



ESA/REG/001, rev. 5
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REGULATIONS OF THE EUROPEAN SPACE AGENCY

ESA Procurement Regulations and related Implementing Instructions

The purpose of the attached Procurement Regulations and their Annexes (implementing instructions) is to regulate the procurement for the execution of the European Space Agency (ESA) activities and programmes, in accordance with the ESA industrial policy objectives set out in Article VII of its Convention and Annex V thereto.

In accordance with Article 59 of these Procurement Regulations, the said Regulations may be amended by the ESA Council on the recommendation of the Industrial Policy Committee and of the Administrative and Finance Committee.

The present revision of the Procurement Regulations (ESA/REG/001, rev.5) enters into force on 12th July 2019, as per its Article 60, and includes the modifications to ESA Procurement Regulations ESA/REG011, rev.4 adopted by ESA Council on 14th June 2019 at its 282th meeting (ESA/C(2019)54) and supersedes ESA/REG/001, rev.4 and its Annexes.

The present document ESA/REG/001, rev.5 contains the following changes :

- Procurement Regulations: articles 2, 3, 6, 7, 10 , 13, 14, 16, 18, 19, 22, 23, 24, 25, 26, 28, 29, 30, 32, 34, 35, 36, 37, 38, 40, 42, 43, 45, 46, 47, 49, 50, 53, 54, 55, 56, 57 and 60 are modified;
- Annex I to the ESA Procurement Regulations: article 4 is deleted;
- Annex V to the ESA Procurement Regulations: articles 1, 2, 3, 4, 5, 6, 7 and 8 together with Rules 1, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of Annex I of the said Annex IV are modified.

The ESA Council authorised public release of these Regulations and related Implementing Instructions, by approving Article 4 of these Procurement Regulations.

**EUROPEAN SPACE AGENCY
PROCUREMENT REGULATIONS
(ESA/REG/001, Rev.5)**

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GLOSSARY

PREAMBLE

The Council,

Recognizing that the integrity and predictability of the European Space Agency's procurement system is core to the efficient and effective management of public resources put at the Agency's disposal by the Member States, the Associate Member States and the Cooperating States and the performance of their respective industries;

Recalling the importance of carrying out procurements in a transparent, impartial and non-discriminatory manner, and of avoiding conflicts of interest;

Recognizing the importance of using and encouraging the use of electronic means for procurement;

AGREES that the placing of contracts for the execution of the Agency's activities and programmes shall be made in accordance with the rules contained in this document.

PART I: GENERAL PROVISIONS AND PRINCIPLES

ARTICLE 1 - ORGANS

1. The competent organs in contract and tendering matters of the European Space Agency (hereinafter referred to as "the Agency") are:
 - a) the **Council** referred to in Article XI of the Convention for the Establishment of a European Space Agency (hereinafter referred to as "the Convention");
 - b) the **Industrial Policy Committee** established pursuant to Article XI.8(b) of the Convention and carrying out its activities according to its Terms of Reference (ESA/C/CLX/Res.1 (Final) attached to ESA/C(2002)125), as may be amended from time to time;
 - c) the **Administrative and Finance Committee** established pursuant to Article XI.8(b) of the Convention and carrying out its activities according to its Terms of Reference (ESA/C/CLXVI/Res.2(Final) attached to ESA/C(2003)96), as may be amended from time to time;
 - d) the **Director General** referred to in Article XII of the Convention, assisted by the staff of the Agency acting in accordance with the powers delegated to them by the Director General;
 - e) the **Audit Commission** carrying out its activities pursuant to Article VI of Annex II to the Convention.
2. In order to guarantee the proper execution of procurements in a transparent and impartial manner and to avoid conflict of interest with regard to third parties, in particular economic operators and with the initiating services within the Agency, the Director General shall take all the necessary measures to ensure the independence of the Procurement Department and its staff as regards the performance of the functions which, by virtue of their appointment, are assigned to them under these Regulations and implementing instructions.

ARTICLE 2 - DEFINITIONS

For the application of these Regulations, the following definitions are used:

Call for proposal	A procedure, limited or not in time, for inviting economic operators to submit tenders at their own initiative without responding to a specific Invitation To Tender issued by the Agency.
Competitive dialogue	The first stage of a specific two-stage tendering procedure where the Agency prequalifies and then invites short listed economic operators to participate in a dialogue process during which any aspects of the procurement may be discussed and solution developed and where at the end of which said economic operators are invited to participate in the second stage by means of restricted competitive tendering.
Contract	An agreement established in writing, the subject of which is the delivery of supplies, the rendering of services or any activities carried out to or for the Agency in exchange for a price or another consideration, including any amendment to such agreement (Change Notice, Rider).
Contractor	A Tenderer who has entered into a contract with by the Agency.
Contract file	The minimum set of information required under these Regulations on any given individual procurement and to be maintained by the Procurement Department in whatever format.
Contract proposal	A submission for approval to place a contract with a recommended Tenderer or an amendment with a contractor.
General Procurement	A procurement, the subject of which is not directly the delivery of supplies or the rendering of services for the Agency's research, experiment, study or development activities and/or infrastructures built for mission's operations .
Potential Bidder	An economic operator who has registered with the Agency.
Procurement Proposal	A submission for approval to issue an Invitation to Tender.
Subcontractor	An economic operator who is under contract to a contractor of the Agency to provide supplies or services in support of a contract placed by the Agency.
Tenderer ¹	An economic operator who has submitted a tender (This excludes economic operator who shall provide supplies or service in support to the Tenderer in the frame of a contract placed by the Agency).

¹ In the interest of mere simplification the term Tenderer shall cover equally the concepts of contractor, potential bidder and Tenderer

Tendering Body	A public body (including intergovernmental organisations) acting as potential contractor.
Tender Evaluation Board	A board appointed by the Director General to review the content of an Invitation to Tender package prior to its publication and to evaluate admitted tenders in response to the said Invitation to Tender.
Tender Opening Board	A board appointed by the Director General to decide on the admissibility of tenders received.
Tender process	The part of the procurement process up to and including the award of a contract by the Agency.
Time Periods and their Calculation	<p>When a time period is set in these Regulations and their Annexes to be “within” a defined period of years, months, working days or calendar days, the day after the starting date shall be counted as the first date in the calculation of the end date (e.g if a start date is the 1st June then this day counts as “day 0” and the 2 June counts as “day 1” in the calculation of the end date).</p> <p>When the calculated end date of a time period is a Saturday, Sunday or a bank holiday in the country in which a performance is required, the next working day after shall be the last date of the time period.”</p>

ARTICLE 3 - APPLICABILITY

1. These Regulations govern the tender process for the placing of all contracts with the following exceptions:
 - a) Purchase orders unless otherwise decided by the Head of the Procurement Department; and,
 - b) Cases set under paragraph 2 and 3 below.
2. Articles 6.5, , 7.1, 10.7, 13 f), 18.1.a), 19.1, 21,24.1.p),27 and 43 of these Regulations do not apply to:
 - a) contracts for services usually performed by local economic operators, including building and maintenance of infrastructure, which have no industrial policy implications;
 - b) general procurement contracts;
 - c) contracts for services for which a public body holds a monopoly;
3. Articles 21 and 43 of these Regulations do not apply to:
 - a) the implementation of arrangements by which the Agency delivers supplies or renders services to third parties including public bodies when such arrangements are not the result of an international agreement; and
 - b) the implementation of international agreements entered into by the Agency with public bodies (including intergovernmental organisations) that are fully funding the activities to be procured by the Agency.
4. These Regulations do not apply to Agency staff contracts.
5. With the exception of their Article 19.3, these Regulations shall not apply to:
 - a) tendering procedures initiated by the Agency prior to the entry into force of these revised Regulations as established under Article 60 of said Regulations; and
 - b) tendering procedures initiated or to be initiated by the Agency in the execution of international agreements entered into by the Agency with public bodies (including intergovernmental organisations) prior to the entry into force of these revised Regulations unless otherwise agreed in writing by the Agency with said bodies.

ARTICLE 4 - PUBLIC ACCESS TO PROCUREMENT REGULATIONS

1. These Regulations and any Implementing Instructions issued by the Director General for their execution shall, pursuant to Article 9 of these Regulations, be published in the Agency's electronic medium dedicated to procurement and shall remain readily accessible to the public.
2. The Agency shall, on request, provide an explanation of these Regulations and any Implementing Instructions to any Tenderer.
3. These Regulations and Implementing Instructions shall be kept up to date. Any modifications shall promptly be published and notified in the Agency's electronic medium dedicated to procurement.

ARTICLE 5 - USE OF ELECTRONIC TOOLS

1. Where the Agency publishes its Invitations To Tender or authorises submission of tenders by electronic means, the tools used and their technical characteristics shall be non-discriminatory in nature, generally available and interoperable with the information and communication technology products in general use.

The information relating to the specifications required for presentation of tenders including encryption, shall be made available to the Tenderers free of charge.

2. Devices for the electronic receipt of tenders, must at least guarantee, through technical means and appropriate procedures, compliance with the following requirements:
 - a) electronic signatures/identifiers relating to tenders shall be attributed by the Agency;
 - b) the exact time and date of the receipt of tenders can be determined precisely;
 - c) reasonably ensure that, before the time limits laid down, no one can have access to data transmitted under these requirements;
 - d) if that access prohibition referred to in sub-paragraph c) 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 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 the requirements set under this paragraph must remain accessible only to persons authorised to acquaint themselves therewith;
 - i) data received and opened in accordance with the requirements set under this paragraph must remain readily accessible for a minimum of 12 months or until the time for review foreseen under Part VI of these Regulations has elapsed, whatever the later.

3. The Agency may provide any training required and remote support for Tenderers to be acquainted with the utilisation of the electronic tools.

Upon written demand training shall be given once per Tenderer, it being the responsibility of the Tenderer to maintain this knowledge internally.

ARTICLE 6 - RECORDING OF THE PROCESS

1. The Agency shall maintain a record of the procurement proceedings followed for each individual procurement. Such record shall be kept in the contract file and shall contain, as a minimum, the following information:
 - a) a brief description of the subject of the procurement;
 - b) the tender procedure followed and for restricted or non-competitive tender, the basis for such tender procedure;
 - c) any requests for clarification of the Invitation to Tender documents, the responses thereto, as well as any modification of those documents;
 - d) the names of Tenderers that submitted tenders in response to the Invitation to Tender and the price and, with the exception of general procurement contracts, geographical distribution of each tender;
 - e) the tender evaluation report comprising as a minimum:
 - i. the evaluation and ranking of tenders, including the quoted price(s) and application of any weighting factors and resulting marks;
 - ii. the name of the Tenderer recommended for contract award together with its quoted price;
 - f) the record of any consultation and/or negotiation held with Tenderers in the course of the proceedings prior to the award and placing of the contract;
 - g) if the proceedings did not result in a contract, a statement to that effect and of the grounds therefore;
 - h) for each tender rejected a statement to that effect including the information required under Article 45 of these Regulations;
 - i) any submission(s) made to IPC or AFC in application of these Regulations;
 - j) a copy of any resulting contract(s)
2. The statement referred to under paragraph 1.h) shall, on written request and following the official notification of the rejection by the Agency, be made available in writing to the Tenderer whose tender has been rejected.
3. In the written notification issued by the Agency of the outcome of the procurement proceedings and foreseen under Article 45 of these Regulations, the portion of records referred to in paragraph 1.e) pertaining to an individual tender shall be made available to the Tenderer.
4. Disclosure of the information referred to under paragraph 1. may be requested at any stage of a procurement by the Agency's Industrial Ombudsman and the Procurement Review Board in the frame of the Review Procedure foreseen under Part VI of the present Regulations . However, except when ordered to do so by the Agency's Industrial Ombudsman and/or the Agency's Procurement Review Board, and subject to the conditions of such an order, the Agency shall not disclose:

- a) information if its disclosure would prejudice legitimate commercial interests of the parties or would inhibit fair competition;
 - b) information relating to the examination, evaluation and comparison of tenders and Tenderers other than the tender evaluation report referred to in paragraph 1. e); or
 - c) information which is covered by the Agency's Security Regulations.
5. In application of Article 7.2 of these Regulations any delegation of a Member State, Associate Member State or Cooperating State may, in a specific case, ask for a summary of the tender evaluation report referred to in paragraph 1.e) and which solely concerns a Tenderer considered to belong to that State.
6. The Agency shall not be liable to Tenderers for damages owing:
- a) solely to a failure to maintain a record of the procurement proceedings in accordance with the present article; or
 - b) to disclosure by a recipient of the information provided pursuant to paragraphs 4 and 5.

ARTICLE 7 - REPORTING

1. The Director General shall maintain a record of numbers, values and categories of contracts awarded in each Member State, Associate Member State, Cooperating State and in other States.

To that effect the Director General shall submit to the Industrial Policy Committee on a quarterly basis:

- a) a list of contracts awarded during the previous quarter ; and
 - b) a report on the state of the geographical distribution of contracts at the end of the previous quarter.
2. Any delegation of a Member State, Associate Member State or Cooperating State may receive upon request in a specific case a written or oral explanation of the reasons for actions taken under these Regulations. The Director General shall also furnish such information to the Industrial Policy Committee.
3. The Agency shall not be liable to Tenderers for damages owing to the above mentioned disclosures by their recipients.

**ARTICLE 8 - SUBMISSION OF PROCUREMENT MATTERS TO THE
INDUSTRIAL POLICY COMMITTEE AND
ADMINISTRATIVE AND FINANCE COMMITTEE**

1. The Director General may submit for the decision or recommendation of the Industrial Policy Committee or of the Administrative and Finance Committee questions with procurement implications concerning the application of these Regulations and corresponding contracts.
2. The submission referred to in paragraph 1. shall be made as early as possible after the question has arisen.

ARTICLE 9 - IMPLEMENTING INSTRUCTIONS

1. The Director General shall, where required and as necessary, issue instructions for the implementation of these Regulations. Such instructions shall be notified to the Industrial Policy Committee.
2. The instructions referred to in paragraph 1. shall always be taken in compliance with the principles set forth under Article 10 of these Regulations.

ARTICLE 10 - PRINCIPLES

1. Provisions in these Regulations and in any instructions concerning the placing of contracts shall always be interpreted so as to ensure:
 - a) transparency and fair and equitable treatment of all economic operators;
 - b) that the participation of a Tendering Body does not cause any distortion of competition in relation to private economic operators;
 - c) the most economic and effective employment of the Agency's resources;
 - d) the implementation of the defined industrial policy and with the exception of general procurement contracts to guarantee a distribution of work among Member States which is consistent with the prescriptions of Article VII and Annex V of the Convention.
2. No contract action shall be taken until approval has been obtained in accordance with the applicable Rules and Regulations of the Agency.
3. No contract actions shall be taken for studies of future projects, preparatory activities and the early programme phases until such time it is considered that these actions are sufficiently funded such as to ensure an orderly development and completion of the programme in the framework of an end to end procurement process.
4. Resulting contracts shall be subject to the Agency's General Clauses and Conditions except in so far as such clauses and conditions are explicitly waived, amended or replaced by special clauses and conditions introduced in the contract or in annexes forming an integral part thereof.
5. The Contract price shall be expressed in Euro.
6. At the discretion of the Director General, industrial cost and rates audits may be carried out at any time prior or subsequent to the award of a contract by the Agency. The conditions under which these audits shall be carried out, exceptions, the frequency and validity period during which the rates will be binding, shall be established by means of an implementing instruction.
7. At the discretion of the Director General, audits may be carried out at any time to check whether an economic operator complies with the requirements set under Article II.3 of Annex V to the Agency's Convention. The conditions under which these audits shall be carried out shall be established by means of an implementing instruction.

ARTICLE 11- GRANTING OF SPECIAL RIGHTS IN THE FRAME OF AGREEMENTS

1. Where in the frame of an agreement which is not a contract as defined under Article 2 of these Regulations, the Agency grants to a Party to the agreement the right to carry out procurements on its behalf through the establishment of contracts, the agreement by which that right is granted shall provide that, in respect of the tendering process followed and the resulting contract which the Party awards as part of the activities covered by the agreement, the Party must comply with the principles set forth under Article 10.1 of these Regulations.
2. In order to ensure the execution of such obligations by the Party concerned, the Agency shall establish a specific set of procurement requirements to be made applicable to the agreement. Such requirements may include “Best Practices” foreseen under Article 17.2 of these Regulations.

In all cases such requirements shall not be subject to the right of review provided for under Part VI of these Regulations.

ARTICLE 12 - AUDITING

The implementation of these Regulations, and any internal instructions established by the Director General to ensure their proper execution and the subsequent placing of contracts, shall be subject to auditing by the Audit Commission in accordance with the Convention.

PART II: METHODS OF PROCUREMENT

ARTICLE 13 - COMPETITIVE TENDERING

1. Open competitive tender shall be the normal procedure for the placing of contracts.
2. Restricted competitive tender may be applied:
 - a) for supplies or services the special nature of which limits the capacity to procure them from a limited number of economic operators;
 - b) for general procurements which have no industrial policy implications where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the supplies or services to be procured;
 - c) for supplies or services procured by the Agency in the frame of international agreements entered into by the Agency with public bodies (including intergovernmental organisations), if expressly foreseen in the said agreements;
 - d) where the supplies or services are procured by the Agency by means of a Framework Agreement as defined under Article 15.3 of these Regulations;
 - e) for supplies or services classified secret or whose performance must be accompanied by special security measures in accordance with the Agency's regulations in force or when the protection of the essential interest of the Agency so requires;
 - f) if the Industrial Policy Committee has given a directive or a guideline to that effect to the Director General, in particular in application of Article VII of the Convention and Articles IV.5, IV.6 , IV.7 and V of Annex V to the Convention;
 - g) for the second stage of a two-stage tendering procedure excluding that foreseen under Article 16.1.c) of these Regulations.
3. Wherever possible for restricted competitive tender, at least three economic operators shall be invited to tender.
4. The reason for applying restricted competitive tender and for the choice of the economic operators shall be recorded in the contracts file.

ARTICLE 14 - NON-COMPETITIVE TENDERING

1. Competitive tendering may be waived in one or more of the following cases:
 - a) if only one source for the supplies or services exists;
 - b) in a case of extreme urgency resulting from compelling operational needs;
 - c) where for scientific, technical or economic reasons, contracts for additional or supplementary supplies or services cannot be separated from those of a previous contract;
 - d) if the supplies or services required are the subject of intellectual property rights and can, as a consequence, only be procured from one particular source;
 - e) where the supplies or services are procured by the Agency by means of Framework Agreement as defined under Article 15.4 of these Regulations;
 - f) if the expenditure involved does not exceed 100 000 Euro;
 - g) if the Industrial Policy Committee has given a directive or a guideline to that effect to the Director General.
2. Where, following a competitive tender, only one tender is admitted, the Invitation to Tender shall be re-issued unless it is considered that such reissuing would be unlikely to obtain better results or would not be feasible due to extreme urgency resulting from compelling operational needs, in such case competitive tendering may be waived.
3. Where the supplies or services are procured by the Agency in the frame of international agreements entered into by the Agency with public bodies (including intergovernmental organisations), competitive tendering may be waived if expressly foreseen in the said agreements.
4. Where the supplies or services are procured in the frame of an Agency programme which foresees “calls for proposals” and/or co-funding as the means of fulfilling its objectives, competitive tendering may be waived.
5. In all cases the reason for waiving competitive tendering shall be recorded in the contracts file.
6. Articles 35, 41 and 42 of these Regulations shall not apply when competitive tendering is waived.

ARTICLE 15 - FRAMEWORK AGREEMENTS

1. A Framework Agreement is a single frame contract, or the aggregation of several frame contracts, the Agency has entered into with one or several contractors in order to ensure the delivery of supplies or rendering of services for a given period and/or within a given financial limit of liability and this following the methods foreseen under Articles 13 or 14 of these Regulations.
2. Where for any given Agency activity, frame contracts between the Agency and several contractors are to be entered into, such contracts shall be concluded in identical terms.
3. Where frame contracts between the Agency and several contractors have been entered into, a simplified restricted competitive tender procedure shall be carried out between all of the contractors for each of the supplies or services to be procured under the Framework Agreement.

This simplified procedure shall be established by means of an implementing instruction.

4. Where a frame contract between the Agency and a single contractor has been entered into, competitive tendering shall be waived for each of the supplies or services to be procured under the frame contract.
5. Where frame contracts between the Agency and several contractors have been entered into and where, during the given period of the Framework Agreement, one or several contractors:
 - a) have declined on three consecutive accounts to submit a tender in response to the request issued by the Agency; or
 - b) have been acquired by and/or merged with other contractors part of the Framework Agreement the effect of which would impair competition, the economics of the Framework Agreement or result in only one frame contract remaining;

the Agency at its discretion may either terminate the individual frame contracts, terminate the framework agreement and/or invite other economic operators to participate in the restricted procedure foreseen under Article 15.3 of these Regulations.

6. Unless required for at the time of the procurement proposal, the duration of a Framework Agreement shall be limited to a maximum of five years.
7. Where, for operational reasons the duration of a Framework Agreement needs to be extended beyond the original authorised duration, this extension shall be subject to a contract proposal.

ARTICLE 16 - TWO - STAGE TENDERING

1. In order to obtain the most satisfactory solution to its procurement needs, the Agency may engage in procurement by means of two-stage tendering:
 - a) when it considers that it is not feasible to formulate detailed specifications for the supplies or, in the case of services, to identify their characteristics and where necessary inputs from economic operators are needed to detail the specifications for the supplies or, in the case of services, to identify their characteristics;
 - b) when it engages in pre-qualification proceedings with a view to identify economic operators that are qualified;
 - c) in the case of procurement actions superior or equal to 20 000 000 Euro where no admitted tender has received an overall weighted mark superior or equal to 60 as a result of the evaluation carried out under Article 39 of these Regulations but one or more admitted tenders have received an overall weighted mark comprised between 40 and 59; and
 - d) in the case of procurement actions where the IPC has approved a two-stage tendering approach in accordance with Article 21 of these Regulations.
2. The provisions of Article 13 of these Regulations shall apply to the two-stage tendering process.
3. The first stage of the tendering may take the form of either:
 - a) a call for expression of interest; or
 - b) an Invitation to Tender;

where the Agency shall set out its needs and requirements in its solicitation documents.

Unless otherwise specified, the price shall not be required at this first stage.

In both cases, the criteria for allowing the economic operators to participate in the second stage of the process shall be objective and non-discriminatory and clearly spelled out in the solicitation documents.

Where competitive dialogue with the Tenderers is foreseen during this first stage this will be clearly spelled out in the solicitation documents.

The Agency shall ensure equality of treatment among all Tenderers and confidentiality of the solutions proposed or other information communicated by the participants in the competitive dialogue unless they expressly consent to its disclosure.

If provision is made for this in the call for expression of interest or the Invitation to Tender, the Agency may provide for this procedure to take place in successive steps in order to reduce the number of solutions to be discussed during the first stage. This selection will be achieved through the application of the selection criteria established in the call for expression of interest or the Invitation to Tender.

4. In the second stage of the tendering, the Agency shall invite those economic operators who have been retained to submit a tender in response to a restricted competition based on a new single set of specifications except in the case foreseen under paragraph 1.c) above where such modifications are not authorised.

In formulating those specifications, the Agency may not modify the subject matter of the procurement but may delete or modify:

- a) any aspect, originally set forth in the solicitation documents for the first stage, of the technical, quality or performance characteristics of the supplies or services to be procured and add any new characteristics that conform to the requirements of the present Regulations; and,
- b) any evaluation criterion originally set forth in the solicitation documents for the first stage for examining and evaluating tenders and for ascertaining the successful tender, and may add any new criterion that conforms to the requirements of the present Regulations, only to the extent that the deletion, modification or addition is required as a result of changes made in the technical, quality or performance characteristics of the subject matter of the procurement.

If the Agency rather than issuing a new set of documents for the second stage uses the solicitation documents used for the first stage, any such deletion, modification or addition shall be clearly identified and communicated to retained economic operators in the invitation to submit final tenders.

The issuing, receipt and evaluation procedure for the second stage shall be done in accordance with the applicable provisions of these Regulations.

5. The modalities for a two-stage tendering shall be further detailed in a dedicated procedure for the relevant procurement action to be attached to the solicitation documents to be issued by the Agency. Such procedure shall in all cases respects the principles set under Article 10.1 of these Regulations.

