with a value not exceeding the value referred to in Article 137(1);
- b contracts awarded in the field of external actions, with a value below the thresholds referred to in Article 265(1)(a), Article 267(1)(a) or Article 269(1)(a).

Where the contracting authority decides not to require proof of the financial, economic, technical and professional capacity of candidates or tenderers, no pre-financing shall be made unless a financial guarantee of an equivalent amount is provided.

Article 147

Economic and financial capacity(Article 110(1) of the Financial Regulation)

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

- a appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;
- b financial statements for at most the last three years for which accounts have been closed;
- c a statement of overall turnover and turnover concerning the works, supplies or services covered by the contract during a period which may be no more than the last three financial years available.

2 The contracting authority may waive the obligation of a candidate or tenderer to submit the documentary evidence referred to in paragraph 1 if such evidence has already been submitted to it for the purposes of another procurement procedure and still complies with paragraph 1.

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

3 An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for performance of the contract, for example by producing an undertaking on the part of those entities to place those resources at its disposal.

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The contracting authority may require that the economic operator and the entities referred to in the first subparagraph are jointly liable for the execution of the contract.

Under the same conditions, a consortium of economic operators as referred to in Article 121(5) may rely on the capacities of members of the consortium or of other entities.

Article 148

Technical and professional capacity(Article 110(1) of the Financial Regulation)

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

2 Evidence of the technical and professional capacity of 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:

- a the educational and professional qualifications of the service provider or work contractor and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services or carrying out the works;
- b a list:
 - (i) of the principal services provided and supplies delivered in the past three years, with the sums, dates and recipients, public or private;
 - (ii) of the works carried out in the last five years, with the sums, dates and place;
- c a description of the technical equipment, tools and plant to be employed by the firm for performing a service or works contract;
- d a description of the technical equipment and the measures employed to ensure the quality of supplies and services, and a description of the firm's study and research facilities;
- e an indication of the technicians or technical bodies involved, whether or not belonging directly to the firm, especially those responsible for quality control;
- f in respect of supplies: samples, descriptions and/or authentic photographs and/or certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of the products with the specifications or standards in force;
- g a statement of the average annual manpower and the number of managerial staff of the service provider or work contractor in the last three years;
- h an indication of the proportion of the contract which the service provider may intend to subcontract;
- i for public works contracts and public service contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract.

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

For the purposes of point (b)(ii) of the first subparagraph the list of the most important works shall be accompanied by certificates of satisfactory execution, specifying whether they have been carried out in a professional manner and have been fully completed.

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

4 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 accredited bodies. However, contracting authorities shall also accept other evidence of equivalent quality assurance measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

5 Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management schemes or standards, they shall refer to the European Union Eco-Management and Audit Scheme or to other environmental management schemes as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council⁽⁸⁾ or other environmental management standards based on the relevant European or international standards by accredited bodies. 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.

6 An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for performance of the contract, for example by producing an undertaking on the part of those entities to place those resources at its disposal.

Under the same conditions, a consortium of economic operators as referred to in Article 121(5) may rely on the capacities of members of the consortium or of other entities.

7 In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, the contracting authority may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a consortium of economic operators as referred to in Article 121(6), a participant in the consortium.

8 Contracting authorities may conclude that economic operators will not perform the contract to an appropriate quality standard where the contracting authority establishes that they have conflicting interests which may negatively affect the performance of the contract.

Article 149

Award arrangements and criteria(Article 110(2) of the Financial Regulation)

1 Without prejudice to Article 107 of the Financial Regulation, contracts shall be awarded in one of the following two ways:

- a under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;
- b under the best-value-for-money procedure.

2 To determine which tender offers the best value for money the contracting authority shall take into account the price quoted and other quality criteria justified by the subject of the contract such as, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability completion or delivery times, after-sales service and technical assistance. The contracting authority may lay down minimum levels of quality. Tenders below those levels of quality shall be rejected.

3 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.

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

Article 150

Use of electronic auctions(Article 110(2) of the Financial Regulation)

1 Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

For the purpose of the first subparagraph, contracting authorities shall use a repetitive electronic process (electronic auction), which shall be held after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

2 In open, restricted or negotiated procedures in the case referred to in Article 135(1) (a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the tender 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 122(3) (b) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 131.

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.

3 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;

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- 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.

4 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.

5 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 149(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.

6 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.

7 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;
- c when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

For the purposes of point (b) of the first subparagraph, 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.

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

8 After closing an electronic auction, contracting authorities shall award the contract in accordance with Article 149 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.

Article 151

Abnormally low tenders(Article 110(2) of the Financial Regulation)

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

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

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

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

Article 152

Time limits for receipt of tenders and requests to participate(Article 111(1) of the Financial Regulation)

1 The contracting authorities shall lay down in calendar days fixed and peremptory time limits for the receipt of tenders and requests to participate. The time limits shall be long enough to allow interested parties a reasonable and appropriate period to prepare and submit their tenders, taking particular account of the complexity of the contract or the need to visit the site or consult on the spot the documents annexed to the specifications.

2 In open procedures for contracts with a value equal to or above the thresholds set in Article 170(1), 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, in cases of use of the competitive dialogue referred to in Article 132 and in negotiated procedures with publication of a contract notice for contracts above the thresholds set in Article 170(1), 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 170(1), 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 procedures after a call for expressions of interest referred to in Article 136(1), the time limit shall be:

- a no less than 21 days from the date on which the invitation to tender is dispatched for receipt of tenders in the case of the procedure referred to in Article 136(1)(a) and Article 136(3)(b)(i);
- b no less than 10 days for receipt of requests to participate and no less than 21 days for receipt of tenders in the case of the two-step procedure referred to in Article 136(3)(b)(ii).

4 Where the contracting authorities, in accordance with Article 123(2), have sent a pre-information notice for publication or have themselves published a prior information notice on their buyer profile for contracts above the thresholds set in Article 170(1), 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 prior information notice satisfies the following conditions:

- a it contains all the information required for the contract notice, in so far 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.

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

Article 153

Time allowed for access to tender documents(Article 111(1) of the Financial Regulation)

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 132 and additional documents shall be sent, within five working 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 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 as soon as possible and no later than six calendar 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.

3 If, for whatever reason, the specifications and the additional documents or information cannot be supplied within the time limits set in paragraphs 1 and 2 of this Article, or where tenders can be made only after a visit to the site or after on-the-spot consultation of the documents annexed to the specifications, the time limits for receipt of tenders referred to in Article 152 shall be extended to enable all economic operators to acquaint themselves with all the requisite information for preparing tenders. That extension shall be advertised in appropriate manner, in accordance with the arrangements set out in Articles 123 to 126.

4 In the open procedure, including the dynamic purchasing systems referred to in Article 131, if there is unrestricted and full direct access by electronic means to the entire call for tenders and any additional documents, paragraph 1 of this Article shall not apply. The contract notice referred to in Article 123(3) shall give the internet address at which those documents can be consulted.

Article 154

Time limits in urgent cases(Article 111(1) of the Financial Regulation)

1 Where duly substantiated urgency renders impracticable the minimum time limits laid down in Article 152(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 the Publications Office 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.

Article 155

Methods of communication(Article 111(1) of the Financial Regulation)

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 generally available and shall not restrict the access of economic operators to the procurement 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;

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- c the confidentiality of tenders and requests to participate is preserved and the contracting authorities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired;
- d the protection of personal data in accordance with the requirements of Regulation (EC) No 45/2001.

Where necessary for the purposes of legal proof, the contracting 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 152.

2 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 and shall not restrict economic operators' access to the procurement procedure.