ARTICLE 17 - BEST PRACTICES

1. In order to ensure that the principle of transparency and fair and equitable treatment of all economic operators established under Article 10.1 a) of these Regulations are implemented throughout its procurements, the Agency shall have the right to contractually impose on its Prime Contractors the tendering requirements they have to follow in the selection of their industrial consortium and the contractual replication by the Prime Contractors of such requirements on their sub-contractors.

To that effect, the Director General shall establish a specific set of procurement requirements to be made applicable to all such contracts between the Agency and Prime Contractors.

Such requirements shall be called “Best Practices for the Selection of subcontractors by Prime Contractors in the Frame of ESA’s Procurements” and shall be approved by the Industrial Policy Committee.

2. Where the Agency sets such contractual obligations on the Prime Contractor, the tendering process to be carried out by the Prime Contractor (or when applicable by its sub-contractors or the Agency in application of Article 22.1.b.ii of these Regulations) and the resulting contracts which the Prime Contractor (or when applicable its sub- contractors) awards are not subject to the right of review provided for under Part VI of these Regulations.

PART III INITIATION OF TENDER

ARTICLE 18 - QUALIFICATION, EXCLUSION, SUSPENSION AND REGISTRATION OF ECONOMIC OPERATORS

1. All economic operators who are established in a Member States, Associate Member States or Cooperating States of the Agency qualify to participate in a tendering procedure of the Agency provided they both:
 - a) satisfy the requirements set under Article II.3 of Annex V to the Convention, and
 - b) do not fall under one of the exclusions foreseen under paragraphs 2 and 12 below.
2. An economic operators is excluded from any participation in a tendering procedure of the Agency whatever its subject including if it were to act as subcontractor where:
 - a) it does not possess the necessary professional and technical qualifications, professional and technical competences, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, and the personnel, to perform a contract;
 - b) it does not have the legal capacity to enter into the procurement contract;
 - c) it is bankrupt, subject to insolvency or winding up procedures, is having its assets administered by a liquidator or a court, has entered into an arrangement with creditors, has suspended business activities, is the subject of proceedings concerning those matters, or is in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
 - d) it or persons having powers of representation, decision making or control over it have been convicted of an offence concerning their professional conduct either by a judgment which has the force of *res judicata* or an administrative decision including that of an international organisation;
 - e) it has been established by any means which the Agency can justify that it or persons having powers of representation, decision making or control over it have been guilty of grave professional misconduct for having violated applicable laws or regulations or ethical standards of the profession to which they belong or for having engaged in any wrongful conduct which has an impact on their professional credibility where such conduct denotes wrongful intent or gross negligence;
 - f) it is not in compliance with its obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which it is established, the countries in which the Agency is established or those of the country(ies) where the contract is to be performed;

- g) it, or persons having powers of representation, decision making or control over it have been the subject of an administrative decision including that of an international organisation or of a judgment which has the force of *res judicata* for: fraud; corruption; conduct related to a criminal organisation; money laundering; terrorist financing or terrorist related offences linked to terrorist activities respectively, or inciting aiding, abetting to commit such offences; child labour or other forms of trafficking in human beings; creating an entity in a different jurisdiction with the intent to circumvent fiscal, social or any other legal obligation in the jurisdiction of its registered office, central administration or principal place of business; or any other activity or act detrimental to the Agency's interests; and,
 - h) it is currently subject to a suspension pursuant to Article 19.3 of these Regulations.
3. The Director General shall maintain a Potential Bidders electronic registration system accessible through the public part of the Agency's electronic medium dedicated to procurement where interested economic operators—including tendering bodies—established in or designated by Member States, Associated States or Cooperating States are required to register directly and provide amongst other information a declaration and evidence of absence of situation of exclusion in relation to the cases foreseen under paragraphs 2 here above or failing that, a declaration of honour signed and dated stating that the economic operator is not in one of those cases.
- Such above registration—with the exception of that concerning the provision of the declaration of honour—is not required from economic operators—including those established in a Member States, Associate Member States or Cooperating States of the Agency—wishing to participate in a General Procurement tendering procedure of the Agency.
4. Should any registration be refused, the reasons for refusal shall be communicated for information both to the concerned economic operator and the Member State, Associate Member State or Cooperating State of the Agency to which that economic operator is considered to belong.
5. Information provided by Potential Bidders may be used for the Agency's internal purposes only and shall not be disclosed outside the Agency.
6. Potential Bidders shall update their information every twelve (12) months.
7. Where during this twelve month period the Potential Bidder finds itself in one of the situations foreseen under paragraphs 2 it shall so inform the Agency immediately in writing.
8. A Member State, Associate Member State or Cooperating State shall upon its request be provided with a copy of the list of the Potential Bidders considered to belong to that State including tendering bodies.

9. In the frame of arrangements and/or of procurements made with non-Member States, Associate States, Cooperating States or international organisations, economic operators from those States or from the Member States of an international organisation may be required to satisfy the requirements laid down under the present Article and may be granted full or partial access to the non- public part of the Agency's electronic medium dedicated to procurement.
- 10 Where a Member State, Associate Member State or Cooperating State of the Agency requires access to any of the above information, such request shall be addressed in writing and, with the exception of the information foreseen under paragraph 8, disclosure by the Agency shall not be made prior to the receipt by the Agency of the written consent of the economic operator concerned.
11. In the frame of a General Procurement, Economic Operators who are not established in a Member State, Associate Member State or Cooperating State of the Agency may only participate in a tendering procedure of the Agency if they are established in a country being party to the World Trade Organization ("WTO") Government Procurement Agreement (GPA). The Agency reserves the right to place further restrictions on participation for the protection of its essential security interests or that of its Member States as defined by the WTO Government Procurement Agreement.

The obligation of information established under paragraph 7 above shall be required at any time from Economic Operators who are not under an obligation to register in accordance with paragraph 3 above be it prior to the award or during the execution of a Contract.

12. In the frame of a General Procurement, shall be excluded from participating in a tendering procedure those Economic Operators who have supported the Agency in the establishment of the requirements forming the basis of said tendering procedure.

ARTICLE 19 - ADMINISTRATIVE SANCTIONS

1. Failure by Potential Bidders to comply with Article 18.6 of these Regulations within a period of three months following the due date for the update of the required information may result in the Potential Bidders being denied access to the non-public part of the Agency's electronic medium dedicated to procurement.
2. Failure to provide or update required information under Article 18 of these Regulations shall result in the contract not being awarded.
3. The Director General may suspend economic operators from participating in the Agency's procurements if:
 - a) they are found guilty of misrepresentation in supplying the information in relation to Article 18) of these Regulations or, when formally required, they fail to supply this information on three consecutive accounts;
 - b) it has been proven by any means which the Agency can justify that they, or persons having powers of representation, decision making or control over them are found guilty in the frame of an Agency's or any other public procurement

procedure including that of international organisations, of having or attempted to have amongst others:

- i. entered into agreement with other economic operators with the aim of distorting competition;
- ii. influenced the decision making process during the procurement procedure;
- iii. obtained sensitive information that may confer upon them undue advantages during the procurement procedure; or,
- iv. bribed a person participating in the procurement procedure.

In all cases, however, the economic operator concerned shall be given an opportunity to present his observations and where applicable the concerned Member State, Associate Member State or Cooperating State shall be informed accordingly.

4. Suspension for misrepresentation under paragraph 3 above shall further result in any contracts awarded by the Agency to an Economic Operator being terminated for fault of the Contractor and ESA shall be entitled to recover any payments made under said contracts and any direct or indirect cost incurred.
5. The duration of the suspension pursuant to paragraph 3 shall be proportionate to the seriousness of the misconduct but shall never exceed:
 - a) The duration of an exclusion set by a judgment which has the force of res judicata or an administrative decision including that of an international organisation;
 - b) Five years for the cases foreseen under Articles 18.2.g) and 19.3 of these Regulations; and
 - c) Three years for the cases foreseen under Article 18.2.d) and 18.2.e) of these Regulations.
6. Where a suspension decision may be taken on the grounds of several of the cases foreseen under Articles 18.2 of these Regulations, the duration of the suspension period shall be that of the longest allowable under these Regulations.

ARTICLE 20 - ADVANCED NOTICE

1. The Agency shall publish regularly on the Agency's electronic medium dedicated to procurement a list of Intended Invitations to Tender on a competitive basis.
2. In addition, and at the discretion of the Director General, the list may contain Intended Invitations to Tender on a non-competitive basis.
3. Potential Bidders shall be able to express their interest to the published Intended Invitation to Tender directly on the Agency's electronic medium dedicated to procurement.

ARTICLE 21 - SUBMISSIONS TO THE INDUSTRIAL POLICY COMMITTEE AND THRESHOLDS

Subject to Article 3.2 of these Regulations, the following shall apply:

1. Prior to the issue of Invitations to Tender, the Director General shall submit for the approval of the Industrial Policy Committee procurement proposals in the following cases:
 - a) General Studies exceeding 300 000 Euro;
 - b) technological Programmes exceeding 500 000 Euro per activity committed;
 - c) all other procurements exceeding 2 000 000 Euro;
 - d) all procurements which involve expenditure exceeding 200 000 Euro with an economic operator (contractor or subcontractor) of a non-Member State not participating in the programme; or
 - e) such other cases which the Industrial Policy Committee has asked to be submitted for approval.
2. The Director General shall, in addition, submit for the approval of the Industrial Policy Committee procurement proposals he considers are not adequately covered by the directives or any guidelines issued by the Industrial Policy Committee or might give rise to a conflict with those directives or guidelines.
3. In a case of extreme urgency resulting from compelling operational needs, the submission of a procurement proposal for a competitive tender as foreseen under Article 13.1 of these Regulations not exceeding 5 000 000 Euro may be dispensed with by the Director General.

However, in the case of a restricted competitive tender as foreseen under Article 13.2 of these Regulations or in the case of a non-competitive tender as foreseen under Article 14 of these Regulations, the Chairman of the Industrial Policy Committee has to approve the issue of the Invitation to Tender.

ARTICLE 22 - CONFLICT OF INTEREST

1. For the purpose of these Regulations there is a conflict of interest:

- a) where the impartial and objective exercise of the functions of an Agency staff member or any other person participating in the Tender Evaluation Board or evaluation panels referred to under Article 23 of these Regulations, is compromised for reasons involving family, emotional life, political affinity, economic interest or any other shared interest with Tenderers;
- b) where in the case of “Best Practices” as foreseen under Article 11 and Article 17 of these Regulations:
 - i. the impartial and objective exercise of the functions of an employee of a Prime contractor and/or of one of its subcontractor, an employee of a Party to an agreement or an Agency staff member or any other person participating in Tender Evaluation Boards or evaluation panels under the Best Practices referred to under Article 11 and Article 17 of these Regulations is compromised for reasons involving family, emotional life, political affinity, economic interest or any other shared interest with Tenderers; and/or
 - ii. the impartial and objective exercise of the Prime contractor and/or his subcontractor, a Party to an agreement is compromised by economic interest or any other shared interest with Tenderers. In such cases the Agency shall take all necessary measures so as to ensure that the principle of fair and equal treatment of all economic operators is maintained throughout the competition.

2. Declaration of non-interest

- a) By the time of the first meeting of the Tender Evaluation Board or evaluation panel, the persons participating in the Tender Evaluation Board or evaluation panel shall have signed off a declaration of non-interest in the outcome of the tender action, whether competitive or non-competitive;
 - b) At the time of receipt of the tenders for evaluation, the persons participating in a Tender Evaluation Board or evaluation panel shall be requested to review this declaration in the light of the tenders received and this will be recorded in the contracts file.
3. Where a person makes a declaration as to the existence of a conflict of interest, or a potential conflict of interest, the Agency’s competent authority designated in the “Tender Evaluation Manual” referred to under Article 23.10 of these Regulations shall be informed for action.
4. Any breach, omission or false statement in respect of the obligations referred to under paragraph 2 may lead to sanctions being applied by the Director General.

ARTICLE 23 - TENDER EVALUATION BOARD AND PANELS

1. A Tender Evaluation Board responsible for the preparation and evaluation of tenders shall be established in the following cases :
 - a) for each open competitive tender and restricted competitive tender as foreseen under Article 13 of these Regulations;
 - b) for each non-competitive tender when it is the subject of a submission to Industrial Policy Committee as foreseen under Article 21 of these Regulations;
 - c) for each non-competitive tender when it is not the subject of a submission to the Industrial Policy Committee as foreseen under Article 21 of these Regulations;
 - d) such other cases the Director General sees fit.
2. The Tender Evaluation Board shall be made up of :
 - a) For the cases foreseen under paragraphs 1.a),1.b) and 1.d) which have a value above 100 000 Euro:
 - i. at least two persons representing at least two initiating services of the Agency with no hierarchical link between them; and
 - ii. the Contract Officer representing the independent organisational entity responsible for the Agency's procurement policy in general and the proper execution of procurements in accordance with the Agency's Convention and pertaining regulations and who will act as joint secretary to the Board.
 - b) For the cases foreseen under paragraphs 1.a),1.b) and 1.d) which have a value below 100 000 Euro and for all the cases foreseen under paragraph 1.c) :
 - i. at least one person representing an initiating service of the Agency; and
 - ii. the Contract Officer representing the independent organisational entity responsible for the Agency's procurement policy in general and the proper execution of procurements in accordance with the Agency's Convention and pertaining regulations and who will act as secretary to the Board.
3. Experts including some external to the Agency may assist the Tender Evaluation Board.
4. Observers may be invited to attend meetings of the Tender Evaluation Board.

5. In the frame of international agreements entered into by the Agency with public bodies (including international organisations), staff of the public bodies may be nominated members, experts or observers if expressly foreseen in the said agreements.
6. Except as provided in paragraph 5, appointment of members, experts or observers from outside the Agency shall be agreed on a case by case basis.
7. Participants to a Tender Evaluation Board shall have the duty not to disclose any information concerning the proceedings of the Board and the evaluation to persons not involved in the evaluation and to keep all evaluation documents, including tenders, safe from disclosure.

Any breach of the above duties and obligations may lead to sanctions being applied by the Director General.

8. by the time of the first meeting of the Board, to be held prior to the issuing of the Invitation to Tender, each participant shall have signed off :
 - a) a declaration of secrecy; and
 - b) the declaration of non-interest in the outcome of the tender action laid down in Article 22 of these Regulations.
9. Where the complexity of the subject matter of the procurement so warrants, the Tender Evaluation Board may, prior to receipts of tenders, appoint evaluation panels to advise it on specific aspects of the tenders.

Appointment to the evaluation panels and obligations of its members shall be similar to those laid down under Article 22 and Article 23 of these Regulations.
10. The procedure concerning the composition and proceedings of the Tender Evaluation Board and evaluation panels shall be established by the Director General by means of an implementing instruction referred to as the "Tender Evaluation Manual".

PART IV TENDERING PROCEEDINGS

ARTICLE 24 - CONTENT OF THE INVITATION TO TENDER

1. Invitations To Tender shall contain as a minimum the following information
 - a) the object of the intended contract;
 - b) a specification of the requirements in all necessary details;
 - c) the type of price and the currency in which the tender is to be expressed ;
 - d) the time limits for the execution of the intended contract;
 - e) the closing date and time and place for the receipt of tenders;
 - f) the method of submission of tenders where appropriate;
 - g) the language in which the tenders are to be prepared;
 - h) instructions for the submission of the information required under Article 18;
 - i) instruction for submission of information on any proposed subcontractors;
 - j) a statement as to the use of two stage tendering and competitive dialogue where appropriate;
 - k) a statement as to the use of Best Practices where appropriate;
 - l) a statement that tenders will be treated confidentially;
 - m) a statement of the evaluation criteria to be applied where appropriate;
 - n) a statement of special clauses and conditions applicable to the intended contract;
 - o) a statement that the Invitation To Tender does not commit the Agency in any way;
 - p) a statement of any requirements on the geographical distribution of work where appropriate;
 - q) a statement of any industrial policy requirements where appropriate;
 - r) a statement in the case of an optional programme that preference will be given to Tenderers in States participating in the relevant programme; and
 - s) a statement clearly indicating where applicable that the subject procurement is a General Procurement.
2. The above information or any other requirements necessary for the preparation of a tender in response to an Invitation To Tender shall be established where appropriate by means of an implementing instruction known as “General Conditions for Tender”.

ARTICLE 25 - EVALUATION CRITERIA, SELECTION CRITERIA AND WEIGHTING FACTORS

1.
 - a) Evaluation criteria shall be established for each Invitation to Tender where the tenderer is required to submit a full proposal.
 - b) Where, contrary to the submission of a full proposal, the Invitation to Tender only requires from economic operators the submission of a signed declaration stating their price and their unconditional acceptance of among others the contractual and technical requirements established in the Invitation to Tender, the establishment of evaluation criteria is not required.
 - c) For General Procurement, selection criteria may be established for each Invitation to Tender where the tenderer is required to submit a full proposal.
2. The Tender Evaluation Board shall be free to establish such selection and evaluation criteria as it sees fit, provided that all significant parts of the Invitation To Tender are covered and when applicable specific industrial policy measures are taken into account.
3. However, the Tender Evaluation Board shall, as far as possible, take into consideration the following:
 - a) selection and evaluation criteria shall be well defined, logically distinct and avoid duplication;
 - b) whereas foreseen under Article 23 of these Regulations the Tender Evaluation Board decides to appoint tender evaluation panels, the evaluation criteria should, as far as possible, be arranged under aspects corresponding to the field of reference of each panel; and
 - c) selection and evaluation criteria shall not create unfair advantage to one economic operator over another.
4. In the case of competitive tendering foreseen under Article 13 of these Regulations, the Tender Evaluation Board shall attribute weighting factors against each of the evaluation criteria it establishes.

The Tender Evaluation Board may further attribute weighting factors against each of the evaluation criteria it establishes for procurement actions superior or equal to 20 000 000 Euro in the case of non-competitive tendering foreseen under Article 21 of these Regulations.
5. Weighting factors shall not create unfair advantage to one economic operator over another.
6. The Invitation To Tender shall specify the weighting factors which will be applied by the Tender Evaluation Board for the evaluation.
7. Once approved, the evaluation criteria and weighting factors shall be binding for the evaluation.

ARTICLE 26 - LANGUAGES OF THE INVITATION TO TENDER

1. Open and restricted Invitations To Tender which have been the subject of a submission to the Industrial Policy Committee in accordance with Article 21 of these Regulations shall be issued normally in English and in French.
2. Invitations To Tender which have not been the subject of a submission to the Industrial Policy Committee in accordance with Article 21 of these Regulations shall be issued normally in English.

Invitations To Tender shall be made available in French at the request of any economic operator who requires it within ten calendar days following publication. Such request shall not constitute a case for the extension of the time limits established under Article 29 of these Regulations.

3. If Invitations To Tender are restricted to potential Tenderers in one country, the language of that country may be used by the Agency at its sole discretion.

ARTICLE 27 - ADDRESSEES OF THE INVITATION TO TENDER

1. For open competitive tendering foreseen under Article 13.1 of these Regulations, Invitations To Tender shall be directly accessible from the non-public part of the Agency's electronic tool dedicated to procurement to:
 - a) all Potential Bidders in the States participating in the programme to which the Invitation To Tender refers;
 - b) all Potential Bidders in some of the States participating in the programme to which the Invitation To Tender refers if the Industrial Policy Committee has given a directive or guideline to that effect to the Director General;
 - c) all Potential Bidders in States not participating in the programme to which the Invitation To Tender refers if:
 - i. the Industrial Policy Committee has given a directive or guideline to that effect to the Director General; or
 - ii. this results from the implementation of an international agreement entered into by the Agency with public bodies (including intergovernmental organisations);
 - d) identified Potential Bidders in States not participating in the programme to which the Invitation To Tender refers if:
 - i. the Industrial Policy Committee has given a directive or guideline to that effect to the Director General;
 - ii. there is no other way of satisfying requirements or where unacceptable delay or cost would result from not doing so; or
 - iii. this results from the implementation of an international agreement entered into by the Agency with public bodies (including intergovernmental organisations).

2. For restricted competitive tendering foreseen under Article 13.2 of these Regulations, and for non-competitive tendering foreseen under Article 14 of these Regulations, Invitations To Tender may be made accessible to the identified Potential Bidders from the non-public part of the Agency's electronic tool dedicated to procurement or by any other electronic means available which comply with the requirements set under Article 5 of these Regulations.
3. The Director General shall ensure that all competitive tendering Invitations To Tender shall be made directly accessible from the non-public part of the Agency's electronic tool dedicated to procurement to the concerned Member States, Associate Member States and Cooperating States.
4. Where individual economic operators from Member States, Associate Member States and Cooperating States not participating in the programme to which the Invitation To Tender refers request an Invitation To Tender issued under Article 13.1 of these Regulations, the latter may only be issued to them provided the said Invitation To Tender does not contain information which precludes its distribution outside the States participating in the programme to which the Invitation To Tender refers.

In all cases such individual economic operators to whom the Invitation To Tender is provided shall be reminded that preference will be given to economic operators from States participating in the programme to which the Invitation To Tender refers.

Any decision not to provide the Invitation To Tender to such economic operators shall not require any substantiation and in no case shall constitute the basis for a claim.

ARTICLE 28 - PUBLICATION OF INVITATION TO TENDER

1. The publication of the Invitation to Tender or of the call for expression of interest shall be made simultaneously to all Potential Bidders through the Agency's electronic tool dedicated to procurement.

In the case of General Procurement further to the above mentioned obligation the publication may be made by using any other media in order to reach the larger community of potential tenderers.

2. Access to, and downloading from, such electronic tool shall be made available free of charge.

ARTICLE 29 - TIME LIMITS FOR TENDERING PERIOD

1. Any prescribed time limit for the tendering period shall be adequate to allow for the preparation and submission of tenders before the closing date of the Invitation To Tender.
2. In determining any such time limits, the Tender Evaluation Board shall, consistent with its own reasonable needs, take into account such factors as the complexity of the intended procurement and the extent of subcontracting anticipated.
3. In the case of competitive tendering foreseen under Article 13 of these Regulations, the time limit for receipt of tenders shall in no circumstances be less than:
 - a) 42 calendar days from the date on which the Invitation To Tender is published or dispatched for procurement actions above the thresholds set in Article 21 of these Regulations or in any other provisions replacing said Article 21;
 - b) 28 calendar days for all other procurement actions provided such period would not create an unfair advantage to the benefit of one or more economic operators.
4. In the case of non-competitive tendering foreseen under Article 14 of these Regulations, the time limit shall in no circumstances be less than:
 - a) 42 calendar days from the date on which the Invitation To Tender is published for procurements above the thresholds set in Article 21 of these Regulations or in any other provisions replacing Article 21;
 - b) 7 calendar days for all other procurement.
5. The Agency may, at its discretion and at any time during the time limit for receipt of tenders foreseen in the Invitation To Tender, extend such time limit.

For the case foreseen under paragraph 3.b) above, an extension of a maximum period of up to 14 calendar days shall be granted automatically at the request of any Potential Bidder, provided such request reaches the Agency within the time limit prescribed in the Invitation To Tender for such requests.

Such extension shall be communicated simultaneously to all Potential Bidders concerned on the same date and in a manner identical with that applicable in respect of the original Invitation To Tender's publication.

**ARTICLE 30 - BRIEFING, CLARIFICATIONS AND
AMENDMENTS OF INVITATION TO TENDER**

1. If justified by its complexity, briefing meetings where the requirements of the Invitation To Tender are described and explained can be called before or shortly after the Invitation To Tender is issued.

The invitation to attend such briefing meetings and the subsequent questions submitted and answers given during these briefing meetings, shall be communicated simultaneously to all Potential Bidders concerned on the same date in a manner identical with that applicable in respect of the original or forthcoming Invitation To Tender's publication.

2. Once the Invitation To Tender is issued and before the closing date for the submission of tenders, the Agency may clarify and/or amend the Invitation To Tender either following requests from economic operators or at its own initiative.
3. Only requests submitted in writing and concerning the understanding of the Invitation To Tender's requirements will be answered.
4. The only authorised point of contact for the Agency before the closing date for the submission of tenders shall be the Contracts Officer designated in the Invitation To Tender, or in his absence any other Contracts Officer designated by the Procurement Department.
5. In all cases, such clarifications and/or amendments will:
 - a) be subject to the approval of the Tender Evaluation Board's Chairman prior to their publication;
 - b) contain both the original question and answer when applicable without identifying the source of the request;
 - c) be communicated within a reasonable time period prior to the closing date;
and
 - d) be communicated simultaneously to all Potential Bidders concerned on the same date and in a manner identical with that applicable in respect of the original Invitation To Tender 's publication.

ARTICLE 31 - SUSPENSION OF THE PROCUREMENT PROCESS

1. The Director General may at any time suspend the procurement process related to an Invitation To Tender.
2. Upon resumption of the process, due account shall be taken of the period of suspension with respect to the time limits prescribed under Articles 29 and 37 of these Regulations and of any other elements entailed by such suspension the effect of which could impair the principles of transparency and fair and equitable treatment of economic operators.
3. Potential Bidders shall be informed simultaneously of any suspension and subsequent resumption in a manner identical with that applicable in respect of the original Invitation To Tender's publication.

ARTICLE 32 - CANCELLATION OF THE INVITATION TO TENDER

1. The Director General may at any time cancel an Invitation To Tender.
2. Potential Bidders or Tenderers shall be informed simultaneously of any cancellation together with the reason therefore
3. Such cancellation by the Agency may not give rise to any claims by economic operators.

ARTICLE 33 - SUBMISSION OF TENDERS

1. The method and conditions of submission of the tenders shall be determined at the time of the issuing of the Invitation to Tender.
2. Where electronic means of communication are chosen for the submission of the tenders they shall be compliant with the requirements set under Article 5 of these Regulations.

ARTICLE 34 - OPENING OF TENDERS

1. All tenders received shall be opened by a Tender Opening Board after the closing date and time stated in the Invitation To Tender and may be public.
2. The Tender Opening Board shall be made up of:
 - a) at least one member of the Tender Evaluation Board referred to under Article 23 of these Regulations and representing an initiating service of the Agency or a staff of the Procurement Department other than the one foreseen under paragraph 2.b); and
 - b) the Contract Officer acting as joint secretary to the Tender Evaluation Board and/or another staff of the Procurement Department.

In the frame of international agreements entered into by the Agency with public bodies (including international organisations), staff of the public bodies may be nominated members, or observers of the Tender Opening Board if expressly foreseen in the said agreements.

To avoid any conflict of interest, those persons shall be subject to the obligations laid down in Article 22 and 23 of these Regulations.

3. No opening may take place in the absence of a staff of the Procurement Department identified under paragraph 2. b) .
4. The Tender Opening Board shall admit tenders if they were received before the closing date and time.
5. The Tender Opening Board may admit tenders even if received late if the Tenderers can provide evidence that they were sent in good time.
6. The members of the Tender Opening Board shall draw up and sign the record of the opening.

As a minimum, the report shall identify all those tenders received, the ones which satisfy the requirements and those which do not and the grounds on which tenders were not admitted for evaluation.

7. Tenderers whose tenders were not admitted for evaluation shall be notified in writing immediately.
8. Upon receipt of the notification foreseen under paragraph 7, Tenderers may formally request a debriefing from the Contacts Officer as to the reasons for which their tender was not accepted for evaluation.
9. The procedure concerning the Tender Opening Board shall be incorporated in the “Tender Evaluation Manual” referred to in Article 23 of these Regulations.

10. When in accordance with paragraph 1 above the Agency elects to open the tender publicly such decision shall be taken by the Procurement Department and:

- a) this shall be indicated in the Invitation To Tender together with the date and place of the public opening;
- b) public openings shall take place on the Agency's premises. For security reasons such participation shall be notified to the Contracts Officer at least 10 calendar days prior to the public opening, failure to do so shall result in the Tenderer not being allowed on said premises;
- c) participation shall be limited to the Tenderers and not to economic operators who would be acting as subcontractors in any resulting contracts;
- d) information made public at the time of the opening shall be limited to the name of the Tenderers;
- e) the list of tenders received will be communicated on request to the Tenderers that are not present at the time of the public opening; and
- f) the proceedings of the public opening shall be recorded in the contract file.

ARTICLE 35 - RE-ISSUE OF INVITATION TO TENDER

1. An Invitation to Tender may be reissued after cancellation of the original Invitation to Tender in the following cases:
 - a) where it is found necessary to amend the Invitation To Tender after the closing date and time for receipt of tenders;
 - b) where substantial errors or irregularities have actually occurred during the tender process;

A substantial error or irregularity shall be any infringement of these Regulations and/or its Implementing Instructions or any other pertaining Regulations of the Agency resulting from an act or an omission during the tender process which causes or might cause the principles of transparency and fair and equitable treatment of all economic operators to be jeopardised;

- c) where the interest of the Agency so requires;
 - d) where no tender has been received or admitted by the Tender Opening Board;
 - e) where only one tender has been admitted by the Tender Opening Board and competitive tender is not waived under Article 14.2 of these Regulations;
 - f) where as a result of the evaluation carried out under Article 39 of these Regulations no admitted tender is acceptable; or,
 - g) where for procurement actions superior or equal to 20 000 000 Euro no admitted tender has obtained an overall minimum weighted mark of 60 following the two stage tendering procedure foreseen under Article 16. 1.c) of these Regulations.
2. The reason for the reissue shall be stated in the contracts file.

ARTICLE 36 - CONFIDENTIALITY OF TENDERS AND PERSONAL DATA PROTECTION

1. Tenders shall be treated in such a manner as to avoid the disclosure of their content to competing Tenderers and other persons or entities not participating in the procurement process.
2. Where tenders are not admitted under Article 34 of these Regulations or where under Article 32 of these Regulations the Invitation to Tender is cancelled after the closing date and unless otherwise agreed with the Tenderers in the latter case, tenders shall be disposed of/returned unopened to the Tenderers together with the written notification foreseen under Article 34.7 of these Regulations.
3. Within 60 calendar days following the issuance of the notifications foreseen under Article 45 of these Regulations, tenders shall be disposed of, or dealt with, as required by the Tenderers in writing.
4. Tenders for supplies or services whose performance must be accompanied by special security measures shall be treated in accordance with the Agency's regulations in force.
5. Personal data contained in tenders shall be treated in accordance with the Agency's publicly available policy on Personal Data Protection. Breaches of said policy by the Agency shall not give rise to claims under the provisions of Part VI of these Regulations but under the procedure foreseen under the Agency's policy on Personal Data Protection.

ARTICLE 37 - PERIOD OF VALIDITY OF TENDERS

1. Any prescribed time-limit determined by the Tender Evaluation Board for the validity period of Tenders to be received shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and where appropriate the submissions foreseen under Article 43 of these Regulations.
2. As a matter of guidance and depending on the magnitude of the procurement in subject, the validity period of tenders should never be less than 60 calendar days from the closing date and time stated in the Invitation To Tender or in any extension granted in accordance with Article 29.5 of these Regulations.
3. Where negotiations foreseen under these Regulations are taking place and, due to their complexity, go beyond the validity period of the tenders, the validity period of such tenders shall be considered implicitly extended until such time the negotiations are finalised unless otherwise notified in writing by Tenderers.
4. Where, in application of Article 43 of these Regulations, a submission is foreseen which will take place beyond the validity period of the tenders, the validity period of such tenders shall be considered implicitly extended until such time the submission has taken place unless otherwise notified in writing by Tenderers.
5. Where in application of Article 31 of these Regulations the tender proceedings are suspended, upon resumption of the proceedings Tenderers will be required in writing to explicitly extend the validity period of their tenders for the period foreseen in the notification of resumption.

ARTICLE 38 - CONFIRMATION OF QUALIFICATION

At the time of the submission of their tenders, Tenderers (including subcontractors) shall confirm in writing their compliance with the qualification and eligibility requirements set under Article 18 of these Regulations.

ARTICLE 39 - EVALUATION OF TENDERS

1. All tenders admitted for evaluation by the Tender Opening Board shall be submitted to a Tender Evaluation Board.
2. The Tender Evaluation Board shall first verify that the tenders admitted for evaluation by the Tender Opening Board are complete and constitute full responses to the requirements fit for evaluation.

If any element specifically required in the conditions of tender is missing, and the omission of which is such as to render the tender substantively incomplete, so that its further evaluation would impair fair competition, the Tender Evaluation Board shall eliminate such tender from further evaluation.

3. Subsequent to the verification made under paragraph 2, the Tender Evaluation Board shall proceed with the evaluation of the admitted tenders and shall base its evaluation on the criteria it established in accordance with Article 25 of these Regulations.
4. The Tender Evaluation Board shall only proceed with the final marking of each evaluation criterion and when applicable with the application of the corresponding weighting factors established in accordance with Article 25 of these Regulations, once it is satisfied that all findings have been discussed and any negotiations or dialogues foreseen under Article 41.1 of these Regulations have been concluded satisfactorily.

ARTICLE 40 - CONSULTATION WITH TENDERERS DURING THE EVALUATION PERIOD

1. With the exception of the two stage tendering procedure foreseen under Article 16 of these Regulations, following the opening of tenders, and during the evaluation period, consultations may only be undertaken with Tenderers to obtain clarification of tenders that may be considered necessary:
 - a) for the admission of tenders for evaluation as foreseen under Articles 34 and 39.2 of these Regulations; and/or
 - b) for the evaluation of tenders as foreseen under Article 39 of these Regulations.
2. Consultations shall not be aimed at perfecting and/or complementing tenders.
3. Consultation with Tenderers shall be conducted by the Contract Officer acting as joint secretary to the Tender Evaluation Board. They shall be formal, in writing, and restricted to what is necessary to ensure fair and equitable treatment of all Tenderers.
4. Any consultation proceedings with Tenderers shall be recorded, kept in the contract file and made safe from disclosure to Agency staff member or other persons not participating in the procurement process.

**ARTICLE 41- NEGOTIATION AND DIALOGUE WITH TENDERERS
DURING THE EVALUATION PERIOD**

1. Negotiations and dialogues with Tenderers may only be undertaken in the frame of procurement actions engaged by means of two stage tendering as foreseen under Article 16 of these Regulations.
2. Negotiations and dialogues shall be led by the Procurement Department.
3. Negotiations and dialogues will normally take place on Agency premises, but the place of negotiation and dialogue shall in any case be selected so as to maintain equality of opportunity for all Tenderers.
4. Prior to the start of negotiations and dialogues, Tenderers shall be informed of the nature of, and the reason for, the negotiations and dialogues.
5. If any Tenderer refuses to enter into negotiation and dialogue, the fact shall be recorded, but negotiations and dialogues with other Tenderers shall proceed.
6. All Tenderers shall be given equal opportunity, and the negotiations and dialogues shall be impartial and shall give no preference to any Tenderer.
7. No information contained in one tender, may be used in negotiations and dialogues with another Tenderer.
8. All questions or demands put to Tenderers shall be recorded in writing, and responses shall be submitted in writing. Tenderers shall be informed that their responses shall be formally regarded as constituting a revised binding tender.
9. Minutes of any meetings shall be kept and signed by all the participants present at the meeting and a report on any visit to inspect facilities made.
10. Following the conclusion of the negotiations and dialogues Tenderers may be required to submit their tenders or best and final offer, either through revised partial or complete tenders.
11. The Tender Evaluation Board shall consider these final tenders, mark them and apply weighting factors as foreseen under Article 39 of these Regulations.
12. Any negotiation and dialogue proceedings with Tenderers shall be recorded, kept in the contract file and made safe from disclosure to competing Tenderers or persons not participating in the procurement process.

ARTICLE 42 - RESULTS OF EVALUATION AND RECOMMENDATION

1. The recommended tender shall be the one designated in accordance with the instructions provided in the Tender Evaluation Manual referred to in Article 23.10 of these Regulations.

For non-competitive procurement actions equal or superior to 10 000 000 Euro and for competitive procurement actions equal or superior to 20 000 000 Euro recommendation for the award of a contract shall only be made by the Tender Evaluation Board where a Tenderer has obtained a minimum overall weighted mark of sixty (60).

In all other cases the ITT may be reissued in accordance with Article 35 of these Regulations.

2. Where as a result of the evaluation carried out under Article 39 of these Regulations the Tender Evaluation Board considers that:
 - a) no tender is acceptable; or,
 - b) no tender has obtained the required minimum overall weighted mark of sixty (60) foreseen under paragraph 1 above,

the Tender Evaluation Board may recommend that the Invitation To Tender be re-issued in accordance with Article 35 of these Regulations or cancelled in accordance with Article 32 of these Regulations.

3. The Tender Evaluation Board shall prepare a report on the evaluation concluding with the recommendation of a tender(s) considered acceptable for the award of the contract, for a reissuing or cancellation of the Invitation To Tender. Such report shall be kept in the contract file and made safe from disclosure to Agency staff or other persons not participating in the procurement process.
4. The above recommendation shall be submitted for joint decision by the Head of the initiating service responsible for the procurement and the Head of the Procurement Department who may when considered necessary take into account other elements with the aim of attaining the objectives set under Article 10.1 c) and 10.1 d) of these Regulations.

PART V: AWARD OF CONTRACT

ARTICLE 43 - SUBMISSION OF CONTRACT PROPOSAL AND INFORMATION NOTE TO THE INDUSTRIAL POLICY COMMITTEE

Subject to Article 3.2 of these Regulations the following shall apply:

1. Prior to the award of contract, the Director General shall submit for approval of the Industrial Policy Committee Contract proposals in the following cases:
 - a) where the evaluation of tenders results in a recommendation for the choice of a contractor which would be contrary to the directives or to any guidelines issued by the Industrial Policy Committee;
 - b) where the intended contract exceeds 20 000 000 Euro including subcontractors;
 - c) where at the time of the submission of a Procurement Proposal not exceeding 20 000 000 Euro, the Industrial Policy Committee has not voted against the request by one or several States concerning the submission of a Contract proposal;
 - d) where the intended contract is the result of a “call for proposal” and exceeds the limits stated in Article 21 of these Regulations;
 - e) where the intended contract involves expenditure exceeding 200 000 Euro in a non-Member State not participating in the programme, unless the procurement in the non-Member State was foreseen in the Procurement Proposal or in the frame of an international agreement entered into by the Agency with public bodies (including intergovernmental organisations);
 - f) where the intended contract value including options if any was initially estimated to be below the limits stated in Article 21 of these Regulations, but a later estimate based on tenders received indicates that the contract value including options if any will exceed those limits;
 - g) where, in the cases foreseen under Article 21.3 of these Regulations, a procurement proposal has been dispensed with by the Director General; or
 - h) where the intended contract value including options does not exceed 20 000 000 Euro but was the subject of a Procurement Proposal exceeding 20 000 000 Euro.
2. Subsequent to the award of contract or prior to the award of an amendment to an existing contract, the Director General shall submit for approval of the Industrial Policy Committee Contract proposals in the following cases:
 - a) where the value of a contract at the time of signature was below the limits stated in Article 21 of these Regulations and where a proposed amendment would result in the total value of this contract exceeding those limits;
 - b) where the supplies or services under a Procurement Proposal or Contract

proposal already approved in accordance with Articles 21 and 43.1 of these Regulations or with Articles 9 and 18 of Contracts Regulations (ESA/C(82)111ANNEX I rev.2 dated 14 October 1993) differs substantially in nature or magnitude from the supplies or services originally approved;

- c) where an amendment involves expenditure exceeding 200 000 Euro in a non-Member State not participating in the programme and has not been the subject of a Procurement Proposal or an international agreement entered into by the Agency with public bodies (including intergovernmental organisations);
 - d) in application of Article 15.7 of these Regulations;
 - e) where the proposed value of a work order to be placed under a frame contract exceeds the limits stated in Article 21 of these Regulations and such value would bring the total value of said frame contract to exceed the limit already authorised by the Industrial Policy Committee in accordance with Article 21 of these Regulations.
3. The Director General shall submit for information to the Industrial Policy Committee Information Notes in the following cases:
- a) where at the time of the submission of a Procurement Proposal the Industrial Policy Committee has not decided against the request by one or several States concerning the submission of an Information Note;
 - b) where a contract subject to paragraph 1.b) granted a contractor(s) the right to carry out procurements in order to select an industrial consortium as foreseen under Article 17 of these Regulations, two Information Notes shall be submitted to the Industrial Policy Committee, the first one when forty per cent of sub-contractors are selected and the second one when eighty per cent of the subcontractors are selected.
- 4 Where, during the period between the recommendation foreseen under Article 42 of these Regulations and the placing of a resulting contract following submission to the Industrial Policy Committee of the Contract proposal foreseen under paragraph 1, an incumbent contractor due to unforeseeable reasons or events is no longer in a position to preserve the continuity of the operational needs in terms of preservation of continuity of operational services, the Chairperson of the Industrial Policy Committee, based on reasons of extreme urgency, is authorised to allow the Director General to grant to the recommended Tenderer a limited contractual coverage not exceeding 2 000 000 Euros and this in order to proceed with the activities strictly necessary for preserving the continuity of said operational services during the said period. Such authorisation shall be communicated to IPC at the time of its granting.

Should the total limited contractual coverage necessary to cover said period be superior to 2 000 000 Euros, the Chairperson of the Industrial Policy Committee shall, at the time of granting above authorisation, seek the approval of the Industrial Policy Committee for any amount exceeding 2 000 000 Euros by either calling for an extraordinary meeting of

the Industrial Policy Committee or by means of a written procedure, it being understood that such approval shall be obtained at least two weeks prior to the end of the period covered by said 2 000 000 Euro.

ARTICLE 44 - SIGNATURE AND ENTRY INTO FORCE OF CONTRACT.

1. A contract may not enter into force before its signature by the parties, in accordance with their respective prescribed procedures.
2. Where, for operational reasons, a contract needs to start prior to all points of the said contract being negotiated, the Agency may authorise the start of the activities by releasing a formal Preliminary Authorisation to Proceed for a given period together, if so required, with a financial limit of liability.
3. Contracts and Preliminary Authorisations to Proceed shall be signed in two originals by the Contractor and the Agency.
4. On behalf of the Agency contracts and Preliminary Authorisations to Proceed shall be signed by the Director General or by the staff to whom he has delegated this authority.
5. The original of the signed contract and Preliminary Authorisations to Proceed retained by the Agency shall be kept in the contracts file and made safe from disclosure to Agency staff or other persons not participating in the execution of the contract.
6. A contractor who starts activities prior to the signature of the contract or Preliminary Authorisation to Proceed by the Agency shall not hold the Agency liable for any consequences should the Agency not sign the contract or Preliminary Authorisation to Proceed.

ARTICLE 45 - NOTIFICATION TO TENDERERS AND AWARD NOTICES

1. Tenderers who have not been selected for the placing of a contract will be notified in writing of the outcome of their respective tenders by the Procurement Department and this only after the approval by the Industrial Policy Committee foreseen under Article 43 of these Regulations, when applicable, or the signature of the contract and/or Preliminary Authorisation to Proceed by the Agency with the successful Tenderer, whichever takes place first.

The above notification shall comprise a short résumé of the findings of the Tender Evaluation Board together with the associated marks on the tender in question, and shall not cover the quality or contents of other tenders.

2. Award notices on procurement actions may be published at the Agency's discretion. In such cases the information published through the award notices shall be limited to:
 - a) Title of procurement action and Invitation To Tender reference;
 - b) The name of the Tenderer to which the contract has been awarded;
 - c) The price of the awarded contract provided such publication does not affect the economic interest of the successful Tenderer. To that effect the successful Tenderer may be consulted prior to the publication of the said award notice.
- 3 Award notices on procurement actions fully funded by public bodies (including intergovernmental organisations) in the frame of the implementation of an international agreement entered into by the Agency shall be published by the Agency and/or the public body where such publishing is required in the said agreement.

The information to be published shall be that established in the agreement.

ARTICLE 46 - DEBRIEFING TO UNSUCCESSFUL TENDERERS

1. Within 10 calendar days following the receipt of the notification foreseen under Article 45 of these Regulations, unsuccessful Tenderers may formally require in writing from the Contracts Officer who acted as joint secretary to the Tender Evaluation Board an oral debriefing explaining the reasons why their tender was not successful.
2. Such oral debriefing shall in principle be made by means of teleconference or videoconference, the unsuccessful Tenderers may nevertheless require that it takes place at the Agency's premises . The debriefing shall be given by the concerned Contracts Officer (or in his absence by another Contracts Officer or his hierarchy) with the participation of the Technical Officer at a date to be agreed with the unsuccessful Tenderer. As a matter of guidance such debriefings should be given within 20 calendar days from the Agency receiving the formal written request.
3. For procurements which have been the subject of a submission to the Industrial Policy Committee, the chairman of the Tender Evaluation Board shall participate in the debriefing.
4. Explanations shall be limited to the findings of the Tender Evaluation Board on the tender in question, and shall not cover the quality or contents of other tenders.
5. Minutes of any debriefing meetings shall be made available to its participants for their agreement and signature. The signed original shall be kept by the Agency and, and placed in the contract file.

PART VI: REVIEW

ARTICLE 47 - OBJECTIVES

1. Taking due account of the Agency's legal status and privileges and immunities, established under Article XV of the Convention and its Annex I, and the specific nature and programmatic constraints of the activities carried out by the Agency, the review procedure established under these Regulations seeks to ensure full respect for the right to an effective remedy and fair hearing of all economic operators which have a demonstrated direct interest in an Agency's procurement.
2. Where in the frame of an international agreement with procurement actions fully or partially funded by public bodies (including intergovernmental organisations) entered into by the Agency, the said bodies require that the present review procedure be made applicable to the agreement, all costs associated to such review procedure shall be fully or partially borne by the said public bodies.

ARTICLE 48 - RIGHT TO REVIEW

Subject to Article 49 of these Regulations any economic operator demonstrating a direct interest in an Agency's procurement and that claims a potential loss due to an alleged procedural breach of these Regulations by the Agency may seek review in accordance with Articles 51, 53 and 55 of these Regulations.

ARTICLE 49 - RESTRICTIONS

1. The review provided for under Article 48 of these Regulations is not open to economic operators who would be acting as subcontractors in a resulting contract.
2. The present review being of a procedural nature, the following shall not be subject to the right to review provided for under Article 48 of these Regulations:
 - a) the selection of a method of procurement pursuant to Articles 13 to 17 of these Regulations;
 - b) a decision pursuant to Articles 19, 27.4, 31, 32, 35 and 42 of these Regulations;
 - c) a decision pursuant to Article II.3 of Annex V to the Convention and/or Article 10.9 of these Regulations;
 - d) a decision taken by the Industrial Policy Committee pursuant to Articles 43 of these Regulations;
 - e) cases foreseen under Article 11.2; or
 - f) a breach of Article 36.5.
3. Taking due account of the programmatic constraints of the Agency and unless otherwise agreed by the Director General, the review process provided for in this Part of these Regulations shall not hold up the entry into force of any resulting contract.

ARTICLE 50 - TIME LIMITS AND SUBMISSIONS

1. A claim alleging procedural breach of these Regulations by the Agency before the closing date and time stated in the Invitation To Tender must be filed by the economic operator concerned :
 - a) before the closing date and time if the breach was apparent prior to the said closing date and time; or
 - b) where the breach was not apparent prior to the said closing date and time not later than 10 calendar days after the breach became apparent or should have become apparent.
2. In all other cases following the opening of tenders by the Agency, a claim alleging procedural breach of these Regulations by the Agency must be filed by the economic operator concerned not later than 10 calendar days after the economic operator knew or should have known the basis for the claim.
3. Where an unsuccessful Tenderer requires a debriefing in application of Article 34.8 or Article 46 of these Regulations, that Tenderer may not file in a claim pursuant to this Article before the debriefing date offered to him by the Agency, but must file in his claim not later than 5 calendar days after the date on which the debriefing was held.
4. All claims shall be submitted in writing by registered mail or courier services.

ARTICLE 51 - REVIEW BY THE PROCUREMENT DEPARTMENT

1. A claim referred to in Article 50 of these Regulations, shall, in the first instance be submitted to the Head of the Procurement Department or a person designated by him.
2. Notwithstanding paragraph 1, if a claim referred to in Article 50 of these Regulations is based on an act or decision taken directly by the Head of the Procurement Department, the claim shall be submitted to the Agency's Industrial Ombudsman pursuant to Article 53 of these Regulations.
3. The Head of the Procurement Department shall not entertain a claim unless it was submitted within the time limits set under Article 50 of these Regulations.
4. Unless the claim is resolved by mutual agreement, the Head of the Procurement Department shall, within 10 calendar days after receiving the claim, issue a written decision to the claimant. The decision shall:
 - a) state the reasons for the decision; and
 - b) if the claim is upheld in whole or in part, indicate the corrective measures that are to be taken.
5. If the Head of the Procurement Department does not issue his decision within the time limit specified under paragraph 4, the claimant is entitled within 5 calendar days thereafter to submit his claim to the Agency's Industrial Ombudsman pursuant to Article 53 of these Regulations.