3 Except for contracts below the threshold laid down in Article 170(1), devices for the electronic receipt of tenders and requests to participate shall guarantee, through technical means and appropriate procedures, that:

- a the economic operator can be authenticated with certainty;
- b the exact time and date of the receipt of tenders and requests to participate can be determined precisely;
- c it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;
- d where that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;
- e only authorised persons may set or change the dates for opening data received;
- f during the different stages of the procurement procedure access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;
- g simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;
- h data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

4 Where the contracting authority authorises submission of tenders and requests to participate by electronic means, the electronic documents submitted by means of such systems shall be deemed to be the originals and to be signed by an authorised representative of the economic operator.

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

- 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 or candidate in person or by an agent; for which purposes the call for tenders shall specify, in addition to the information referred to in Article 138(2)(a), the department to which tenders or requests to participate are to be delivered against a signed and dated receipt.

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

Tenders must be submitted in a sealed envelope itself enclosed within a second sealed envelope. The inner envelope must bear, in addition to the name of the department to which it is addressed, as indicated in the invitation to tender, the words ‘Invitation to tender — Not to be opened by the mail service’. If self-adhesive envelopes are used, they must be sealed with adhesive tape and the sender must sign across that tape.

Article 156

Tender guarantees(Article 111(3) of the Financial Regulation)

The contracting authority may require a tender guarantee, lodged in accordance with Article 163, representing 1 % to 2 % of the total value of the contract.

A tender guarantee shall be released when the contract is awarded. If no tender is submitted by the deadline set or if the tender is subsequently withdrawn, the guarantee shall be retained.

Article 157

Opening of tenders and requests to participate(Article 111(4) of the Financial Regulation)

1 All requests to participate and tenders that satisfy the requirements of Article 155 shall be opened.

2 Where the value of a contract exceeds the threshold laid down in Article 137(1), the authorising officer responsible shall appoint a committee to open the tenders.

The opening committee shall be made up of at least three persons representing at least two organisational entities of the 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 57 of the Financial Regulation. In the representations or local units referred to in Article 72 of this Regulation 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.

In the case of a procurement procedure launched on an interinstitutional basis, the opening committee shall be appointed by the responsible authorising officer from the institution responsible for the procurement procedure. The composition of the opening committee shall reflect, in so far as possible, the interinstitutional character of the procurement procedure.

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.

They shall also initial either of the following:

- a each page of each tender;
- b the cover page and the pages containing the financial details of each tender, the integrity of the initial tender being guaranteed by any appropriate technique employed by a department that is independent of the authorising department, save in the cases referred to in the second subparagraph of paragraph 2.

Where the contract is awarded under the automatic award procedure in accordance with point (a) of Article 149(1), the prices quoted in tenders satisfying the requirements shall be made public.

The members of the committee shall sign the written record of the opening of the tenders received, which shall identify those tenders which comply with the requirements of Article 155 and those which do not, and which shall give the grounds on which tenders were rejected for non-compliance, by reference to the methods of submitting tenders referred to in Article 155. That record may be signed in an electronic system providing sufficient identification of the signatory.

Article 158

Committee for the evaluation of tenders and requests to participate(Article 111(5) of the Financial Regulation)

1 All requests to participate and tenders declared as complying with the requirements of Article 155 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.

That committee shall be appointed by the authorising officer responsible to give an advisory opinion on contracts with a value above the threshold referred to in Article 137(1).

However, the authorising officer responsible may decide that the evaluation committee is to evaluate and rank the tenders on the basis of the award criteria only and that the exclusion and selection criteria are to be evaluated by other appropriate means guaranteeing the absence of conflicts of interests.

2 The evaluation committee shall be made up of at least three persons representing at least two organisational entities of the institutions or bodies referred to in Article 208 of the Financial Regulation with no hierarchical link between them, at least one of which does not come under the authorising officer responsible. The authorising officer responsible shall ensure that these persons satisfy the obligations laid down in Article 57 of the Financial Regulation.

In the representations and local units referred to in Article 72 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.

The evaluation committee may be composed of the same members as the committee opening the tenders.

Outside experts may assist the committee by decision of the authorising officer responsible. The authorising officer responsible shall ensure that these experts satisfy the obligations laid down in Article 57 of the Financial Regulation.

In the case of a procurement procedure launched on an interinstitutional basis, the evaluation committee shall be appointed by the responsible authorising officer from the institution responsible for the procurement procedure. The composition of the evaluation committee shall reflect, in so far as possible, the interinstitutional character of the procurement procedure.

3 Requests to participate and tenders which do not satisfy all the essential requirements set out in the tender documents shall be eliminated.

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.

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

4 In the case of abnormally low tenders as referred to in Article 151, the evaluation committee shall request any relevant information concerning the composition of the tender.

Article 159

Results of the evaluation(Article 112 of the Financial Regulation)

1 A written record of the evaluation and ranking of requests to participate and tenders declared to satisfy the requirements shall be drawn up and dated.

The written record shall be signed by all the members of the evaluation committee. That record may be signed in an electronic system providing sufficient identification of the signatory.

If the evaluation committee was not given responsibility to verify the tenders against the exclusion and selection criteria, the written record shall also be signed by the persons who were given that responsibility by the authorising officer responsible. The written record shall be kept for future reference.

2 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;
- b the names of the candidates or tenderers rejected and the reasons for their rejection;
- c the names of the candidates or tenderers to be examined and the reasons for their selection;
- d the reasons for the rejection of tenders found to be abnormally low;
- e the names of the candidates or contractor proposed and the reasons for that choice and, if known, the proportion of the contract or the framework contract which the contractor intends to subcontract to third parties.

3 The contracting authority shall then take its decision giving at least the following:

- a the name and address of the contracting authority, the subject and value of the contract, or the subject and maximum value of the framework contract or the dynamic purchasing system;
- b the names of the candidates or tenderers rejected and the reasons for their rejection;
- c the names of the candidates or tenderers to be examined and the reasons for their selection;
- d the reasons for the rejection of tenders found to be abnormally low;
- e the names of the candidates or contractor selected and the reasons for that choice by reference to the selection and award criteria announced in advance and, if known, the proportion of the contract or the framework contract which the contractor intends to subcontract to third parties;
- f in the case of negotiated procedures and competitive dialogue, the circumstances referred to in Articles 132, 134, 135, 266, 268, 270 and 271 which justify their use;

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- g where appropriate, the reasons why the contracting authority has decided not to award a contract.

In the case of a procurement procedure launched on an interinstitutional basis, the decision referred to in the first subparagraph shall be taken by the contracting authority responsible for the procurement procedure.

Article 160

Contacts between contracting authorities and tenderers(Article 112 of the Financial Regulation)

- 1 Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.
- 2 Before the closing date for the submission of tenders, in respect of the additional documents and information referred to in Article 153, the contracting authority may:
 - a at the instance of tenderers, communicate additional information solely for the purpose of clarifying the nature of the contract, such information to be communicated on the same date to all tenderers who have asked for the specifications;
 - b at its own instance, if it discovers an error, a lack of precision, an omission or any other type of clerical defect in the text of the contract notice, invitation to tender or specifications, inform the persons concerned on the same date and in a manner identical with that applicable in respect of the original invitation to tender.
- 3 If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.
- 4 In every case where contact has been made, and in the duly justified cases where contact has not been made as referred to in Article 96 of the Financial Regulation, a record shall be kept in the procurement file.