Upon the submission of the claim to the Agency's Industrial Ombudsman, the competence of the Head of the Procurement Department to entertain the claim ceases immediately.

6. The decision of the Head of the Procurement Department foreseen under paragraph 4 above shall be final unless it is challenged by the claimant.
7. Within 5 calendar days from receiving the decision of the Head of the Procurement Department, the claimant shall notify the Head of the Procurement Department in writing of his intention to challenge the decision and shall submit the ensuing claim in writing to the Agency's Industrial Ombudsman.

ARTICLE 52 - THE AGENCY'S INDUSTRIAL OMBUDSMAN

1. The Agency's Industrial Ombudsman and his alternate shall be nominated by Council upon proposal by the Director General and this for a period of 3 years renewable once.
2. The Agency's Industrial Ombudsman and his alternate may only be relieved of their office by Council either at his own request or at the request of the Director General for stated misbehaviour and incapacity.
3. The Agency's Industrial Ombudsman and his alternate are independent in the performance of his functions and shall not seek or accept instructions from anyone whatsoever. They will be eminent persons with particular experience and competence in matters pertaining to European Space Industry and procurement.
4. In the exercise of their function, the Agency's Industrial Ombudsman and his alternate shall enjoy the privileges and immunities provided for in Article XVII of Annex I to the Convention.
5. The Agency's Industrial Ombudsman and his alternate shall not be staff members of the Agency nor members of delegations of Member States, Associate Member States or Cooperating States.
6. The Agency shall provide for all necessary facilities in order to support the Agency's Industrial Ombudsman and his alternate in the carrying out of their duties; they shall have their official seat at the place of residence of the Agency's Industrial Ombudsman.
7. The Agency's Industrial Ombudsman and his alternate shall be financially compensated by the Agency for their activities.

ARTICLE 53 - REVIEW BY THE AGENCY'S INDUSTRIAL OMBUDSMAN

1. The Agency's Industrial Ombudsman established under Article 52 of these Regulations is competent to entertain claims submitted in application of Article 51 of these Regulations.
2. The Agency's Industrial Ombudsman shall not entertain a claim unless it was submitted within the time limits set under Articles 50 and 51 of these Regulations.
3. The Agency's Industrial Ombudsman after having consulted the claimant and the Head of the Procurement Department shall, within 10 calendar days after the submission of the claim, issue a written recommendation simultaneously to the Head of the Procurement Department and the claimant. When the claim is made after contract award, this period of 10 calendar days shall be brought up to 25 calendar days. The recommendation shall:
 - a) when taken in application of Articles 51.2 and 51.5 of these Regulations:
 - i. state the reasons for the recommendation; and
 - ii. indicate the corrective measures that should be taken by the Agency should the recommendation propose to uphold the claim in whole or in part.
 - b) when taken in application of Article 51.7 of these Regulations the recommendation shall be motivated and either :
 - i. confirm the initial decision taken by the Head of the Procurement Department under Article 51.4 of these Regulations; or
 - ii. indicate the corrective measures that should be taken by the Agency should the recommendation propose to uphold the claim in whole or in part.
4. The Head of the Procurement Department shall, within 10 calendar days from receiving the recommendation, issue a written decision to the Agency's Industrial Ombudsman and the claimant.
5. The decision of the Head of the Procurement Department foreseen under paragraphs 4 shall be final unless it is challenged by the claimant.
6. Within 5 calendar days from receiving the decision of the Head of the Procurement Department foreseen under paragraphs 5, the claimant shall notify in writing the Head of the Procurement Department of his intention to challenge the decision and shall submit his claim in writing to the Chairman of the Procurement Review Board established pursuant to Article 54 of these Regulations.

ARTICLE 54 - THE PROCUREMENT REVIEW BOARD

1. The Director General shall establish a Procurement Review Board competent to review decisions taken by the Agency in application of Articles 53.4 of these Regulations.
2. The Procurement Review Board shall consist of six members external to the Agency with proven legal and practical experience in the field of public procurement, members of the Procurement Review Board shall not be members of delegations of Member States, Associate Member States or Cooperating States. The members of the Procurement Review Board shall designate a Chairman and deputy Chairman from amongst their number.
3. The members of the Procurement Review Board shall be nominated by Council and this for a period of 3 years, renewable once for another period of 3 years. Two members shall be nominated upon proposal by the Director General, two members shall be nominated upon proposal by industry out of which one shall be proposed by SMEs and two members shall be nominated upon proposal by the Industrial Policy Committee Chair. Members may further be considered for nomination by Council after a period of non-eligibility of eighteen months starting from the end date of the previous nomination period(s).

Should a member's period of appointment end during the examination of a case by the Procurement Review Board, said period of appointment shall be automatically extended by the period of time necessary for the Procurement Review Board to deliver its decision on the case under examination and this without further need for a decision by Council on said extension. Council shall be informed of such occurrences.

4. The members of the Procurement review Board shall not seek or accept instructions from anyone whatsoever nor shall they participate in any capacity whatsoever in activities involving the Agency other than the present ones.
5. The members of the Procurement Review Board shall enjoy the privileges and immunities provided for in Article XVII of Annex I to the Convention.
6. The members of the Procurement Review Board shall be financially compensated by the Agency for their activities.
7. The Director General shall establish the necessary detailed implementing instruction concerning the establishment and proceedings of the Procurement Review Board. Such implementing instruction shall be approved by the Industrial Policy Committee.

ARTICLE 55 - REVIEW BY THE PROCUREMENT REVIEW BOARD

1. The Procurement Review Board shall not entertain a claim unless it was submitted in writing by registered mail or courier services and within the time limits set under Article 53.6 of these Regulations.
2. Records of the challenged process shall be disclosed to the Procurement Review Board when required.
3. The decision of the Procurement Review Board shall be taken within 15 calendar days after the submission of the claim. When the claim is made after contract award, this period of 15 calendar days shall be brought up to 30 calendar days.

Where the Procurement Review Board considers it necessary the above periods of 15 and 30 calendar days may be extended by a maximum period of 15 calendar days.

4. The proceedings of the Procurement Review Board shall ensure that:
 - a) the parties participating to the review can be heard before a decision is reached;
 - b) the parties participating to the review can be represented and accompanied;
 - c) the parties participating to the review shall have access to all the procurement proceedings; and
 - d) the proceedings can take place in public.
5. The decision of the Procurement Review Board shall be in writing with a statement describing the basis for the decision, and shall be final and binding on the parties.
6. Where the decision of the Procurement Review Board upholds the decision of the Agency, the costs incurred by the claimant shall not be reimbursed.
7. The Agency shall bear its own costs unless it is demonstrated that the claimant was not acting in good faith.

ARTICLE 56 - INTERIM MEASURES

1. The timely submission of a claim under Article 51 of these Regulations may result in the suspension of the procurement process by the Director General as foreseen under Article 31 of these Regulations, provided that the claim is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the claimant will suffer irreparable damages in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the Agency.
2. Interim measures may be proposed to the Director General by the Head of the Procurement Department, the Agency's Industrial Ombudsman or the Agency's Procurement Review Board.

ARTICLE 57 - COMPENSATION

Where as a result of the review procedure foreseen under Part VI of these Regulations a final and binding decision grants compensation to a claimant for the loss or damages suffered due to a procedural breach of these Regulations by the Agency, such compensation shall in all cases be limited to the cost for tender preparation and the costs incurred for protest within the limit of 120 000 Euro.

In no event shall the Agency be held liable for payments in excess of 120 000 Euro for compensation granted under these Regulations.

ARTICLE 58 - REVIEW PROCEDURE

In order to ensure the correct execution of the obligations set under the Part VI of these Regulations, the Director General shall establish the necessary detailed implementing instruction through a document known as “European Space Agency’s Procurement Review Procedure”. Such instruction shall be approved by the Industrial Policy Committee and published in accordance with Article 4 of these Regulations.

PART VII AMENDMENTS AND ENTRY INTO FORCE

ARTICLE 59 - AMENDMENTS

These regulations may be amended by the Council on the recommendation of the Industrial Policy Committee and of the Administrative and Finance Committee.

ARTICLE 60 - ENTRY INTO FORCE

These Regulations shall enter into force on 12 July 2019 (20 working days after Council) at which time they will replace and supersede Revision 4 of ESA/REG/001.

ANNEXES IMPLEMENTING

GLOSSARY

Economic operator	Any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the delivery of supplies, products or services.
Electronic means	Means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.
Frame contract	An agreement (s) between the Agency and one or more contractors, the purpose of which is to establish the terms governing work orders to be awarded during a given period and/or within a given financial limit of liability, in particular with regard to the price, the activity and, where appropriate, the quantity envisaged.
Invitation To Tender	A formal communication to economic operators containing the conditions for the submission together with specifications and requirements and inviting them to submit tenders for a contract.
Open competitive tender	A procedure for inviting tenders open to any economic operator.
Non-competitive tender	A procedure in which competitive tender is waived.
Restricted competitive tender	A procedure for inviting tenders restricted to economic operator selected by the Agency.
Purchase Order	A simplified agreement, the subject of which is the delivery of supplies or the rendering of services of low value to or for the Agency.
Res judicata	A matter settled by judgement rendered by a court of competent jurisdiction.
Tender	A submission, in response to an invitation from the Agency, which is intended to form the basis of a contract.

ANNEXES

IMPLEMENTING INSTRUCTIONS

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**ANNEX I: IMPLEMENTING INSTRUCTION CONCERNING THE ESA
INDUSTRIAL COST AUDIT**

(Article 10.7 of these Procurement Regulations)

Revision 3 of this Annex modifies Article 4

In accordance with Article 9 of these Procurement Regulations, the Director General established this Implementing Instruction. This Implementing Instruction has been approved by the ESA Industrial Policy Committee during its 317th Meeting held on 15 April 2019 (ESA/IPC(2019)14, rev. 2)

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ANNEX A

EXAMPLE DOCUMENTATION TO BE PROVIDED FOR ESA AUDITS

Examples of documentation to be provided for Rate Audits

ANNEX A.1

Examples of documentation to be provided for audits of contracts based on cost reimbursement, ceiling price to be converted to fixed price and co-funding

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Preface

The Procurement Regulations' Article 10.8 states that "At the discretion of the Director General, industrial cost and rates audits may be carried out at any time prior or subsequent to the award of a contract by the Agency. The conditions under which these audits shall be carried out shall be established by means of an implementing instruction."

This implementing instruction explains the conditions and processes necessary to carry out the audits, which will be mainly oriented to the major suppliers in the area of space and ground segment.

Article 1 Rationale and Scope of ESA audits

The objective of ESA cost audits is to obtain evidence that the costs to be recovered, based on rates, overheads and other direct costs, are both reasonable and allowable, in accordance with the principles set forth in Annex 1 as amended by subsequent revision(s) of the General Clauses and Conditions for ESA Contracts (GCC).

Article 1.1 Industrial rates and overheads

The aim of the ESA audits related to industrial manpower, facility and other overhead rates such as the General Administrative and Subcontractor overheads is to reach an agreement with the audited company on fixed rates for a two to three year forward-looking period (hereafter referred to as "rates"). The audit process ensures that costs included in the rate calculation are not double-counted by inclusion in other non-labour charges recorded as direct costs against contract cost.

The establishment of rates is not a pre-requisite for doing business with ESA. However for the major suppliers dealing with ESA on a regular basis it is an important step in the industrial bidding process for ESA tenders, facilitating ESA and industry, at any time and in advance of any individual tender, to contribute to an efficient and smooth procurement process, reducing questions on rates each time the company participates in a tender process. The approved rates are also taken into account for cost claims and for post calculation in the framework of a cost reimbursement contract.

Article 1.2 Cost reimbursement / Ceiling Price to be converted into a fixed price

The aim of a cost reimbursement audit is to ensure that the costs to be recovered by means of the application of rates are both reasonable and allowable, in accordance with the principles set forth in Annex 1 as amended by subsequent revision(s) of the General Clauses and Conditions for ESA Contracts (GCC).

Such audits will allow, in particular, understanding and verifying the costs which are allocated through manpower and internal facility rates via a time recording system, the indirect charges as well as other direct costs (purchases) which are directly charged to the contract by means of an invoice. Furthermore, all charges must be assessed to be in pursuit of the contract's performance and deemed to be reasonable in both cost and volume, be they direct costs or manpower hours charged at the agreed rates.

Article 1.3 Co-funding

The aim of the co-funding contracts audit process is similar to that for cost reimbursement contracts. An additional and important factor is to clearly establish that the company own-funded part, typically 50% or 25% of the total cost, can be verified based on the rules approved by the Member States for the co-funding contracts.

Article 1.4 Financial viability

The aim of a financial viability audit is to protect the Agency against placing contracts with companies facing potential insolvency that may not be able to deliver on their part of the contract due to financial constraints.

Article 2 Audit Methodology

Article 2.1 Yearly audit plan

The ESA Industrial Auditing and Contracts Controlling Division establishes a yearly audit plan with a description of the companies to be audited and a target audit date. For industries located in Member States having National Audit Authorities the plan will be established in coordination with the national authorities (where relevant). The audit plan includes rate audits, cost reimbursement audits, and co-funding audits and is approved by the Head of the Procurement Department.

Once a company is included in the yearly audit plan, within the context of Procurement Regulation 10.8, the audit is considered firmly planned and shall be conducted as scheduled.

The IPC will be informed on a regular basis of the execution of the audit plan, including possible updates.

Article 2.2. Audit Announcement and data to be provided by audited companies

Once included in the audit plan, the audit is announced to the company by letter. In this letter the company is requested to provide the relevant ESA auditor with the information and supporting documents required, in view of the scope of the audit.

Annex A of this Implementing Instruction contains a non-exhaustive list of documents requested prior to the conduct of the audit usually readily available from the company's accounting and cost control systems.

Article 2.3 Audit steps

The following steps will be performed by the ESA auditor when conducting a cost audit with the collaboration of the audited companies.

Article 2.3.1 Rates Audit

- 1.1. Profit & Loss reconciliation to the total cost and the establishment of the total cost base to be recovered via the hourly rate.
- 1.2. Determination of sellable/ non sellable cost centre structure (direct/indirect).
- 1.3. Identification of total hours base per cost centre.
- 1.4. Identification of mechanism for allocating overheads to cost centres.
- 1.5. Verification of allowability of cost included in the total cost base in accordance with the principles set forth in Annex 1 (currently under review) of the GCC.
- 1.6. Evaluation of productivity (ratio of sellable hours to total hours) per cost centre and evaluation of indirect charges per cost centre.
- 1.7. Negotiation and establishment of rates for the current year.
- 1.8. Establishment of the forward-looking rates for the next two years in accordance with the principles set forth in article 3 of this Implementing Instruction.

Article 2.3.2 Audit of contracts based on cost reimbursement, co-funding and ceiling price to be converted into fixed prices

- 1.1. Identification of elements charged to the Contract (hours, materials, etc).
- 1.2. Verification of the correct application of ESA-audited rates.
- 1.3. Identification and verification of the audit sample.

1.4. Verification of the charges of hours and cost to the contract in accordance with the principles set forth in Annex 1 (currently under review) of the GCC.

1.5. Application of relevant deductions against previously invoiced amounts.

Article 2.3.3 Financial viability audit

This type of audit follows a number of quantitative methodologies in widespread use including standard ratio analysis and financial capability models.

An in-depth review of the trading environment, company structure and business projections will also be necessary.

Article 3 Multiyear rate agreements in rate audits

The rates agreed in the framework of rate audits are established for the specific audited year, and also for the following two years, these are referred to as “forward-looking rates”.

Article 3.1 Updating method

The forward-looking rates are established based on the agreed rate for the current year, and updated taking into account the following elements:

- 1.- Forward-looking macroeconomic indicators (inflation, salary forecast, material costs);
- 2.- Expected company productivity targets;
- 3.- Fluctuations in forecast business volume (institutional and commercial, space and non-space) for the audited companies.

Article 4 Applicability of new rates and provisional rates

Where new rates and provisional rates are established in accordance with Section 5 of Annex I to the “General Clauses and Conditions for ESA Contracts” ESA/REG/002, rev. 2 at their latest revision, such rates shall be used in any subsequent tender submitted to the Agency irrespective of the type of contract price required.

Article 5 Applicability of ESA audit process for third-party-funded programmes

ESA will propose to partner organisations that it applies its policy of audited rates and overheads as an integral part of its audit, internal control and procurement standards, so as to understand and negotiate industrial proposals/contracts.

Article 6 Cooperation with National Audit Authorities

In the cases, when ESA auditors themselves do not perform the rate audit, the ESA rate will be derived from the hourly rate established by the National Audit Authority that conducted the audit of the specific company, modified to accommodate the ESA principles of allowability of cost.

ESA proposes the convening of meetings between ESA auditors, national authority auditors and the company concerned to review the relevant details and agree - in the event that national rules differ from ESA rules - on the adjustments required, in order to ensure a fair and equal treatment of all companies doing business with ESA.

If so requested for by a Member State, the coordination aspects between ESA and the National audit authorities could be discussed with and agreed between both parties on the basis of the governing principles as listed in Art 10.1 of the Procurement Regulations.

Detailed procedures, methods and roles on audit conduct by National audit Authorities (covering amongst others the steps described in Art. 2.2, Art. 2.3.1, and Art. 2.3.3, and based on the principle of no duplication of audits) could also be agreed upon.

ANNEX A

EXAMPLE DOCUMENTATION TO BE PROVIDED FOR ESA AUDITS

Examples of documentation to be provided for Rate Audits

1 GENERAL FINANCIAL AND ORGANISATIONAL DOCUMENTATION

- 1.1. Published Statutory Accounts / Audited Financial Statements
- 1.2. Detailed Profit & Loss accounts.
- 1.3. Reconciliation of Profit & Loss accounts to the Total Cost Base claimed through the rates and – where relevant - to the total materials and total services base for material and subcontractor overhead calculations.
- 1.4. Organisation chart.

2 DETAILED RATE PROPOSAL DOCUMENTATION

- 2.1. The company's own proposed rate calculation model for the relevant reference years.
 - 2.1.1. Explanation of the year-by-year rate variations quoting, inter alia, the impact of inflation, average salary increases, investments, changes in productivity and business volume variations.
 - 2.1.2. Cost centre list, by legal entity, if relevant, and by cost centre type (direct/indirect / partly direct/partly indirect). The list should indicate the allocation of cost centres to the various rates (G&A, handling of materials and subcontractors or other allocated costs).
 - 2.1.3. For each direct cost centre: direct salary, social and pension charges (e.g. Senior Engineers, Engineers, Junior Engineers), other allocations from overheads, headcount expressed in full time equivalent (FTE) and the actual/forecast sellable hours versus available hours i.e. productive time (standard hours contracted/head e.g. 52 weeks at 40 hrs/week, less holidays, sickness, training, etc.), and treatment of overtime.
 - 2.1.4. For each indirect cost centre: salary, social & pension charges by function e.g. CEO, Finance, HR, etc, or other allocated costs.
 - 2.1.5. Facility rates: value, content (e.g. manpower / depreciation / utilities) and allocation mechanism / rates.
 - 2.1.6. G&A: value, content (e.g. G&A cost centres) and allocation mechanism if not already explicitly covered in point 2.1.4.

- 2.1.7. R&D: value, content (e.g. list of projects) and allocation mechanisms broken down into own-funded R&D, own-funded and co-funded product development.
- 2.1.8. Material and sub-contractor overhead: value, content (e.g. dedicated cost centres), allocation mechanisms, including the methodology for possible intra-company (multinationals / subsidiaries & legal entities) work allocation (arm's length principle applied?).
- 2.1.9. Corporate or Head Office charges: value, content (e.g. nature of charges) and allocation mechanism if not already explicitly covered in 2.1.4.
- 2.1.10. Interest charges / financial costs / leasing costs and their allocation mechanism if not already explicitly covered in 2.1.4.
- 2.1.11. Company investment / depreciation policies (both for financial and cost accounting, if different) and – where relevant – the accounting treatment of investments not owned by the company.
- 2.1.12. Company travel policy including rules for recording travel time in terms of sellable or non-sellable hours.

3 ESCALATION OF PROPOSED RATE

- 3.1. Latest Mid-Term Plan explaining the company's future assumptions and estimations (e.g. macroeconomic and business outlook influencing future activity levels and staff evolution; if relevant, restructuring or rejuvenation costs; mergers & acquisitions; etc.).
- 3.2. Proposal for escalation of the company rates in the subsequent 3 years, and reconciliation to macroeconomic forecasts (i.e. inflation) and productivity improvements.

ANNEX A.1

Examples of documentation to be provided for audits of contracts based on cost reimbursement, ceiling price to be converted to fixed price and co-funding:

1. The relevant rates, provided all the above mentioned necessary supporting data is made available to the ESA auditor.
2. Summary Cost Reports for the relevant period in PSSA2 format, by Work Package, in accordance with contract requirements.
3. Detailed transaction listings, drawn from the companies own accounting and time-recording system.
4. A reconciliation of 2 & 3 above.
5. Highlighted Samples from the listings in 3 above sent to the company.
6. Audit file prepared by the company with original travel vouchers and receipts, timesheets and purchase orders, matched to the requested sample.

**ANNEX II : IMPLEMENTING INSTRUCTION CONCERNING THE
ESA NATIONALITY OF COMPANIES AUDITS ¹**

(Article 10.9 of these Procurement Regulations)

¹ In Accordance with Article 9 of these Procurement Regulations, the Director General established this Implementing Instruction. The ESA Industrial Policy Committee took note of this Implementing Instruction during its 254th meeting held on 28-29 September 2009 (ESA/IPC(2009)98, corr. 1).

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PREFACE

The Procurement Regulations Article 10.9 states that “At the discretion of the Director General, audits may be carried out at any time to check whether an economic operator complies with the requirements set under Article II.3 of Annex V to the Agency’s Convention. The conditions under which these audits shall be carried out shall be established by means of an implementing instruction.”

In relation to the nationalities of companies, the ESA contract award procedure presently applied covers a two-step approach. Firstly, when a new company expresses interest to present a bid on tenders issued by ESA, the company is requested to be registered as a potential bidder. This registration process includes the requirement for the company to declare its nationality. Secondly when a company is awarded with an ESA contract, the contract is accounted against the nationality of the company as initially declared by the company.

During both steps an audit can be initiated in case where there are reasonable doubts for ESA on the nationality declared by the company in relation to the criteria laid down in the ESA Convention.

This implementing instruction explains the conditions and processes necessary to carry out the audits of the nationality of companies.

ARTICLE 1: RATIONALE OF ATTRIBUTION OF NATIONALITY TO COMPANIES FOR GEOGRAPHICAL RETURN PURPOSES AND CONDUCT OF RELEVANT AUDITS

One of the main orientations governing the ESA industrial policy is the geo-return principle which enables the Executive to conduct and implement an effective European Space programme. This policy is based on all ESA Member States participating – having due regard to their financial contribution - in an equitable manner to the successful creation of a strong and competitive European industrial base for space activities.

In order to provide for an equal and transparent treatment of all companies and furthermore to ensure an effective and accurate reporting on the industrial return statistics to the Member States, the objective of ESA audits in relation to the nationality of companies, is to be assured or alternatively obtain evidence that an enterprise can effectively be considered to belong to specific ESA Member States, allowing as such the (parts of the -) contracts awarded to this company to be counted as realised industrial return for those specific Member States . The Article II.3 of Annex V to the ESA Convention lays down the following 4 main criteria in order to determine the nationality of a company:

Criteria 1: Location of the enterprise registered office

Criteria 2: Location of decision-making centres

Criteria 3: Location of research centres

Criteria 4: Territory on which the work is carried out

Additional evaluation elements can be set in specific cases (e.g. for the industrial contracts of the Guiana Space Centre), and duly reported in procurement and/or audit documentation.

With respect to the above criteria it is recalled that the Convention describes that in doubtful cases the ESA Council shall decide whether an enterprise shall be considered to belong to one of the Member States, or not. For this specific task the Council has empowered the IPC, in accordance with section 7(a) of the IPC Terms of Reference (ESA/C/CLX/Res.1 (final))

This implementing instruction formalises the Agency's audit methodology, procedure and approval process to establish the nationality of companies.

ARTICLE 2: AUDIT METHODOLOGY

ARTICLE 2.1: Authority to request a nationality audit

The audit on the nationality of a company may be initiated at the request by / initiative of one of the following parties:

The Member State having reasonable doubts on the nationality of the company and for which the ESA commitments to the company concerned are computed against its industrial return,

The company, in whose opinion ESA is not considering its nationality correctly and which therefore considers that such might have effects on its ability to bid for certain procurements,

ESA, when it decides to verify / re-assess the industrial reality as compared to the 4 basic criteria (plus the additional elements) set for the company as a whole and/or for specific work-packages contracted.

ARTICLE 2.2: Audit Plan

On the basis of the requests made by any of the parties listed in Article 2.1 above, a three-year audit plan will be proposed by the Industrial Cost Audit and Contracts Controlling Division. Such plan will be subsequently presented to and approved by the Head of Procurement Department and the Director of Resources Management and Industrial Matters. Once the annual audit plan has been approved the plan will be presented to the IPC for information. Progress reports on the conduct and outcome of the audits as well as revisions to the audit plan will be presented to the IPC on a regular basis.

The audit plan will specify whether the audit concerns a nationality audit on the company as a whole or whether the audit relates to pre-identified work packages and/or cost elements of contract prices.

ARTICLE 2.3: Audit Announcement and data to be provided by audited companies

Following the inclusion in the approved audit plan, the company will be informed by letter of the intended audit. In this letter the company is requested to provide the relevant ESA auditor with the information and supporting documents required relevant to the scope of the audit.

Article 2.4 of this Implementing Instruction contains a non-exhaustive list of documents requested prior to the conduct of the audit.

ARTICLE 2.4: Audit steps

For each of the criteria set in Article II.3 of annex to the ESA convention and recalled in Article 1 above, the following reviews will be performed by the ESA auditor when conducting a nationality of company audit such with the collaboration of the audited companies:

ARTICLE 2.4.1: Location of the registered office

The Company's legal registration documentation will be reviewed as it has been presented to and validated by the respective national authorities. In addition the Company will be requested to provide the annual published company financial statements over the preceding 3 years.

ARTICLE 2.4.2: Location of the decision making centres

The company will be requested to provide the most recent organisational chart of the company including an overview of the shareholder structure of the mother companies and subsidiaries. With respect to the specific space related activities, the Company will be requested to provide further evidence on the decision making process and on the level of autonomy for the legal entity concerned on matters concerning the business line / company segment dealing with space activities.

ARTICLE 2.4.3: Location of research centres

The company will be requested to provide an overview of the location of the research centres dealing with space related research activities and in particular on the interaction between the research centre and the location where the actual development and/or production / manufacturing / assembly works takes place.

ARTICLE 2.4.4: Territory on which the work is carried out

The company will be requested to provide evidence where the work is actually performed. Such evidence may vary depending on whether the review relates to the determining the nationality of the company as a whole, or whether it concerns a review on specific work packages. The audit evidence requested by the ESA auditor will be tailored to the scope of the audit, but could include elements such as corporate income taxes, and/or social security contribution related payments. In the case the scope of the audit would be a review on the location of where specific work packages are effectively performed, proof from the company's accounting records could be requested.

In the case where the legal entity's cost structure is heavily burdened by costs / charges originating from related companies located in other countries, evidence may be requested on the content / purpose of such costs / charges.

Further reviews may be performed on the basis of the additional criteria set in specific cases, as per Art. 1.

ARTICLE 3: AUDIT PROCESS

The audit process related to the determination of the nationality of companies will be as follows:

Upon approval of the audit plan by the Director of Resources Management and Industrial Matters, the company concerned will be informed by letter that the Agency wishes to conduct a nationality audit of the company and/or of certain work share contracted to the company.

The notification will recall the criteria against which the nationality will be judged, including additional evaluation elements (if needed), and will formalise the written information requested from the company.

Upon receipt of the information / documentation, ESA will inform the company if an on-site audit review is necessary. If such on-site audit review is considered required, therefore, interviews will be conducted with the appropriate management levels, such being arranged in close coordination with the company concerned.

Upon careful considerations of all relevant elements ESA will make its recommendation on the nationality(ies) to be considered for ESA industrial return purposes and on the relevant split and will substantiate its findings in a draft audit report.

The draft audit report will indicate the applicable date of its findings on the ESA industrial return statistics, and where relevant shall define the date for the retroactive implementation on ESA's industrial return statistics.

The audited company concerned will be requested to provide comments to the draft audit report within a period of 4 weeks after its release.

Based on its initial findings and the comments provided by audited company, ESA will finalise its report and implement follow-up actions where relevant.

In case the nationality of the company and/or the nationality aspects related to specific work packages and/or cost elements of ESA contracts awarded are not changed the ESA industrial return statistics will not be changed and the relevant delegation(s) will be informed accordingly.

In case the nationality of the company and/or the nationality aspects related to specific work packages and/or cost elements of ESA contracts awarded are changed, the company and the relevant delegation(s) will be informed accordingly prior to implementing the changes in the ESA industrial return statistics.

ESA will furthermore inform the company and the relevant delegation(s) of the possibility to appeal against the decision within one month of the notification by ESA of the decision to the firm. Such an appeal will be addressed to the IPC Chairman, copy to the Head of the Procurement Department.

In case no appeal is presented, the decision will be implemented at the end of the notification period.

In case an appeal is presented, the decision is deferred until the IPC, acting under the authority delegated to it by council, has pronounced its final decision.

ARTICLE 4: ENTRY INTO FORCE

The implementing instruction will enter into force on the date of its issuance for a period of 3 years.

At the end of the 3 year period the audit process will be re-evaluated by the IPC and based on its findings the Executive will extend the implementing instruction and/or will amend it.

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**ANNEX III : IMPLEMENTING INSTRUCTION CONCERNING THE
TENDER EVALUATION MANUAL ¹**

(Articles 15.3, 16.6, 23.10 and 34.9 of these Procurement Regulations)

Nothing in or related to this Tender Evaluation Manual shall be deemed a waiver of any of the privileges and immunities of the European Space Agency.

¹ In Accordance with Article 9 of these Procurement Regulations, the Director General established this Implementing Instruction.

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Chapter 7: Communications with TEB and Tenderers.

GLOSSARY

For the purpose of this Manual the following definitions will apply:

Adjudication Committee	The internal ESA body responsible for verifying that proposed procurement actions are in line within the established rules and policies and for recommending and approving them.
Appointing Authority	Acting under the authority of the Director General, the Head of the Procurement Department, or a staff member of the Procurement Department to whom the authority to appoint the Tender Evaluation Board has been delegated by the Head of the Procurement Department.
Call for Proposal	A procedure, limited or not in time, for inviting economic operators to submit tenders at their own initiative without responding to a specific Invitation To Tender issued by the Agency.
Competitive Tender	A process through which economic operators are invited to submit tenders.
Contract	An agreement established in writing, the subject of which is the delivery of supplies, the rendering of services or any activities carried out to or for the Agency in exchange for a price or another consideration, including any amendment to such agreement (Contract Change Notice, Rider)
Contractor	A Tenderer who has entered into a contract with the Agency.
Contract officer/ Assistant Contracts officer	A member of the Agency's Procurement Department who performs the procurement support functions.
Contractual solicitation documents	The Agency documents setting forth the desired contractual and tendering requirements under which supplies or services or any other activity will be procured (draft contract, special tender conditions...).
Contract Planning officer (CPO)	A staff member of the Agency Procurement Department who performs the administrative control of the internal procurement process.
Contract proposal	A submission for approval to place a contract with a recommended Tenderer or an amendment with a contractor.
Economic Operator	Any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the delivery of supplies, products or services

Electronic Means	Means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.
Frame contract	An agreement (s) between the Agency and one or more contractors, the purpose of which is to establish the terms governing work orders to be awarded during a given period and/or within a given financial limit of liability, in particular with regard to the price, the activity and, where appropriate, the quantity envisaged.
Framework Agreement	A single frame contract or the aggregation of several frame contracts
General procurement	A procurement, the subject of which is not directly the delivery of supplies or the rendering of services for the Agency's research, experiment, study or development activities and/or operational infrastructures.
Industrial Policy Committee	An ESA Council subordinate body entrusted with the competence on industrial policy matters and procurement.
Industrial policy measures	Any measure defined by ESA in the furtherance of the ESA defined objectives of industrial policy. consistent with the provisions of Article VII of the ESA Convention and Annex V thereof
Initiating Authority	The staff member (usually the Head of Division) who has the direct responsibility of the managerial and/or technical execution of the activity which forms the subject of the tender and who has been delegated in accordance with the Agency internal instructions the right to sign ESA internal acts leading to requests for proposals or for quotation.
Initiating Directorate/Department	The Directorate or Department to which the Initiating Authority reports.
Invitation To Tender ("ITT")/ Request for Quotation ("RFQ")	A formal invitation to economic operators to submit tenders for a contract containing the conditions for the submission together with the technical, managerial and contractual solicitation documents.
Non Competitive Tender(ing) (or "Direct negotiation")	A procedure in which competitive tender(ing) is waived.
Open Competitive Tender(ing)	A procedure for inviting tenders open to any economic operator.
Potential Bidder	An economic operator who has registered with the Agency.
Procurement proposal	A submission for approval to issue an Invitation to Tender.

Programme/Project Manager	<p>The staff member in charge of the technical and managerial execution of a Programme or Project encompassing one or various activities which forms the subject of a tender (Such staff member is also an Initiating Authority).</p> <p>Where only the technical execution of certain activities of the programme or the programme itself is delegated by a Directorate to a staff member of another Directorate, that staff member will act as Initiating Authority but the Programme/Project manager will be requested to sign the internal acts leading to the request for proposals or for quotation in accordance with the Agency Financial Instructions.</p>
Restricted Competitive Tender(ing)	A procedure for inviting tenders restricted to economic operators selected by the Agency.
Staff member	A person appointed pursuant to Article XII.3 of the ESA Convention.
TEB Participant	Any person taking part in the proceedings of a TEB or evaluation panel either as a member, as an expert or as an observer.
Technical and managerial solicitation package	The Agency documents setting forth the desired technical characteristics of the supplies or services or any other activities to be procured (statement of work, technical specifications...), and the associated management requirements.
Technical officer	The staff member designated by the Initiating Authority to follow and manage the activity which is the subject of the Invitation To tender and of the subsequent contract.
Tender/Offer/proposal	A submission in response to an invitation from the Agency.
Tender documents	All documents necessary for the preparation of a tender action
Tender Evaluation Board (TEB)	A board appointed for the purpose of reviewing the content of a procurement package prior to its publication and evaluating admitted tenders submitted.
Tender evaluation panel	A group of experts appointed to advise the TEB on specific aspects of tenders
Tender Opening Board (TOB)	A board responsible for deciding on the admissibility of the tenders received.
Tender Process	The part of the procurement process starting from the issuance of invitations up to and including the award of a contract by the Agency.
Tenderer	An economic operator submitting a tender in response to an Agency invitation (This excludes an economic operator providing supplies or services in support to the Tenderer in the framework of a contract placed by the Agency).

Tendering Body	A public body (including intergovernmental organisations) acting as potential contractor by submitting a tender in response to an Agency invitation.
Work order	An agreement established in writing within a frame contract, the subject of which is the delivery of supplies, the rendering of services or any activities carried out to or for the Agency in exchange for a price or another consideration.

SCOPE:

- I. The purpose of this Tender Evaluation Manual (TEM) is to implement the ESA Procurement Regulations adopted by the ESA Council, and to provide the rules applicable to the composition and proceedings of a Tender Evaluation Board ("TEB"). The rules contained in this TEM are mandatory for all TEB Participants.
- II. The processes described in this TEM are aimed at:
 - i. defining clear and concise requirements so as to constitute a proper basis for competitive tendering and non-competitive tendering;
 - ii. identifying, amongst others, strong and weak points in the technical and programmatic solutions proposed for the purposes of negotiating, and subsequently awarding a contract with the selected contractor.
 - iii. defining the relative quality of the tenders in order to select the most suitable contractor.
- III. Unless provided for herein, no deviation from the procedures laid down in this TEM to suit the needs of a particular procurement action may be implemented without the prior written authorisation of the Head of the Procurement Department or the person to whom he has delegated such authority.

Where in the case of a procurement action it has been decided to draw up a specific Tender Evaluation procedure and/or Manual, the latter in the case of procurement actions above 20 000 000 Euro shall be approved by the Appointing Authority, the Initiating Authority concerned and the appointed Tender Evaluation Board Chairperson. In all cases this specific procedure and/or Manual shall be made available to the TEB prior to its first Meeting and published in accordance with Article 4 of the Procurement Regulations.
- IV. This TEM shall always be interpreted so as to ensure:
 - i. transparency and fair and equitable treatment of all economic operators;
 - ii. that the participation of a Tendering Body does not cause any distortion of competition;
 - iii. the most economic and effective employment of the Agency's resources;
 - iv. the pursuance of the Agency industrial policy objectives consistent with the provisions of Article VII of the ESA Convention and Annex V thereof.
- V. Should any interpretation of any particular provision of this TEM be required, it shall be made in accordance with the above principles and it shall be recorded in the minutes of the TEB. Should the Contract officer or the Chairperson of the TEB consider it necessary or advisable, the matter shall be referred to the Head of the Procurement Department or the person to whom he has delegated such authority for resolution.
- VI. Unless foreseen otherwise, where consultation is required in this TEM and an agreement cannot be reached, the matter shall be brought for resolution to the hierarchical superiors of the persons initially consulted.

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PART I: TENDER EVALUATION BOARD

Pursuant to Article 23 of the Procurement Regulations a Tender Evaluation Board (hereinafter referred to as “TEB”) shall be established for every competitive tender and non-competitive tender.

Chapter 1: TEB composition

1.1 General principles

1.1.1 Any TEB established pursuant to this TEM and to the ESA Procurement Regulations shall be composed of²:

- i. members with voting and marking rights;

and, as the case may be supported by :

- ii. experts, for the purpose of bringing independent expert advice and opinions, with no voting and marking rights ;
- iii. observers, for the purpose of witnessing the TEB proceedings with no voting and marking rights .

1.1.2 Should a specific question arise in the course of an evaluation , the TEB may, on an ad hoc basis, call upon internal ESA specialised support in the areas of concern (e.g. cost engineering, cost auditing, industrial policy, engineering, operations..). Such persons shall not be accounted as experts and will be present only in part of those meetings of the TEB where the Chairperson of the TEB, in agreement with the Contract officer, calls on them to answer the specific questions. They shall have no voting and marking rights when attending the TEB meetings. The intervention of such specialised support shall be recorded in the minutes of the TEB.

1.1.3 In all cases, the member’s category shall comprise a majority of ESA staff members and only ESA staff members may perform the duties of Chairperson³, Technical officer and Contract officer. However, the Contract officer or the Technical officer may exceptionally be, in the case of non-competitive tender (direct negotiations) for small procurement actions a non-ESA staff member supporting the Procurement or initiating Department. In all other cases under no circumstances can both the Contract officer and the Technical officer of a given TEB be non ESA staff members.

² A Director may in no circumstances participate in a Tender Evaluation Board.

³ In the frame of international agreements entered into by the Agency with public bodies (including International Organisations), or in the case of collaborative programmes and when this is expressly foreseen in the programme’s legal instruments, the Chairmanship of the TEB may be co-chaired by a member of the said public body. In such cases the role and responsibilities of the co-chair shall be established in the agreement or as the case may be in a specific TEM.

1.1.4 With the exception of the Contract officer who shall be designated by the Procurement Department, the TEB members⁴ shall be proposed by the Initiating Authority for appointment. TEB members shall have the required overall appropriate experience and qualification in the pertaining technical and/or administrative disciplines in consideration of the nature of the subject procurement action and the appropriate hierarchical level with respect to their role within the TEB.

1.1.5 Where the tender action contains classified information, TEB participants and panel members who need to access such classified information shall possess the required Personnel Security Clearance (“PSC”) as established by the ESA Security Directives (ESA ADMIN/IPOL(2008)6).

1.1.6 Where the procurement is initiated by an establishment or a directorate in support of a programme, project, activity or service of another, a representative from such establishment, programme, project, activity or service shall inasmuch as possible be appointed to the TEB.

1.1.7 Appointment to and membership of a TEB is personal, and cannot be delegated. Participation to a TEB as a member or an expert is an integral part of staff professional duties, and once appointed, the related tasks shall be given priority.

1.1.8 Once appointed, no member of the TEB shall be subject to the instructions of his hierarchical superiors in respect of his activities as a member of the TEB.

1.1.9 Members of a TEB shall be:

- i. ESA staff members; or
- ii. staff members of public bodies (including International Organisations) pursuant to the provisions of international agreements concluded by the Agency or when this is expressly foreseen in the programme Declaration and Implementing Rules; and/or,
- iii. staff of public bodies seconded to the Agency, except when their employing organisation has a direct or indirect economic interest in the outcome of the tender action in question. For the purpose of calculating the proper balance of a TEB, the seconded staff shall count against the Directorate and/or Department to which he reports.

1.1.10 For any tender action superior or equal to 100 000 Euro which has been the subject of a procurement proposal to the IPC and for all competitive or restricted competitive tender actions superior or equal to 100 000 Euro which have not been the subject of a procurement proposal to the IPC, a TEB shall normally comprise not less than 3 (three) and not more than 7 (seven) members (inclusive of the Contract Officer and the Technical officer) unless otherwise agreed by the Appointing Authority; in

⁴ When technically relevant, the TEB shall comprise at least one staff member from D/TEC and/or from D/HSO and/or from D/HFI and/or from D/LAU.

addition, unless otherwise authorised by the Appointing Authority, no more than half of its members shall be from:

- i. the Initiating Directorate for ESTEC
- ii. the Initiating Department for the other establishments and sites.

1.1.11 For non-competitive tender actions which have not been the subject of a procurement proposal to the IPC and for all competitive or restricted competitive tender actions inferior to 100 000 Euro which have been the subject or not of a procurement proposal to the IPC, the TEB membership shall, without exception, comprise as a minimum the Technical officer and the Contract officer.

1.1.12 For restricted tender actions carried out under Framework Agreements a TEB shall normally comprise not less than 3 (three) and not more than 7 (seven) members.

1.1.13 Appointment of TEB members other than those foreseen under paragraph 1.1.9 above shall be made on a case by case basis upon written justification at the time of the proposal for the TEB nomination.

1.2 Specific function-related composition requirements

1.2.1 Chairperson⁵

The Chairperson of the TEB shall not be from the Department of the Initiating Authority and shall be of a grade⁶ equal or superior to that of the Technical officer.

The Technical officer shall not be eligible to be Chairperson

In the case of non-competitive tender actions where the TEB consists only of the Contract officer and the Technical officer, the Contract officer shall act as Chairperson.

1.2.2 Deputy Chairperson⁷

A Deputy Chairperson shall be appointed for every TEB consisting of at least 4 (four) members. The Technical officer shall not be eligible to be Deputy Chairperson.

1.2.3 Joint Secretaries

Upon their appointment, the Technical officer and the Contract officer shall act as Joint Secretaries of the TEB.

Unless otherwise specified in this TEM, the Joint Secretaries form the Tender Opening Board ("TOB").

⁵ In the frame of international agreements entered into by the Agency with public bodies (including International Organisations), or in the case of collaborative programmes and when this is expressly foreseen in the programme's legal instruments, the Chairmanship of the TEB may be co-chaired by a member of the said public body. In such cases the role and responsibilities of the co-chair shall be established in the agreement or as the case may be in a specific TEM.

⁶ For the purpose of this TEM the reference to grade shall not take into account the steps of a given grade band.

⁷ Idem footnote 1 one above.

In the frame of international agreements entered into by the Agency with public bodies (including International Organisations), or in the case of collaborative programmes and when this is expressly foreseen in the programme's legal instruments, the Secretariat of the TEB may be supplemented by staff of the said public bodies.

1.2.4 Experts

As far as possible the appointment of experts shall be avoided.

Not taking into account experts nominated in the frame of international agreements entered into by the Agency with public bodies (including International Organisations), or in the case of collaborative programmes, the number of experts in a TEB shall never be superior to half of the nominated TEB members with a maximum of 4 (four).

Should the complexity of the matter require more experts then the TEB shall recourse to the nomination of panel(s) except in the case of restricted tender actions carried out under Framework Agreements where no panels are allowed. Where a panel is nominated its Chairperson shall be a member of the TEB. (see Part V of the present TEM)

1.2.4.1 Experts may be:

- i. ESA staff members;
- ii. staff members of public bodies (including International Organisations) in the frame of international agreements entered into by the Agency with the public bodies (including international Organisations) or in the frame of collaborative programmes; and/or,
- iii. staff of public bodies seconded to the Agency, except when their employing organisation has a direct or indirect commercial interest in the outcome of the tender action in question.

1.2.4.2 Appointment of experts other than those foreseen under paragraph 1.2.4.1 above shall be agreed by the Appointing Authority on the basis of a written justification provided at the time of the proposal for the TEB nomination.

1.2.4.3 At the time of their appointment, experts are required to accept in writing the same rules as the other TEB participants.

1.2.4.4 Experts will participate only in those meetings - or part of those meetings - of the TEB where the Chairperson of the TEB, in agreement with the Contract officer, calls on them. Where such agreement cannot be reached the matter shall be referred for resolution to the Head of the Procurement Department or the person to whom he has delegated such authority. The absence of nominated experts shall not constitute a case for not holding a TEB meeting.

1.2.4.5 Experts shall only act in an advisory capacity and are not entitled to vote or to mark.

1.2.4.6 Experts shall receive the tender or only parts of the tender as may be decided by the TEB.

1.2.5 Observers

1.2.5.1 Observers from outside the Agency may attend a TEB upon appointment foreseen in the frame of international agreements entered into by the Agency with public bodies (including international Organisations) or in the frame of collaborative programmes.

1.2.5.2 ESA Staff members may be appointed as observers for the purpose of vocational training.

1.2.5.3 Appointment of observers other than those foreseen under paragraph 1.2.5.1 above shall be agreed by the Appointing Authority on the basis of a written justification provided at the time of the proposal for the TEB nomination.

1.2.5.4 Observers shall be subject to the same rules (secrecy and non-interest) as the other TEB participants.

1.2.5.5 Observers are not entitled to intervene in the deliberations, vote or mark.

1.2.5.6 Observers will participate only in those meetings - or part of those meetings - of the TEB where the Chairperson of the TEB, in agreement with the Contract officer, calls on them. Where such agreement cannot be reached the matter shall be referred for resolution to the Head of the Procurement Department or the person to whom he has delegated such authority.

1.2.5.7 Observers may, if they so wish, consult the tender documents. Such consultation may only take place on the Agency's premises unless foreseen otherwise in the frame of international agreements entered into by the Agency with public bodies (including international Organisations) or in the frame of collaborative programmes.

Chapter 2: Appointment of the TEB

The appointment of the TEB participants shall be made in compliance with the requirements of Chapter 1 above.

2.1 Membership proposal

2.1.1 The proposal for the membership of the TEB is the responsibility of the Initiating Authority who shall prepare the required TEB Nomination Form. With the exception of

that of the Contract officer, the Nomination Form shall include the names of all members, and as the case may be, of experts and observers.

2.1.2 Such proposal for membership shall be made subject to agreement with the hierarchy of the persons concerned.

2.1.3 The TEB Nomination Form may only be submitted by the Initiating Authority to the Appointing Authority once the procurement proposal for the tender action in subject has been authorised by the competent body (AC or IPC), except in the cases of:

- i. Tender action below 5 000 000 Euro where it has been dispensed for reasons of extreme urgency resulting from compelling operational needs, as foreseen under Article 21.3 of the Procurement Regulations.
- ii. Procurement carried out in the frame of calls for proposals or announcements of opportunities.

2.1.4 In the case of tender actions which do not need authorisation by the AC or the IPC or in the case of restricted tender actions carried out under Framework Agreements, the Initiating Authority may submit at any time to the Appointing Authority the TEB Nomination Form for approval of both the procurement action and the appointment of the TEB participants.

2.1.5 Unless approved by the AC or the IPC in a procurement plan or in the case of restricted tender actions carried out under Framework Agreements, the TEB Nomination Form shall include a detailed justification for the choice of the proposed method of procurement for:

- i. competitive tender actions limited to some States;
- ii. restricted competitive tender actions; and,
- iii. non-competitive tender actions ("Direct negotiations").