Article 161

Information for candidates and tenderers(Articles 113, 114 and 118 of the Financial Regulation)

- 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.
- 2 The contracting authority shall, within not more than 15 calendar days from the date on which a written request is received, communicate the information provided for in Article 113(2) of the Financial Regulation.
- 3 In the case of contracts awarded by the Union institutions on their own account, with a value equal to or more than the thresholds referred to in Article 170(1) and which are not excluded from the scope of Directive 2004/18/EC, the contracting authority shall inform all

unsuccessful tenderers or candidates, simultaneously and individually, by electronic means, that their application or tender has not been accepted at either of the following stages:

- a shortly after decisions have been taken on the basis of exclusion and selection criteria and before the award decision, in procurement procedures organised in two separate stages;
- b as regards the award decisions and decisions to reject offers, as soon as possible after the award decision and within the following week at the latest.

In each case, the contracting authority shall indicate the reasons why the tender or application has not been accepted and the available legal remedies.

Unsuccessful tenderers or candidates may request additional information about the reasons for their rejection in writing by mail, fax or email, and all selected tenderers whose tenders are not eliminated 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 113(2) of the Financial Regulation. The contracting authority shall reply within no more than 15 calendar days from receipt of the request.

Article 162

Signature of the contract(Articles 113 and 118 of the Financial Regulation)

Performance of the contract may not start before the contract is signed.

Section 4

Guarantees and corrective action

Article 163

Guarantees(Article 115 of the Financial Regulation)

1 Where contractors are required to lodge a guarantee in advance, it must be for an amount and a period that are sufficient for it to be activated.

2 The guarantee shall be supplied by a bank or an authorised financial institution. It may be replaced by a joint and several guarantee by a third party, after acceptance by the contracting authority.

The guarantee shall be denominated in euro.

It shall have the effect of making the bank or financial institution or the third party stand as irrevocable collateral security, or first-call guarantor of the contractor's obligations.

Article 164

Performance guarantee(Article 115 of the Financial Regulation)

1 In order to ensure that the works, supplies or services have been fully delivered and when final acceptance according to the terms of the contract cannot be given upon final payment,

the authorising officer may demand a performance guarantee on a case-by-case basis and subject to a preliminary risk analysis.

2 A guarantee corresponding to 10 % of the total value of the contract may be constituted by deductions from payments as and when they are made.

It may be replaced by an amount withheld from the final payment in order to constitute a guarantee until final acceptance of the services, supplies or works. The amount shall be determined by the authorising officer and shall be proportionate to the risks identified in relation to the performance of the contract, taking into account its subject matter, as well as the usual commercial terms applicable to the sector.

Conditions for such a guarantee shall be announced in the tender documents.

3 After final acceptance of the works, services or supplies, guarantees shall be released in accordance with the terms of the contract.

Article 165

Guarantee for pre-financing(Article 115 of the Financial Regulation)

1 Once the contracting authority has established the need for a pre-financing, it shall assess the risks associated with pre-financing payments, before launching the procurement procedure, taking into account in particular the following criteria:

- a the estimated value of the contract;
- b its subject matter;
- c its duration and pace;
- d the structure of the market.

2 A guarantee shall be required in return for the payment of pre-financing in the case referred to in the second subparagraph of Article 146(6), or when the authorising officer decides to do so pursuant to paragraph 1 of this Article.

No guarantee shall be required for low value contracts as referred to in Article 137(1).

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

Article 166

Suspension in the event of errors or irregularities(Article 116 of the Financial Regulation)

1 Contracts may be suspended under Article 116 of the Financial Regulation in order to verify whether presumed substantial errors or irregularities or fraud have actually occurred. If they are not confirmed, performance of the contract shall resume as soon as possible.

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

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- (1) OJ L 340, 16.12.2002, p. 1.
- (2) OJ C 316, 27.11.1995, p. 48.
- (3) OJ C 195, 25.6.1997, p. 1.
- (4) OJ L 300, 11.11.2008, p. 42.
- (5) OJ L 309, 25.11.2005, p. 15.
- (6) OJ L 164, 22.6.2002, p. 3.
- (7) OJ L 281, 23.11.1995, p. 31.
- (8) OJ L 342, 22.12.2009, p. 1.