Such choice shall be based on PART II of the Procurement Regulations.

2.1.6 A TEB Nomination Form must further be accompanied by:

2.1.6.1 For tender actions above 20 000 000 Euro or preparatory of a follow on procurement above 20 000 000 Euro:

- i. a schedule for the proposed procurement action up to the placing of the contract taking due account of the pertaining agreed Contract Action Plan; and,
- ii. any written justification concerning the nomination of TEB members from outside the Agency and experts and observers.

2.1.6.2 For tender actions below 20 000 000 Euro:

- i. the technical and managerial solicitation package which shall be submitted for review to the proposed TEB;

- ii. a confirmation by the initiating authority that the technical and managerial solicitation package which shall be submitted for review to the proposed TEB has undergone the necessary:
 - a. control to ensure its technical coherence;
 - b. assessment as to its formal quality (e.g. Readability, none ambiguity and uniqueness of requirements);and,
 - c. coherency check with regard to other on-going actions within the Agency or in the framework of any established industrial policy measure, harmonisation policy and administrative disciplines pertaining to the subject procurement;
- iii. a schedule for the proposed procurement action up to the placing of the contract taking due account of both the pertaining agreed Contact Action Plan and the need for submission to Committees when required;
- iv. any written justification concerning the nomination of TEB members from outside the Agency, experts and observers.

2.1.6.3 For restricted tender actions carried out under Framework Agreements

- i. a schedule for the proposed procurement action up to the placing of the work order.
- ii. any written justification concerning the nomination of TEB members from outside the Agency and experts and observers.

2.2 TEB Appointing Authority

2.2.1 The Head of the Procurement Department – or a person to whom he has delegated⁸ such authority – shall be the TEB Appointing Authority and shall appoint the TEB participants. Should the person to whom such authority has been delegated act as Contract officer for the procurement action in question, then the TEB shall be appointed by that person's hierarchy.

2.2.2 In the case of tender actions above 20 000 000 Euro the Appointing Authority shall seek the prior endorsement of the Director General who shall submit it to the Director's General Directors Committee and who may on this occasion require any modification in the proposed Nomination Form.

⁸ *The list of such delegation can be obtained from the local Contracts and Planning Officers of each Establishment.*

2.2.3 In the case of tender actions which do not need authorisation by the AC or the IPC, the Procurement Department shall decide on the method of procurement and in agreement with the Initiating Authority on the application of any industrial policy measures unless:

- i. such method and/or measures were approved by the IPC or AC in a procurement plan,
- ii. in case of extreme urgency pursuant to article 21.3 of the Procurement Regulations, or
- iii. in the case of restricted tender actions carried out under Framework Agreements.

2.2.4 Upon receipt of the complete TEB Nomination Form and associated documents, the Appointing Authority may:

- i. require for justified reasons any modification in the composition of the TEB including the overall number of its participants;
- ii. decide on an alternative method of procurement in the case of tender actions which do not require prior submission to the AC or to the IPC except in the case of restricted tender actions carried out under Framework Agreements;
- iii. introduce in agreement with the Initiating Authority any required industrial policy measures or geographical return constraints;
- iv. postpone or reject the proposed Nomination Form in the absence of any of the documents required under paragraph 2.1.6 above.

2.2.5 The appointments shall be notified to the TEB participants and to the Initiating Authority.

2.3 Changes in appointments

2.3.1 Once appointed a TEB can only be modified in the following cases:

- i. participant's termination of employment irrespective of the reason;
- ii. participant's short or long term illness, or sabbatical leave;
- iii. disciplinary actions engaged against a participant;
- iv. conflict of interest;
- v. duly justified exceptional circumstances;

2.3.2 In all cases, changes in the composition of a TEB shall only be authorised by the Appointing Authority. Where the original appointment has been subject of an endorsement by the Director General, the Appointing Authority shall consult the Director General before authorising the change.

2.3.3 Changes shall be notified to the TEB participants and to the Initiating Authority.

Chapter 3: TEB Member's Duties

3.1 Duties of members

TEB members shall be responsible for:

- i. participating actively in all meetings of the TEB called by the Chairperson;
- ii. reviewing all the documents constituting the solicitation package submitted to them so as to ensure they constitute a proper basis for an ITT or an RFQ pursuant to the requirements set under this TEM;
- iii. analysing the tenders accepted for evaluation with respect to the requirements set under the published solicitation package and marking them pursuant to the requirements set under this TEM;
- iv. responding when called as a witness or interviewed in the framework of the Agency's Procurement Review Process.

3.2 Duties of the Chairperson and Deputy Chairperson of the TEB

The Chairperson, and in his absence the Deputy Chairperson of the TEB, shall:

- i. be responsible for the correct proceedings of the board;
- ii. establish and maintain the schedule of meetings of the board - including that of tender evaluation panels when appointed - up to the final recommendation in consultation with the other members, and following the proposal made by the Joint Secretaries;
- iii. by signing the minutes of the last TEB meeting preceding the publication of an ITT or RFQ certify that the proposed solicitation package reviewed by the TEB constitutes a proper basis for an ITT or an RFQ pursuant to the requirements set under this TEM;
- iv. appoint Tender Evaluation Panels upon proposal by the TEB Joint secretaries;
- v. chair - or participate in - any briefing or debriefing as called for under the present TEM or the Procurement Regulations;
- vi. report immediately to the Appointing Authority on any case which he may consider constituting a breach of the principles of transparency and fair and equitable treatment of all economic operators, or on any case in which industrial policy measures applicable to the tender action may be impaired.

3.3 Duties of the Joint Secretaries

The Joint Secretaries are specifically responsible for:

- i. keeping the records of all meetings;
- ii. taking short minutes and ensuring their distribution to all members;
- iii. drafting of the TEB reports;
- iv. ensuring that the reports and minutes of the TEB are drawn up and signed;
- v. making the necessary arrangements concerning experts and observers from outside the Agency;
- vi. submitting a proposal to the TEB Chairperson for the time schedule up to recommendation;
- vii. ensuring the distribution of admitted tenders or part of;
- viii. submitting a proposal for evaluation criteria and, if the complexity of an evaluation so requires, for sub-criteria, for approval by the TEB;
- ix. submitting a proposal for the appointment of tender evaluation panels (together with the panel reference documents) to the TEB for approval if the complexity of an evaluation so requires;
- x. ensuring that in the case of competitive tender actions the ITT package does not contain any information susceptible to allow for the identification of the TEB participants other than the Contract officer; and,
- xi. participate in any briefing or debriefing as called for under the present TEM or the Procurement Regulations.

3.4 Specific duties of the Contract officer

In addition to his duties as Joint Secretary to the TEB or Chairperson of the TEB in some cases of non-competitive tendering, the Contract officer shall:

- i. see to it that the TEB participants observe the applicable procurement rules and procedures and that the approved procurement policy is correctly implemented;
- ii. keep the records of the procurement proceedings in line with the requirements set under Article 6 of the Procurement Regulations;
- iii. in the case of appointment of a tender evaluation panel, ensure that the nomination of members is done in conformity with Part V of the present TEM ;

- iv. see to it, in consultation with the Chairperson and the Technical officer that the text and the marks given in the TEB report are coherent;
- v. during the tendering period be the only authorised person to receive any questions and requests from potential Tenderers and to issue the related answers by ESA in such a manner compatible with the principles of transparency and fair and equitable treatment of all economic operators;
- vi. in case of negotiations with Tenderers, communicate the questions and demands to the Tenderers concerned ;
- vii. report immediately to the Appointing Authority on any case which he may consider constituting a breach of the principles of transparency and fair and equitable treatment of all economic operators, or on any case in which industrial policy measures applicable to the tender action may be impaired; and,
- viii. participate in any briefing or debriefing as called for under the present TEM or the Procurement Regulations.

Chapter 4: TEB Proceedings

Unless otherwise provided for by the level of classification of the tender action, TEB proceedings (including that of TOB and Panels) and any documents produced in that framework shall be categorised as foreseen by and handled in accordance with the provision of the ESA Security Directives.

Once finalised and approved in accordance with the provision of this TEM, documents to be published shall prior to their release be marked as required by the ESA Security Directives.

Tenders received shall be treated as foreseen by and handled in accordance with the ESA Security Directives.

4.1 Quorum

4.1.1 A TEB can only meet if the following three conditions are met:

- i. two thirds⁹ of its appointed members are present including its Chairperson or its deputy;

⁹ Rounded up to the greatest integer ($5/3 \times 2 = 3.33 > 4$ or $4/3 \times 2 = 2.66 > 3$)

- ii. the nominated Technical officer and Contract officer are present, and
- iii. at least half of those members present are from outside the Initiating Department or Initiating Directorate¹⁰.

4.1.2 Where for a given meeting one of the Joint Secretaries is absent for unexpected reasons, the Appointing Authority may have him replaced. In the specific case of the Technical officer this shall be done following consultation with the Initiating Authority following his proposal¹¹. Such replacements shall be recorded in the minutes of the meeting.

4.1.3 Members who participate in the meeting by means of teleconference or videoconference are to be considered present.

4.2 Voting and marking rules

4.2.1 The decisions of the TEB shall normally be taken by a simple majority vote of members present.

4.2.2 Decisions of the TEB may be taken by consensus if so proposed by the Chairperson at the start of the meeting. If a member objects, the simple majority vote rule shall apply.

4.2.3 In case of a tie, the Chairperson shall have a casting vote.

4.2.4 Marks shall normally be given individually by the TEB members present.

4.2.5 Marking by the TEB members present may be given by consensus if so proposed by the Chairperson before the marking. If a member objects marks shall be given individually.

4.2.6 Members who have communicated their marks or vote in writing but are not present in the way described under paragraph 4.1.3 above are not to be considered as present and their marks or vote shall not be taken into account.

4.2.7 No voting or marking can take place in the absence of a Contract officer.

4.3 TEB member's right to challenge

4.3.1 Should a TEB member find that in the course of the tendering procedure, TEB proceedings (including attribution of marks) and deliberations, or during the clarifications or negotiations with the Tenderers, there is cause to challenge the proceedings of the TEB on grounds of respect of the applicable rules and regulations or the principles of transparency and fair and equitable treatment of all economic operators, he may challenge the proceedings.

¹⁰ For ESTEC it is always from outside the initiating Directorate

¹¹ In such case he shall fill in the required declaration of confidentiality and none interest

Such challenge and its justification shall be recorded in writing in the minutes of the meeting during which the challenge was made.

4.3.2 In such cases the Contract officer shall immediately refer the case to the Head of the Procurement department or his designated representative, for resolution.

4.3.3 Until such time the matter is resolved, the TEB proceedings may continue but in no case will the TEB take any decision (s) the result of which would eliminate a Tenderer or proceed with any marking and application of weighting factors.

4.3.4 The challenge, its outcome and any decisions taken in this context by the Head of the Procurement Department shall be recorded in the summary record decisions of the TEB.

4.4 Minutes of TEB meetings

4.4.1 The minutes of each TEB meeting shall contain as a minimum:

- i. the subject matter of the meeting and the reference number of the procurement;
- ii. the date of the TEB meeting;
- iii. the names of those present;
- iv. the list and references of documents submitted for review; and,
- v. a summary record of all relevant decisions taken by the TEB such as to allow a proper understanding of the different steps of the procedure followed and in particular those concerning approval and/or amendments to specifications, elimination of tenders, minority statements, challenges.

4.4.2 In addition, the minutes of the first TEB meeting shall contain:

- i. a statement by the Chairperson that he has reminded the participants that they must declare any conflict of interest;
- ii. a statement by the Chairperson that he has reminded the participants of their duty not to disclose any information concerning any aspect of the proceedings to third parties to the TEB except to those expressly foreseen under the present TEM, and to keep all documents pertaining to the TEB proceedings safe from access by third parties;
- iii. the confirmation that the Initiating Authority has provided the TEB with the written confirmation foreseen under Chapter 2.1.6 above;
- iv. the confirmation that the documents submitted for review by the TEB have undergone when applicable the process required by the Agency's instructions

on the “Application of ESA approved standards” (ESA/ADMIN/IPOL(2007)11 and updates);

- v. the calendar and schedule of the next meeting(s) compatible with the established plan; and,
- vi. in attachments, all Declarations of non-interest signed by the participants.

4.4.3 In addition, the minutes of the TEB meeting immediately preceding the publication of an ITT or RFQ shall contain¹²:

- i. a statement by the Chairperson that the TEB members have reviewed the documents submitted to them and agreed that they form a proper basis for an ITT or for an RFQ;
- ii. a statement by the Chairperson that the TEB has established the evaluation criteria and when applicable, associated weighting factors;
- iii. a statement by the Chairperson that the TEB members following their review of the documents submitted to them, consider that the schedule and budget proposed for the tender action in subject is adequate;
- iv. the confirmation that the Chairperson and each participant has completed and signed the Declaration of non-interest;
- v. a closing date for the tender action; and,
- vi. the updated calendar and schedule of the next meeting(s) compatible with the established plan.

4.5 TEB’s final evaluation report

4.5.1 The TEB’s final evaluation report shall be signed by the TEB members present at the time of the recommendation - including the Contract officer - and shall be kept in the contracts file.

4.5.2 The final evaluation report shall contain as a minimum:

- i. the reference and subject of the ITT or RFQ;
- ii. the TOB report;
- iii. the evaluation criteria and weighting factors;

¹² *This procedure is not applicable in the case of calls for proposals or announcements of opportunities*

- iv. the industrial policy and geographical distribution requirements indicated in the ITT or RFQ;
- v. the total marks (weighted and un-weighted);
- vi. the overall assessment of each tender;
- vii. any individual reservation or minority statement from TEB members;
- viii. the tenders in ranking order;
- ix. the final recommendation;
- x. the clear identification of the recommended Tenderer and his subcontractors if any together with their:
 - a) individual proposed price and price type;
 - b) respective nationality;
 - c) work geographical distribution.
- xi. any points of negotiation which need to be settled prior to a contract being placed.

4.5.3 The Annex to the final evaluation report shall contain:

- i. the reports and markings by individual panels if any and the summary deliberations of the TEB on such reports if not already included in the final evaluation report;
- ii. interim report(s) in the case of negotiations with Tenderers;
- iii. the minutes of the negotiation meeting(s) with Tenderers; and,
- iv. the record of any decision taken by the TEB concerning main modifications to the specifications or concerning elimination of tenders as the case may be.

4.6 Suspension and resumption of the proceedings

4.6.1 Pursuant to Article 31 of the Procurement Regulations, the Director General or the Head of the Procurement Department to whom he has delegated such authority may at any time suspend the procurement process related to an ITT or to an RFQ.

4.6.2 Upon resumption of the process, the TEB shall take due account of the period of suspension with respect to the time limits prescribed under Articles 29 and 37 of the Procurement Regulations, and of any other elements entailed by such suspension the effect of which could impair the principles of transparency and fair and equitable treatment of economic operators.

4.6.3 Potential Tenderers shall be informed simultaneously of any suspension and subsequent resumption in a manner identical with that applicable to the original ITT publication.

Chapter 5: In-confidence and non-interest

5.1 In-confidence

5.1.1 Unless otherwise provided for in this TEM all deliberations of the TEB and tender evaluation panels must be treated strictly in confidence and documents handled according to their level of classification.

This obligation of confidentiality can only be waived by a direct written instruction of the Director General, or when the participant is called as a witness or is interviewed in the framework of the Agency's Procurement Review Process.

5.1.2 Once appointed, TEB participants or panel members shall not be subjected to instructions from their hierarchy or employer in respect of their activities as participant to a TEB or panel.

5.1.3 The TEB Chairperson or the Joint Secretaries shall be authorised to give an oral briefing on the on-going proceedings of the TEB to the Director General, the responsible initiating Director/Head of Department or to the Appointing Authority or to the Head of the local Procurement division/ service when so required by any of them in writing. Such written requirement is not applicable in the case of non-competitive tender.

In such a case any information provided shall be treated strictly in confidence by the recipients. Any breach of such obligation may lead to sanctions as foreseen hereunder.

5.1.4 Should a participant to a TEB or panel be requested - or put under any pressure - to disclose the proceedings or any documentation - or part of - to any unauthorised third party to the TEB or panel, he shall immediately report the matter to the Contract officer for recording and shall inform the Chairperson and the Head of the Procurement Department for them to take appropriate action.

5.1.5 Pursuant to Article 36.3 of the Procurement Regulations, within 60 (sixty) calendar days following the issuance of the notification to Tenderers which have not been selected, their tenders shall be destroyed, unless the Tenderer requested their return in writing.

Such disposal shall be made in collaboration with the local site and security services according to the procedures in force at ESA.

5.2 Conflict of interest

Pursuant to Article 22 of the Procurement Regulations, whether in the frame of competitive tendering or none competitive tendering, there is a conflict of interest when the impartial and objective exercise of the functions of a TEB participant or panel member is compromised for reasons involving family, emotional life, political affinity,

economic interest or any other shared interest with Tenderers. This may consist of but not be limited to:

- i. an immediate member of the family of a TEB participant or panel member directly employed by or sitting on the board of one of the Tenderers¹³ or of its subsidiaries or subcontractors;
- ii. cases covered by regulation 3 “Loyalty” of the ESA Staff Regulations, Rules and Instructions;
- iii. a TEB participant or panel member who has applied for a position with one of the Tenderers or with one of its subsidiaries or subcontractors and is currently awaiting for an answer or has already been offered a position;
- iv. a TEB participant or panel member recruited by the Agency or by his current employer since less than twelve months and whose last employer is one of the Tenderers or one of its subsidiaries or subcontractors;
- v. a TEB participant or panel member employed by an economic operator or Tendering Body susceptible of submitting a tender (including as a subcontractor) in response to the subject tender action.

5.3 Declaration of non-interest

5.3.1 At the time of the first TEB Meeting or tender evaluation panel meeting, TEB participants or panel members are required to declare any known or potential conflict of interest which may impair the outcome of the tender action.

5.3.2 Where a TEB participant or panel member declares a conflict of interest at the time of the first TEB meeting or tender evaluation panel meeting, the Contract officer in consultation with the TEB Chairperson shall immediately inform the Appointing Authority who in consultation with the Initiating Authority (and when applicable for ESA staff the Director General), shall assess whether or not such interests are compatible with his participation to the TEB.

5.3.3 At the time of receipt of the tenders for evaluation TEB participants or panel members will be requested to review this declaration in the light of the tenders received. This shall be recorded in the tenders distribution receipt form.

5.3.4 Where a TEB participant or panel member declares a conflict of interest at the time of the receipt of the tenders, the Contract officer in consultation with the TEB Chairperson shall immediately inform the Initiating Authority who shall propose a replacement to the Appointing Authority.

¹³ for the purpose of the subject provision, are considered as Tenderers any companies who will be considered as sub-contractors or major suppliers in case of contracts award.

5.4 Sanctions

5.4.1 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEB participants or panel members who are ESA staff members may lead to disciplinary action as foreseen under the ESA Staff Regulations, Rules and Instructions¹⁴.

5.4.2 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEB participants or panel members who are seconded to ESA may lead to the immediate termination of their secondment.

5.4.3 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEB participants or panel members who have been nominated in the frame of international agreements entered into by the Agency with public bodies (including International Organisations) or in the case of collaborative programmes, may lead to their immediate removal from the TEB or evaluation panel.

A notification to the concerned body shall be issued immediately by the Head of the Procurement Department for further evaluation of the case.

5.4.4 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEB participants or panel members who are contractors staff on ESA sites shall lead to their immediate removal from ESA's premises and may further result in the termination of the contract for fault in case of wilful act.

¹⁴ **ESA STAFF REGULATIONS ; REGULATION 3 LOYALTY**

- 3.1 *A staff member may not accept any honour from a government or other source external to the Agency without the permission of the Director General.*
- 3.2 *Staff members shall abstain from all political activities and, more generally, from any public action or statement or publication if such activity, statement or publication is incompatible with the duties or obligations of an international civil servant or liable to involve the moral or material responsibility of the Agency.*
- 3.3 *A staff member shall not hold any posts or have any regular or paid occupation outside the Agency without the Director General's permission.*
- 3.4 *A staff member, or his spouse, may not directly or indirectly hold such interests in a commercial firm as could, by their nature, compromise his independence in the discharge of his duties in the Agency.*

Rule 3/1 Loyalty – General provisions

- (i) *The Director General shall have discretion to judge whether or not honours, and outside remunerations, activities and interests, are compatible with employment by the Agency and with the performance of a staff member's duties.*
- (ii) *The staff member concerned shall submit in writing, through his Personnel Officer, any applications for permission and statements which the Director General will need in order to form his judgement in the cases referred to above. The provisions relating specifically to certain of such statements and applications are given in Rules 3.1/1 to 3.4/1.*
- (iii) *An omission or false statement in infringement of Regulation 3 may lead to the termination of a staff member's appointment under Regulation 15.3(iii) or his dismissal under Regulation 25.2(iv)*

PART II: PROCEDURE FOR COMPETITIVE TENDERING

Chapter 1: TEB responsibilities prior to the issuing of the ITT. (PRE-TEB)

Prior to the issuing of the ITT, the TEB under the responsibility of its Chairperson shall review the corresponding solicitation package.

1.1 Acceptability of ITT documents for review by the TEB

1.1.1 All technical and managerial solicitation documents which form part of the ITT package to be reviewed by the TEB shall be distributed by the responsible Technical officer at least five (5) working days prior to the first meeting of the TEB¹⁵.

In the absence of any such documents on the fifth working day preceding the first meeting of the TEB, the TEB Chairperson shall call off the said meeting.

1.1.2 Those contractual solicitation documents which shall form part of the ITT package to be published by the Agency shall be distributed by the Contract officer at least two working days prior to the first TEB meeting. Such documents shall generally consist of a draft contract and draft special conditions for tender.

In the absence of any such documents on the day preceding the first meeting of the TEB, the TEB Chairperson may call off the said meeting.

1.2 Amendments to the technical and managerial solicitation documents

1.2.1 No amendment of the ITT technical and managerial solicitation documents which would result in a substantial change or complete review of the programmatic and technical content of the approved tender action can be made by the TEB without the prior approval of the Initiating Authority which remains responsible for the procurement action.

1.2.2 Should the TEB feel that such changes are needed, the proceedings of the TEB shall be suspended and the Chairperson together with the Joint Secretaries shall consult with the Initiating Authority or a person duly designated by it. All such matters shall be duly recorded in the summary minutes of the meeting.

1.2.3 When reviewing the documents the TEB shall ensure that:

- i. they constitute a proper basis for a competitive tender;
- ii. the requirements are unambiguous and exhaustive so that all potential Tenderers can understand them;

¹⁵ The Contract Officer will organise the meeting, such meeting may be held by teleconference or video conference.

- iii. any element of the ITT that has the effect of giving preference to some companies or their products is justified by specific requirements and recorded in the minutes;
- iv. terminology and units of measurement used are those normal to the subject matter of the ITT;
- v. the technical parts of the ITT do not contain contractual aspects¹⁶;
- vi. the proposed budget is commensurate with the subject procurement. Should this not be the case, the Chairperson together with the Joint Secretaries shall consult with the Initiating Authority.
- vii. all applicable industrial policy and geographical return requirements are correctly reflected and unambiguous; and,
- viii. the proposed schedule to complete the work is realistic. Should this not be the case, the Chairperson together with the Joint Secretaries shall consult with the Initiating Authority.

All such matters shall be duly recorded in the summary minutes of the meeting.

1.3 Endorsement and approval of solicitation documents for release

1.3.1 Once the TEB considers that all the conditions set forth in section 1.2 above are met, the documents shall be considered endorsed and shall be submitted to the Initiating Authority and the Procurement Department for approval through the appropriate electronic form.

1.3.2 Once approved by the Initiating Authority and the Procurement Department, the documents shall be binding for the subsequent evaluation phase unless modified in accordance with the provisions of Chapter 3 hereafter.

1.3.3 Should the Initiating Authority consider that the documents submitted result in a substantial change or complete review of the programmatic and technical content of the approved tender action it shall have the right to reject all or part of the documents endorsed by the TEB.

In such case it shall notify the Chairperson and the Joint Secretaries accordingly, provide them with its detailed comments and ask for the TEB to reconvene for taking its comments into consideration.

1.3.4 Should the Procurement Department be of the opinion that the documents presented contain some elements or ambiguities which may impair the principles of transparency and fair and equitable treatment of all economic operators or do not comply with the applicable instructions or specific industrial policy measures, it shall return the form to the Initiating Authority with its comments for further implementation by the TEB.

¹⁶ *Service Level Agreements are not to be considered in technical parts.*

1.4 Establishment and handling of the evaluation criteria and weighting factors

Pursuant to Article 25 of the Procurement Regulations and based on the proposal made by the Joint Secretaries, the TEB shall establish the evaluation criteria and sub-criteria, if any, and the associated weighting factors.

Evaluation criteria including sub-criteria, if any, are applied by the TEB to determine the strengths and weaknesses of a tender by separate evaluations of its various aspects. The identification of specific significant evaluation criteria is more essential than the identification of a multitude of criteria covering all possible minor aspects, which should be treated as sub-criteria.

The number of evaluation criteria shall never be less than two and no more than five.

1.4.1 Evaluation criteria shall be established and published for each ITT. Once approved, the evaluation criteria and sub-criteria shall be binding for the evaluation.

1.4.2 The TEB shall be free to establish such evaluation criteria as it sees fit, provided that all significant parts of the ITT are covered.

Guideline

Evaluation criteria may be selected from the following list:

- *understanding of and compliance with the requirements,*
- *quality,*
- *approach and suitability of the proposed design,*
- *suitability of facilities and of support programme,*
- *overall organisation and management methods,*
- *costing and planning,*
- *manpower deployment,*
- *experience and capacity of the Tenderer,*
- *compliance with substantive tender and contract conditions,*
- *Industrial procurement Plan (Make or Buy) etc.*

1.4.3 When establishing criteria and sub-criteria, the TEB shall inasmuch as possible follow established practice and shall take into consideration the following:

- i. evaluation criteria shall be well defined, logically distinct and avoid duplication;
- ii. where the TEB decides to appoint tender evaluation panels, the evaluation criteria should, as far as possible, be arranged under aspects corresponding to the field of reference of each panel;
- iii. sub-criteria when used shall breakdown the evaluation criteria into their various aspects and shall cover all aspects of the evaluation criteria to which they refer and shall not be used as means of introducing new criteria; and,
- iv. evaluation criteria shall not create unfair advantage for one economic operator over another.

1.4.4 Weighting factors

- i. The TEB shall attribute weighting factors against each of the evaluation criteria it establishes.
- ii. Weighting factors shall not create an unfair advantage to one economic operator over another.
- iii. The total of the weighting factors spread over the evaluation criteria and sub-criteria, if any, shall add up to 100%.
- iv. The weighting factors to be applied for the evaluation shall be published at the time of the issuing of the ITT.

1.4.5 Handling of approved evaluation criteria, sub criteria and weighting factors

Approval of the evaluation criteria, sub-criteria, if any, and their corresponding weighting factors shall be the subject of a separate item in the records of the TEB.

1.5 Establishment of the calendar

Based on the proposal made by the Joint Secretaries, the TEB shall establish the calendar and schedule of its next meetings - and that of the tender evaluation panel(s) where appointed - up to the recommendation.

1.5.1 General

Considering that all initiating Directorates/Departments should produce a comprehensive Procurement Plan with the objective of an even flow of actual procurement actions, the TEB Chairperson when establishing the time-schedule for the tender action shall ensure that such schedule is compatible with the pertaining Internal Procurement Plan established by the Initiating Department in association with the Procurement Department.

1.5.2 Proposal for time schedule

The TEB Chairperson shall establish in consultation with the other members a calendar of meetings for the TEB further actions up to the recommendation, it being understood that the time-limits for the tendering period established in conformity with the provisions of Article 29.3 of the Procurement Regulations is not less than:

- i. 30 working days from the date of publication or dispatch of the ITT for procurement actions superior or equal to 300 000 Euro.
- ii. 20 working days from the date of publication or dispatch of the ITT for all other procurement actions provided such period would not create an unfair advantage to the benefit of one or more economic operators.

This calendar shall be established in such a way that the recommendation shall be reached within a reasonable time-limit following the receipt of the tenders (ideally 30 calendar days with the exception of major tender actions).

As a rule, extensions to the closing dates shall not be granted. If granted, the Contract officer shall not communicate the name of the economic operator requesting the extension.

For cases foreseen under 1.5.2 ii an extension of a maximum period of 10 working days shall be granted automatically at the request of any potential Tenderer, provided such request reaches the Agency within the time limit prescribed in the ITT for such request.

1.6 Appointment of Evaluation Panels

Pursuant to Article 23.9 of the Procurement Regulations, and in accordance with PART V of the present TEM, where the complexity of the subject matter of the tender action so warrants, the TEB may appoint tender evaluation panels to advise it on specific aspects of the tenders.

1.7 Key Acceptance Factors

The TEB shall when relevant decide on key acceptance factors to be verified by the TOB. Such factors shall in any case be clearly indicated in the ITT cover letter and/or in the Special Conditions of Tender.

Chapter 2: TEB responsibilities during the tendering period

2.1 Amendments to the ITT

2.1.1 Amendments to the ITT may be proposed by the Initiating Directorate/Department at any time before the closing date and time of receipt of tenders.

2.1.2 Such amendments will be submitted to the Chairperson of the TEB and the Head of the local Procurement division/ service for consultation.

2.1.3 Following such consultation, the TEB Chairperson shall consult with the TEB in order to assess the impact of the proposed amendment on the ITT and he shall take the appropriate measures, including if necessary re-issuing of the ITT.

2.1.4 Any amendment to the ITT – together with any extension of the related closing date for the receipt of tenders, as may be required - shall be communicated simultaneously to all potential Tenderers concerned in the same manner to that which was used at the time of the publication of the original ITT. Such amendments and the associated decisions shall be kept in the contract file of the procurement

2.2 Clarifications to the ITT

2.2.1 The Agency may, before the closing dates and time of receipt of tenders, issue clarifications on the ITT either at the request of a potential Tenderer or on its own initiative.

2.2.2 Questions from potential Tenderers will only be considered when submitted in writing to the responsible Contract officer in the manner specified in the ITT and before the time-limits prescribed in the said ITT¹⁷.

2.2.3 Only questions received within the time-limits prescribed in the said ITT and concerning the understanding of the Agency's requirements will be answered.

2.2.4 The Contract officer shall transmit the questions to the Technical officer. Both will decide how the questions should be answered.

2.2.5 The answers to the questions will be prepared by the Technical officer or by the Contract officer or by both, and both the question and the answer shall be communicated to the TEB Chairperson (or the deputy Chairperson in case of absence) for approval prior to publication.

Without communicating the name of the economic operator asking the question, the answer and the question shall be communicated simultaneously to all potential Tenderers concerned on the same date in a manner identical with that applicable in respect of the original ITT's publication.

For restricted competitions, the question and the answer shall be addressed directly and simultaneously to each potential Tenderer.

Such communications shall be kept in the contract file of the procurement.

2.2.6 Should the Technical officer or the Contract officer deem that the answer could constitute an amendment to the ITT they shall:

- i. submit it to the Chairperson of the TEB and the Head of the local Procurement division/ service for consultation.
- ii. following such consultation, the TEB Chairperson shall consult with the TEB in order to assess the impact of the proposed amendment on the ITT and he shall take the appropriate measures, including if necessary re-issuing of the ITT.

2.2.7 Any clarification to the ITT - including as appropriate any extension of the closing date and time for the receipt of tenders - shall be communicated simultaneously to all potential Tenderers concerned in a manner identical with that applicable in respect of the original ITT publication. Such clarifications shall be kept in the contract file of the procurement.

¹⁷ As a guideline this period should be of 10 working days.

2.3 Communications with potential Tenderers

2.3.1 Communications with potential Tenderers shall be formal, in writing, and restricted to what is necessary to ensure clarity of the Agency's requirements and to preserve fair competition.

2.3.2 Any communication shall only be issued by the responsible Contracts officer or in his absence through the local Procurement division/ service and recorded in the contract file of the procurement.

2.4 Rescheduling of the TEB calendar

Any extension of the closing date for the receipt of tenders reschedules the TEB calendar established prior to the issuing of the ITT accordingly and is recorded as such. It shall also be recorded in the contract file of the procurement and communicated to the local Contract planning officer.

Chapter 3: Briefing to potential Tenderers prior to or during the tendering period¹⁸

Further to clarifications and amendments, the Agency may communicate with potential Tenderers through the organisation of briefing meetings when justified by the complexity of the ITT as provided under Article 30.1 of the Procurement Regulations.

3.1 Briefing meetings shall inasmuch as possible take place on the Agency's premises and shall be called or organised jointly by the Procurement Department and by the Initiating Authority.

3.2 Briefing meetings may take place preferably at any time prior to the issuing of the ITT, exceptionally within the first third of the tendering period.

3.3 Briefing meetings taking place following the issuing of the ITT shall be chaired by the TEB Chairperson and their records shall be kept by the Joint Secretaries of the TEB.

3.4 The invitation to attend briefing meetings and the subsequent questions submitted and answers given during these meetings shall be communicated by the Contract officer simultaneously to all potential Tenderers concerned whether present at the meeting or not in a manner identical with that applicable to the publication of the original or forthcoming ITT.

¹⁸ *These rules are only applicable once a TEB has been nominated.*

Chapter 4: Receipt and opening of tenders

Pursuant to Article 34 of the Procurement Regulations, all tenders received shall be opened by a Tender Opening Board (TOB) after the closing date and time established for the ITT.

4.1 Principles governing the proceedings of the TOB

The procedures regulating the receipt and opening of tenders are primarily established at ensuring that no distortion of competition or unfair advantage to a particular Tenderer occurs, and that all Tenderers have complied with both the general and special conditions of tender required in the ITT.

4.2 The Tender Opening Board (TOB)

4.2.1 The TOB shall consist of the Joint Secretaries of the TEB. The Contract officer shall act as Chairperson of the TOB.

4.2.2 For some tender actions identified in specific implementing instructions, the TOB may consist of the Contract officer and the local Contract planning officer (CPO), the latter acting as Chairperson of the TOB.

4.2.3 Where the Technical officer is in an establishment different from that of the Contracts officer or where the Technical officer is exceptionally absent, he may be replaced by another Contracts officer or the local Contract planning officer (CPO).

4.2.4 In the framework of international agreements entered into by the Agency with public bodies (including International Organisations) - or in the case of collaborative programmes - and when expressly foreseen in the programme legal instruments, the TOB may be supplemented by representatives of the public body. The latter shall be subject to the same obligations concerning in-confidence and non-interest as those applicable to TEB members.

4.3 Duties of the Tender Opening Board

4.3.1 Meeting.

The TOB shall convene as soon as possible after the closing date and time stipulated in the ITT.

4.3.2 Opening Conditions.

No opening may take place in the absence of a staff member of the Procurement Department.

Prior to the opening of the tenders, the TOB shall verify that the dispatch conditions have been met.

4.3.3 Admissibility of tenders

- i. Tenders shall be admitted if they were received before the closing date and time and if they do not show prima facie evidence of a major non-compliance with the formal tender conditions (including specific key acceptance factors) which would render the tender incomplete or could impair the fairness or secrecy of the competition.
- ii. Tenders received after the closing date and time may be admitted if the Tenderer has dispatched the tender in time to meet the closing date and has notified the Contract officer in writing (fax, e-mail with proof of dispatch...) of the dispatch.
- iii. If a tender, having been dispatched in time, with the proper written notification sent to the Agency, appears to have been lost or delayed in the transmission, the Agency may grant the Tenderer an extension allowing for the dispatching of duplicates within defined time-limits.

In such a case, the Contract officer shall request the Tenderer to send within 1 (one) working day the summary technical description, price and schedule of delivery by telecopy, and when technically feasible the full proposal by e-mail in Pdf format.

- iv. Tenders arriving after the expiry of the said limits and for which no proper written notification or proof of dispatch was sent to the Agency in due time shall not be taken into consideration and will be returned unopened to the Tenderer.

4.3.4 Non-admissible tenders

When a tender is considered non-admissible by the TOB, the TOB Chairperson shall inform the TEB Chairperson and both shall submit the matter to the Head of the local Procurement division/ service for decision.

If the tender is ruled non-admissible, the local Procurement division/ service shall within 3 working days from the decision notify the Tenderer in writing ("notification of non- admissibility"), stating the reasons for which the tender was considered non admissible .

4.4 TOB decision-making

4.4.1 Decisions by the TOB shall be taken unanimously.

4.4.2 If a decision cannot be taken unanimously, the Chairperson of the TOB shall inform the TEB Chairperson and both shall submit the matter to the Head of the local procurement division/ service for decision.

4.4.3 Where no tenders have been received, the TOB Chairperson shall inform the TEB Chairperson and shall submit the matter to both the Initiating Authority and the Head of the local procurement division/service for deciding jointly on whether to re-issue the ITT - either unchanged or amended.

Should they deem that re-issuing of the ITT, even with amended specifications, would be unlikely to yield acceptable tenders, the overall tender action shall be cancelled. The Contract officer shall implement the decision accordingly, notify the local Contracts Planning officer, and this shall be recorded in the contract file of the procurement.

4.4.4 Where only one tender has been received, the TOB Chairperson shall submit the matter to the Initiating Authority and to the Head of the local Procurement division/service for decision after having consulted with the TEB Chairperson. They shall jointly decide on whether to re-issue the ITT or to evaluate the tender received.

A decision to evaluate the admitted tender may only be taken if it is considered that re-issuing the ITT would be unlikely to yield better results or would be unfeasible due to the extreme urgency of the procurement or compelling operational requirements.

The Contract officer shall implement the decision accordingly, record it in the contract file of the procurement and notify the local Contracts Planning officer.

4.4.5 Where all tenders received have been ruled non-admissible pursuant to paragraph 4.3.4 above, the Initiating Authority and the Head of the local Procurement division/service shall jointly decide on whether to re-issue the ITT, either unchanged or amended. The Contract officer shall implement the decision accordingly, record it in the contract file of the procurement and notify the local Contract Planning officer.

4.4.6 In the case of an open competitive tender, any unsolicited tender (e.g. from an economic operator under the jurisdiction of a non-participating State) may, at the discretion of the Head of Procurement Department following consultation with the Initiating Authority, be admitted for evaluation.

4.4.7 In the case of a restricted tender action, an unsolicited tender (e.g. from an economic operator under the jurisdiction of a non-participating State) shall in principle not be admitted for evaluation; nonetheless, the Head of the local Procurement division/service may decide otherwise after having consulted with the Initiating Authority, taking due account of the terms of the restriction and provided the decision does not prejudice the fairness of the tender action.

4.5 TOB Report

4.5.1 The TOB shall draw up a report containing as a minimum:

- i. the subject and reference number of the ITT;
- ii. the date of issuance of the ITT, its closing date and any modifications thereto;

- iii. the names and nationality of the Tenderers and of any subcontractors, their respective quoted price and price type;
- iv. the status of the tenders as to their admissibility or not, and the reasons for non-admissibility, as the case may be;
- v. any decision in the case where a single tender has been received; and,
- vi. any decision taken pursuant to the key acceptance factors established in the ITT pursuant to Chapter 1 section 1.7 above.

4.5.2 The TOB report shall be drawn up through the TOB electronic report made available and it shall be distributed by the Contract officer to the TEB Chairperson and members and in the case where the tender action has been delegated from one Directorate to another it shall further be distributed to the delegating Directorate for information.

4.5.3 The TOB report shall form the first part of the TEB evaluation report.

4.6 Debriefing to Tenderers ruled non admissible

4.6.1 Pursuant to Article 34.8 of the Procurement Regulations, upon receipt of the notification of non-admissibility, Tenderers ruled non admissible may formally request in writing an oral debriefing from the Contract officer as to the reasons for which their tender was not accepted for evaluation.

4.6.2 Such oral debriefing shall take place at the Agency's premises and be given by the concerned Contract officer (or in his absence by another Contract officer or his hierarchy) at a date to be agreed with the Tenderer. As a matter of guidance, such debriefings should be given within 10 (ten) calendar days as from the date by which the Agency received the formal written request. If agreed by the parties such debriefing may be given by means of teleconference.

4.6.3 Explanations shall be limited to the findings of the TOB on the tender in question.

4.6.4 Minutes of debriefing meetings shall be established using the standard form and only contain:

- i. the subject matter of the meeting and the reference number of the procurement;
- ii. the date of the debriefing meeting ;
- iii. the way in which it was given (oral or teleconference) ;
- iv. the names and functions of those participating; and,
- v. a formal statement that the debriefing was given in accordance with Article 34.8 of the Agency's Procurement Regulations.

4.6.5 Minutes of debriefing meetings shall be signed by the participants present and the original shall be appended to the contract file of the procurement.

Where the debriefing was made by teleconference the minutes shall be established by the Agency's concerned Contracts officer and issued to the Tenderer ruled non admissible within one working day for his approval and signature.

The original bearing the signature of the Tenderer ruled non admissible shall be returned to the Agency who shall append it to the contract file of the procurement.

4.7 Public Opening of Tenders.

Where pursuant to Article 34.10 of the Procurement Regulations the Agency elects to open publicly the following shall apply:

- i. the decision to open publicly shall be taken by the Procurement Department;
- ii. the public opening shall be indicated in the ITT together with the date and place of the public opening;
- iii. public openings shall take place on the Agency's premises;
- iv. participation shall be limited to the Tenderers and not to economic operators who would be acting as subcontractors in any resulting contracts;
- v. information made public at the time of the opening shall be limited to the name of the Tenderers;
- vi. the list of tenders received will be communicated on request to the Tenderers that are not present at the time of the public opening; and,
- vii. the proceedings of the public opening shall be recorded in the contract file of the procurement.

Chapter 5: Re-issuing of the ITT

5.1 Pursuant to Article 35 of the Procurement Regulations, an ITT may only be re-issued in the following cases:

- i. where it is found necessary to amend the ITT after the closing date and time for the receipt of tenders.
- ii. where substantial errors¹⁹ or irregularities have actually occurred during the tendering process.
- iii. where the interest of the Agency so requires.
- iv. where pursuant to Chapter 4 above it has been decided to re-issue the ITT, either unchanged or amended.
- v. where as a result of the evaluation carried out by the TEB no admitted tender is acceptable.
- vi. where for ITTs superior or equal to 20 000 000 Euro no admitted tender has obtained an overall minimum weighted mark of 60 following the two stage tendering procedure foreseen under Article 16.1.c) of the Procurement Regulations.

The justification for the re-issuing of the ITT shall be recorded in the contract file of the procurement.

5.2 Disposal of tenders.

Where a decision is taken to cancel or re-issue the ITT with or without amended specifications, within five working days of the notification of such decision to all Tenderers, all tenders received shall be disposed of by the Agency or dealt with as required by the Tenderer in writing at the time of the submission of the tender.

¹⁹ A substantial error or irregularity shall be any infringement of the Procurement Regulations and/or its Implementing Instructions or any other pertaining Regulations of the Agency resulting from an act or an omission during the tender process which causes or might cause the principles of transparency and fair and equitable treatment of all economic operators to be jeopardised.

Chapter 6: Distribution of admitted tenders

6.1 Following the closing of the TOB proceedings, each member of the TEB shall receive a complete copy of each admitted tender unless otherwise required pursuant to the ESA Security Directives; when required, any other TEB participant shall receive either a complete or a partial copy of each admitted tender.

6.2 Where there are evaluation panels, the Chairperson of each panel shall receive a complete copy of each admitted tender. The decision on whether panel members are to receive complete tenders, or only such parts as relate to the aspects which are to be evaluated by the particular panel, shall be taken by the TEB Chairperson. The distribution of cost information shall be restricted to that information relevant to the aspect being evaluated by the individual concerned.

6.3 In support to the evaluation, specific parts of the tenders may be further distributed to:

- i. Cost Engineering services;
- ii. Procurement Audit and Industrial Policy services.

6.4 Tenders or part of shall not be distributed to any other persons.

6.5 Upon receipt of the documents the recipient shall sign off the receipt form.

6.6 Tenders received shall be treated by the recipients as foreseen by and handled in accordance with the provisions of the ESA Security Directives such as to avoid the disclosure of their content.

Chapter 7: TEB responsibilities subsequent to the receipt of tenders

The TEB, with the assistance of tender evaluation panels where appointed, shall assess tenders, mark them, apply weighting factors when applicable, prepare a final report on the results and make a recommendation as to any contract action to be taken as an outcome of the evaluation, in accordance with the following procedures.

7.1 Preliminary assessment

7.1.1 Prior to a qualitative assessment of the tenders admitted for evaluation by the TOB, the TEB shall undertake a second verification that each tender contains:

- i. a technical and managerial proposal;
- ii. a financial proposal including a binding price and price type;
- iii. a statement of contractual compliance;
- iv. a list of deliverables and associated delivery date(s);
- v. a confirmation of compliance with Article 18.1 and 18.5 of the Procurement Regulations; and,
- vi. a signature validating the tender.

7.1.2 If any of the above elements, or if any other element specifically required in the conditions of tender (including key acceptance factors established in the ITT) is missing and that omission is such as to render the tender substantively incomplete, then the TEB shall eliminate such tender from further evaluation.

7.2 Evaluation

7.2.1 The TEB shall evaluate against the set of criteria defined in the ITT:

- i. the completeness and the quality of the tender against the requirements of the ITT .
- ii. whether the ITT requirements (including work statement and management requirements) are complied with.

7.2.2 The TEB shall identify the strengths and weaknesses of each tender in respect to the criteria²⁰.

7.2.3 If a statement contained in a tender needs clarification, the procedure to be followed in such a case is the one described in Chapter 8 below.

²⁰ *This shall be done by comparing the tender with the ITT requirements, and not by comparing tenders among themselves.*

7.3 Discussion of findings

7.3.1 Prior to the marking of tenders the TEB shall discuss its findings and that of the panel(s), if any, on each aspect of a tender.

7.3.2 The TEB Chairperson shall guide the discussion in such a way that any significant difference of opinion may be reduced, and if this is not possible, then this is clearly identified and recorded.

7.4 Marking of tenders

7.4.1 The TEB following its discussion of findings shall award marks to each of the criteria and sub-criteria where appropriate.

7.4.2 The price as opposed to the credibility of costs shall not be marked.

7.4.3 TEB members shall mark all criteria for which they have a general understanding and can make an assessment.

They shall not restrict themselves to criteria related to their professional specialty, or aspects of criteria related thereto.

If a member marks one tender under a particular criterion, he shall mark all tenders under the said criterion.

7.4.4 The marks shall be a number between 0 (zero) and 100 (one hundred) for each criterion in accordance with the following scale:

Perfect	100
Excellent	90
Very Good	75
Good	60
Fair	50
Barely Acceptable	40
Worthless	0

7.4.5 Members shall restrict themselves to the indicated figures, but may if so authorised by the Chairperson award an intermediate mark by increments of 5 only if this would, to a significant extent, better reflect their judgment.

7.4.6 Any member of a TEB, whose mark differs significantly from the average of the marks given by the other members of the TEB under any criterion (20 points or more)

shall state specifically why he disagrees under that criterion, and the reason shall be recorded as “minority statement” in the TEB report.

7.4.7 Unless the majority of the TEB members consider the tender unacceptable under any criterion, any member(s) of a TEB who give(s) a mark below 40 shall state specifically why he/they consider the tender unacceptable under that criterion, and the reason(s) shall be recorded as “minority statement” in the TEB report.

7.4.8 Where prior to the attribution of marks it was decided by the TEB to mark by consensus, any member who at the time of the marking cannot agree with the proposed consensus marking shall specifically state why he disagrees, on which criterion and this shall be recorded in the minutes by the Contract officer.

In the latter case the marking shall be performed individually.

7.4.9 When the Chairperson of the TEB is satisfied that further discussion will not lead to a reduction of any discrepancies, the marks shall be officially recorded on the marking sheets. Marks once thus recorded cannot be changed.

7.5 Assessment of results following the marking

7.5.1 If as a result of the marking one or more tender is marked acceptable (i.e. ≥ 40) under all evaluation criteria, the TEB shall:

- i. eliminate the tender(s) having received one or more mark below 40;
- ii. proceed in applying the weighting factors only to the tender or those tenders marked acceptable under all evaluation criteria;
- iii. make its overall assessment and recommendation pursuant to paragraph 7.7 below; and,
- iv. finalise its final report and have it signed by all members.

7.5.2 If as a result of the marking all of the tenders are marked below 40 under one or more criteria the TEB shall not apply the weighting factors, close the evaluation and draw up its *final* report. In such a case:

- i. the Chairperson of the TEB shall submit the report to the Initiating Authority and to the Head of the Procurement Department or the person to whom he has delegated his authority for decision on whether to re-issue the tender;
- ii. The decision and the reasons therefore shall be recorded by the Contract officer in the contract file of the procurement.

7.6 Application of weighting factors

7.6.1 Once the TEB has proceeded with its marking (paragraph 7.5.1 above) the weighting factors shall be applied to the awarded marks.

7.6.2 The result of such application will be weighted marks which shall also be filled into the marking sheets together with their respective aggregate for each tender.

7.7 Overall assessment of tenders and finalisation of recommendation

7.7.1 Following the application of the weighting factors the TEB shall proceed with an overall assessment of the tenders taking into consideration:

- i. the weighted marks;
- ii. the price; and ,
- iii. when established in the ITT at the time of its issuing, the industrial policy measures and/or the geographical return requirements.

7.7.2 The TEB Chairperson who is responsible for the correct proceedings of the board shall guide the discussion in such a way that any possible significant differences of opinion may be reduced, or if this is not possible, that they are clearly identified and recorded.

7.7.3 As a result of the overall assessment of tenders, the TEB shall make a final recommendation for awarding the contract to the Tenderer who offers the most economic and effective employment of the Agency's resources.

This shall be the best combination of the total weighted mark, price and when applicable the industrial policy measures and/or the geographical return requirements established in the ITT at the time of its issuing.

In the case of general procurements, this shall be the lowest price tender acceptable under all the evaluation criteria.

Special cases for ITTs superior or equal to 20 000 000 Euro¹

For ITTs superior or equal to 20 000 000 Euro a final recommendation for awarding the contract can only be made for a tender if the latter has obtained a minimum overall weighted mark of at least sixty (60).

Where no admitted tender has received an overall weighted mark superior or equal to 60 as a result of the evaluation carried out but one or more admitted tenders have received an overall weighted mark comprised between 40 and 59, pursuant to Article 16 c) of the Procurement Regulations negotiations with all the Tenderers having received an overall weighted mark comprised between 40 and 59 are authorised.

¹ In some specific cases and where IPC has given its prior authorisation pursuant to Article 16 d) of the Procurement Regulations the two stage tendering procedure described in this Chapter may apply to procurement below 20 MEuro.

The detailed procedure for carrying out such negotiations is established under Chapter 9 of the present Part II.

7.7.4 The TEB shall also identify the main items that would require negotiation with the recommended Tenderer prior to the placing of a contract and such findings shall be clearly identified in its report.

In the case of ITTs superior or equal to 20 000 000 Euro for which negotiations shall be carried out pursuant to paragraph 7.7.3 above, the TEB shall identify the items that require negotiations and points which could be improved with every and each Tenderer.

7.7.5 The TEB shall recommend only one tender unless the programme or individual procurement proposal under which the subject tender action takes place foresees parallel contracts. In such a case, the TEB shall recommend the tender which comes second in the overall assessment provided it is of a good quality.

7.7.6 In all other cases, should the TEB consider that another tender of good quality but which comes second in the overall assessment could be considered, then it shall express this in a separate section of its evaluation report for the Initiating Authority's benefit, but it shall in no case make a recommendation on it.

7.7.7 In all cases, the TEB may deem it appropriate to point out in its final report the implications resulting from the choice of a given Tenderer, and may make any other remark it considers relevant to the evaluation.

7.8 Submission of the final evaluation report for decision.

7.8.1 Pursuant to Article 42.4 of the Procurement Regulations, the Technical officer shall submit the final evaluation report to the Initiating Authority and to the Head of the local procurement division/ service for joint decision by attaching the scanned copy of the original report signed by the TEB members to the appropriate electronic form.

In the case of ITTs superior or equal to 20 000 000 Euro for which negotiations have been carried out and updated or new tenders submitted and evaluated in accordance with Chapter 9 below, the initial final report shall be supplemented by a second final report to which the individual negotiation reports shall be attached.

7.8.2 In order to help them in their decision the Initiating Authority and/or the Head of the local Procurement division/ service may require a copy of the tender(s) recommended.

7.8.3 At this stage, the TEB Chairperson together with the Contract officer shall give an oral report to the Director General, the responsible Director, the Initiating Authority, the Appointing Authority and to the Head of the local Procurement division/ service, when required by any of them. This shall be recorded in the contract file of the procurement.

7.9 Referral of the final report back to the TEB

Exceptionally, in case of doubt as to the correctness or completeness of the evaluation, the Initiating Authority and/or the Head of the local Procurement division/ service may prior to making a decision, refer the matter back to the TEB Chairperson and Contract officer in writing with their detailed comments for further evaluation by the TEB; they shall, however, not direct changes to evaluation criteria, weighting factors or marks.

7.10 Closing of evaluation by the TEB

7.10.1 A TEB is maintained until such time a final recommendation is made or the action cancelled.

7.10.2 On finalisation of the evaluation, the TEB Chairperson shall remind its members again not to disclose any information concerning the evaluation to any third party, unless expressly authorised by the Director General or called as a witness or interviewed in the framework of the Agency's Procurement Review Process.

7.10.3 Each TEB participant who has received a tender - or part(s) of - shall return such documents immediately to the Contract officer for further disposal.

7.10.4 The Contract officer shall keep the originals of the recommended tender(s) and the Initiating Authority and the Technical officer may each retain one copy of the recommended tender(s) for the purpose of administering the resulting contract.

7.10.5 The Contract officer shall ensure that any other documents no longer needed for the sake of keeping the records are collected and disposed of.

Chapter 8: Communications with Tenderers subsequent to the admittance of the tenders for evaluation

Communications with Tenderers shall be limited to clarifications and notifications. They shall be in writing and shall preserve fair competition.

Any communication shall be issued through the local procurement division/ service and recorded in the contract file of the procurement.

8.1 Clarifications

If an omission in a tender is considered unintentional or if a statement contained in a tender needs clarification, the local Procurement division/ service shall, on the request of the Chairperson of the TEB consult with the Tenderer concerned in writing in order to obtain any clarification necessary for evaluation.

8.2 Notification to Tenderers after evaluation

Pursuant to Article 45 of the Procurement Regulations, Tenderers who have not been selected for the placing of a contract will be notified by the Procurement Department of the outcome of their respective tenders. Such notification shall be issued after the approval by the AC or the IPC as applicable, or after the signature of the contract and/or Preliminary Authorisation To Proceed (PATP) by the Agency with the successful Tenderer, whichever takes place first.

The above notification shall comprise a summary of the findings of the TEB together with the associated marks on the tender in question, and shall not cover the quality or contents of other tenders.

8.3 Debriefing to unsuccessful Tenderers

8.3.1 Within 10 calendar days following the receipt of the notification foreseen under paragraph 8.2 above unsuccessful Tenderers may require from the Contract officer an oral debriefing explaining the reasons why their tenders were not successful.

8.3.2 Such a debriefing shall in principle take place at the Agency premises - unless otherwise decided by the Agency - and shall be given by the concerned Contract officer (or in case of unavailability, by another Contract officer designated by his hierarchy) and Technical officer at a date to be agreed with the Tenderer.

As a matter of guidance, such debriefings should be given within 20 calendar days from the date of receipt by the Agency of the formal written request.

8.3.3. For procurements which have been the subject of a submission to the IPC, the TEB Chairperson shall participate in the debriefing.

8.3.4 Explanations shall be limited to the findings of the TEB on the tender in question, and shall not cover the quality or contents of other tenders. The following information may nonetheless be given:

- i. name of the successful Tenderer;
- ii. difference in points (with respect to the overall weighted mark) between the successful Tenderer and the debriefed Tenderer;
- iii. number of tenders evaluated and ranking of the debriefed Tenderer.

8.3.5 Minutes of debriefing meetings shall be drafted by the Contract officer and shall be signed by him and the representative of the unsuccessful Tenderer. The original shall be placed in the contract file of the procurement.

Chapter 9: Negotiations with Tenderers (Second Stage of Tendering).

The Agency may engage in a second stage of tendering where following the initial evaluation carried out by the TEB in application of Chapter 7 of the present Part II, no admitted tender has received an overall weighted mark superior or equal to 60 but one or more admitted tenders have received an overall weighted mark comprised between 40 and 59.

The present Chapter 9 describes the procedure to be followed in the second stage of this two Stage tendering procedure

9.1 Authorisation to enter into negotiation

On the basis of the report foreseen under Paragraph 7.8 above the Initiating Authority and the Head of the Procurement Department shall jointly authorise the entering into negotiations, the overriding objective of such negotiations being to obtain acceptable tenders (overall weighted mark of at least 60) .

They shall further determine:

- the topics for negotiations;
- the composition of the negotiation team; and,
- the period within which the negotiations shall take place.

9.2 Subjects and boundaries for negotiation

9.2.1 The topics for negotiation shall be determined by the need to improve tenders to an acceptable level (superior or equal to 60) and to allow a positive recommendation.

Such topics shall not lead in the deletion or modification of:

- any aspect, originally set forth in the solicitation documents having served as a basis for the initial evaluation, or
- any technical or quality characteristics of the supplies or services to be procured, and
- any evaluation criteria and weighting factor originally set forth in those documents for evaluating the tenders.

Such topics shall neither result in the addition of new characteristics or criteria with respect to the solicitation documents having served as a basis for the initial evaluation.

9.2.2 In its negotiations with Tenderers the team shall restrict itself to the topics and objectives set under paragraph 9.1 above.

Should it feel it needs to deviate, it shall state so in writing and obtain prior written approval from the Initiating Authority and the Head of the Procurement Department.

9.2.3 Prior to the start of negotiations, Tenderers shall be reminded in writing that:

i. where they accept to enter into negotiations and such negotiations go beyond the validity period of the initial tenders, pursuant to Article 37 of the Procurement Regulations their tenders shall be considered implicitly extended unless otherwise notified in writing by the Tenderers.

ii. any refusal by a Tenderer to enter into negotiations shall be communicated to the Agency in writing and such refusal will result in the elimination of his initial tender, but negotiations with other Tenderers shall proceed.

9.3 Composition of the negotiation team

9.3.1 The Initiating Authority and the Head of the Procurement Department in consultation with the TEB Chairperson shall establish the negotiation team and the person (s) who shall lead it.

9.3.2 In any case the team shall include the Technical officer and the Contract officer.

9.3.3 The members of the team should be chosen from the TEB and Panel participants which are members of the project unless special expertise which cannot be found among such participants is required for the negotiations.

9.3.4 All members of the negotiation team are subject to the rules on secrecy and non-interest established under Chapter 5 of Part I to the present manual.

9.3.5 The names of the negotiation team members shall be recorded in the contract file of the procurement.

9.4 Place of negotiations

9.4.1 Negotiations will normally take place on Agency premises, but the place of negotiation shall in any case be selected so as to maintain equality of opportunity for all Tenderers.

9.4.2 Where necessary, negotiations may include inspections of the facilities of the Tenderers in order to assess the capability of the Tenderers concerned.

9.5 Conduct of negotiations

9.5.1 Negotiations shall be led by the person(s) designed as such by the Initiating Authority and the Head of the Procurement Department at the time of the nomination of the negotiation team.

9.5.2 The Technical officer and the Contract officer under the authority of the TEB Chairperson shall fix the times and places for the individual negotiations, establish individual agendas, prepare and issue individual questions or demands to each of the Tenderers concerned and see to it that equality of opportunity is maintained at all times.

9.5.3 Negotiations will be conducted, under strict conditions of quality, recording and traceability with all Tenderers, with an aim of achieving the best possible revised tender from each Tenderer.

9.5.4 All Tenderers shall be treated equally and as such the negotiations shall be conducted impartially and no preference shall be given to any Tenderer.

9.5.5 No information contained in one tender (including tenders which were not retained for negotiation) or obtained during negotiations with other Tenderers, may be used with or disclosed to another Tenderer be it in the course of or outside negotiations.

9.5.6 The negotiation team may lay down the required competences and any other appropriate conditions such as the size of the negotiation team of the Tenderer.

9.5.7 No negotiations can take place in the absence of the Contracts officer and Technical officer. If the Contracts officer is exceptionally absent he may be replaced by another Contracts officer. If the Technical officer is exceptionally absent he may be replaced by another member of the Initiating Service. Such replacements will be recorded in the contract file of the procurement.

9.6 Recording of negotiations

9.6.1 All questions or demands put to Tenderers shall be recorded in writing in the contract file of the procurement, and responses shall be submitted in writing to the Contract officer who shall communicate them to the negotiation team and to the TEB for information.

9.6.2 Minutes of any meetings shall be kept and signed by both parties and a report on any visit to inspect facilities made and communicated to the TEB members. Such document will be attached to the contract file of the procurement.

9.6.3 A negotiation report summing up the negotiation(s) with each Tenderer shall be established by the person(s) leading the negotiation team at the end of each negotiation and attached to the second final report foreseen under paragraph 7.8.1 above.

9.7 Request for the submission of revised tenders and establishment of the submission period and validity period of the revised tenders.

9.7.1 The request for the submission of a revised tender shall be under the responsibility of the TEB and always be in writing.

9.7.2 Tenderers shall be informed that their responses shall be formally regarded as constituting a revised binding tender and that they may revise the price of their tender.

9.7.3 As the negotiations cannot take place simultaneously, the periods granted for submission of revised tenders and the terms of the request for submission shall be identical, starting from the finalisation of the negotiation with each Tenderer concerned.

The possibility of waiting for all negotiations to be finalised prior to issuing a request simultaneously to all Tenderers is also authorised.

9.7.4 The TEB chairperson together with the TEB secretaries shall establish the length of the period to be granted for submission of revised tenders.

As a rule this period shall never be less than 10 working days from the date of request for submission by the Agency.

9.7.5 An extension of the period of validity of tenders may be requested in order to take into account any factors such as the submission to the IPC.

9.7.6 The rules concerning the admissibility of revised tenders as described under paragraph 9.8.2 below shall be clearly indicated.

9.7.7 No extension of the period of submission of the revised tenders shall be granted.

9.8 Receipt and opening of revised tenders

9.8.1 The receipt and opening of the revised tenders shall be done by the Tender Opening Board.

9.8.2 A revised tender shall be admitted if it is received before the closing date and time communicated by the Agency.

9.8.3 The rules of admissibility concerning revised tenders are the ones contained under paragraphs 4.3.3 ii),iii) and iv) and 4.3.4 above.

9.9 TEB responsibilities subsequent to the receipt of revised tenders

9.9.1 Upon receipt of the revised tenders, the TEB in compliance with the provisions of Chapter 7 above shall consider the revised tenders, mark them against the same evaluation criteria and weighting factors used at the time of the first evaluation, proceed with an overall assessment and draw up a final report with a recommendation for the award of a contract.

9.9.2 The TEB shall further certify based on the negotiation reports that the negotiations carried out did not result in any deviations from the limitations set under paragraph 9.2.1 above.

9.10 Communications with Tenderers subsequent to the admittance of the revised tenders for evaluation

Communications with tenders shall be made in accordance with Chapter 8 above.

PART III:PROCEDURE FOR NON-COMPETITIVE TENDERING (DIRECT NEGOTIATIONS)

Chapter 1: TEB responsibilities prior to the issuing of the RFQ. (PRE-TEB)

Prior to the issuing of the RFQ, the TEB under the responsibility of its Chairperson shall review the corresponding solicitation package.

1.1 Acceptability of RFO documents for review by the TEB

1.1.1 All technical and managerial solicitation documents which form part of the RFQ package to be reviewed by the TEB shall be distributed by the responsible Technical officer at least five (5) working days prior to the first meeting of the TEB²¹.

In the absence of any such documents on the fifth working day preceding the first meeting of the TEB, the TEB Chairperson may call off the said meeting.

1.1.2 Those contractual solicitation documents which shall form part of the RFQ package to be published by the Agency shall be distributed by the Contract officer at least two working days prior to the first TEB meeting. Such documents shall generally consist of a draft contract and draft special conditions for tender.

In the absence of any such documents on the day preceding the first meeting of the TEB, the TEB Chairperson may call off the said meeting.

1.2 Amendments to the technical and managerial solicitation documents

1.2.1 No amendment of the RFQ technical and managerial solicitation documents which would result in a substantial change or complete review of the programmatic and technical content of the approved tender action can be made by the TEB without the prior approval of the Initiating Authority which remains responsible for the procurement action.

1.2.2 Should the TEB feel that such changes are needed, the proceedings of the TEB shall be suspended and the Chairperson together with the Contract officer - and with the Technical officer in the cases where the TEB is only made up of the Contract officer and the Technical officer- shall consult with the Initiating Authority or a person duly designated by it. All such matters shall be duly recorded in the summary minutes of the meeting.

²¹ *The Contract officer will organise the meeting, such meeting may be held by teleconference or video conference....*

1.2.3 When reviewing the documents the TEB shall ensure that:

- i. they constitute a proper basis for a non-competitive tender;
- ii. the requirements are unambiguous and exhaustive so that the Tenderer can understand them;
- iii. terminology and units of measurement used are those normal to the subject matter of the RFQ;
- iv. the technical parts of the RFQ do not contain contractual aspects²²;
- v. the proposed budget is commensurate with the subject procurement. Should this not be the case, the Chairperson together with the Contract officer shall consult with the Initiating Authority. All such matters shall be duly recorded in the summary minutes of the meeting;
- vi. all applicable industrial policy and geographical return requirements are correctly reflected and unambiguous; and,
- vii. the proposed schedule to complete the work is realistic. Should this not be the case, the Chairperson together with the Contract officer shall consult with the Initiating Authority. All such matters shall be duly recorded in the summary minutes of the meeting.

1.3 Endorsement and approval of solicitation documents for release

1.3.1 Once the TEB considers that all the conditions set forth in section 1.2 above are met, the documents shall be considered endorsed and shall be submitted to the Initiating Authority and the Procurement Department for approval through the appropriate electronic form.

1.3.2 Once approved by the Initiating Authority and the Procurement department, the documents shall be binding for the subsequent evaluation phase, unless modified in accordance with the provisions of Chapter 3 hereafter.

1.3.3 Should the Initiating Authority consider that the documents submitted result in a substantial change or complete review of the programmatic and technical content of the approved tender action it shall have the right to reject all or part of the documents endorsed by the TEB.

In such case it shall notify the Chairperson and the Contract officer accordingly, provide them with its detailed comments and ask for the TEB to reconvene for taking its comments into consideration.

1.3.4 Should the Appointing Authority be of the opinion that the documents presented contain some elements or ambiguities which do not comply with the applicable instructions or specific industrial policy measures it shall return the form to the Initiating Authority with its comments for further implementation by the TEB.

²² *Service Level Agreements are not to be considered in technical parts.*

1.3.5 Where the Appointing Authority is of the opinion that the documents presented contain some elements or ambiguities which would invalidate the basis on which the initial decision to waive open competition was made it shall consult with the Initiating Authority.

1.3.6 Where a decision to reverse to open competition is taken and where the TEB was only made up of the Contract officer and the Technical officer a new TEB shall be established and convene in accordance with the rules applicable to open competitive tender actions as set for under PART II of the present TEM.

1.3.7 Where a decision to reverse to open competition is taken and where the TEB was made up of 3 or more members, the TEB shall remain unchanged and shall reconvene in order to align its proceedings with Part II of the present TEM which becomes applicable.

1.4 Establishment and handling of the evaluation criteria and weighting factors

Pursuant to Article 25 of the Procurement Regulations and based on the proposal made by the Joint Secretaries, the TEB shall establish the evaluation criteria and sub-criteria, if any.

Evaluation criteria including sub-criteria, if any, are applied by the TEB to determine the strengths and weaknesses of a tender by separate evaluations of its various aspects. The identification of specific significant evaluation criteria is more essential than the identification of a multitude of criteria covering all possible minor aspects, which should be treated as sub-criteria.

The number of evaluation criteria shall never be less than two and more than five.

1.4.1 Evaluation criteria shall be established and published for each RFQ.

Once approved, the evaluation criteria and sub-criteria shall be binding for the evaluation.

1.4.2 The TEB shall be free to establish such evaluation criteria as it sees fit, provided that all significant parts of the RFQ are covered.

Guideline

Evaluation criteria may be selected from the following list:

- understanding of and compliance with the requirements,*
- quality,*
- approach and suitability of the proposed design,*
- suitability of facilities and of support programme,*
- overall organisation and management methods,*
- costing and planning,*
- manpower deployment,*
- experience and capacity of the Tenderer,*
- compliance with substantive tender and contract conditions,*
- Industrial procurement Plan (Make or Buy) etc.*

1.4.3 When establishing criteria and sub-criteria, the TEB shall in as much as possible follow established practice and shall take into consideration the following:

- i. evaluation criteria shall be well defined, logically distinct and avoid duplication;
- ii. where the TEB decides to appoint tender evaluation panels, the evaluation criteria should, as far as possible, be arranged under aspects corresponding to the field of reference of each panel; and,
- iii. Sub-criteria when used shall breakdown the evaluation criteria into their various aspects and shall cover all aspects of the evaluation criteria to which they refer and shall not be used as means of introducing new criteria.

1.4.4 Weighting factors for tender actions superior or equal to 20 000 000 Euro

- i. For tender actions equal or superior to 20 000 000 Euro, the TEB shall attribute weighting factors against each of the evaluation criteria it establishes.
- ii. The total of the weighting factors spread over the evaluation criteria and sub-criteria, if any, shall add up to 100%.
- iii. The weighting factors to be applied for the evaluation shall be published at the time of the issuing of the RFQ.

1.4.5 Handling of approved evaluation criteria, sub criteria and weighting factors.

Approval of the evaluation criteria, sub-criteria, if any, and their corresponding weighting factors, if any, shall be the subject of a separate item in the records of the TEB.

1.5 Establishment of the calendar

Based on the proposal made by the Joint Secretaries, the TEB shall establish the calendar and schedule of its next meetings - and that of the tender evaluation panel where appointed - up to the recommendation.

1.5.1 General

Considering that all initiating Directorates/Departments should produce a comprehensive Procurement Plan with the objective of an even flow of actual procurement actions, the TEB Chairperson when establishing the time-schedule for the tender action shall ensure that such schedule is compatible with the pertaining Internal Procurement Plan established by the Initiating Department in association with the Procurement Department.

1.5.2 Proposal for time schedule

The TEB Chairperson shall establish in agreement with the other members a calendar of meetings for the TEB further actions up to the recommendation.

The time-limits for the tendering period established in conformity with the provisions of Article 29.4 of the Procurement Regulations, shall in no circumstances be less than:

- i. 30 working days from the date on which the RFQ is published for procurements which have been the subject of a submission to IPC.
- ii. 20 working days for all other procurement of non- standard supplies or services;
- iii. 10 working days for the procurement of standard supplies or services which have no industrial policy implications. In cases of duly substantiated urgency this 10 working days' time limit may be reduced.

This calendar shall be established in such a way that the recommendation shall be reached within a reasonable time-limit following the receipt of the proposal (ideally 30 calendar days with the exception of major tender actions).

As a rule, extensions to the closing date should only be granted if the interest of the Agency so requires.

1.6 Appointment of Evaluation Panels

Pursuant to Article 23.9 of the Procurement Regulations, and in accordance with PART V of the present TEM, where the complexity of the subject matter of the tender action so warrants, the TEB may appoint tender evaluation panels to advise it on specific aspects of the tenders.

1.7 Key Acceptance Factors

The TEB shall when relevant decide on key acceptance factors to be verified by the TOB. Such factors shall in any case be clearly indicated in the RFQ cover letter and/or in the Special Conditions of Tender.

Chapter 2: TEB responsibilities during the tendering period

2.1 Amendments to the RFO

2.1.1 Amendments to the RFQ may be proposed by the Initiating Directorate /Department at any time before the closing date and time of receipt of the tender.

2.1.2 Such amendments will first be submitted to the Appointing Authority in order to assess whether the basis on which the initial decision to waive competition was made is still valid.

2.1.3 Where, the Appointing Authority is of the opinion that such amendments would invalidate the basis on which the initial decision to waive competition was made it shall consult with the Initiating Authority.

2.1.4 Where a referral of the matter to the Adjudication Committee or to the Industrial Policy Committee takes place as a result of the consultation with the Initiating Authority, the RFQ shall be suspended immediately and the Tenderer informed accordingly.

2.1.5 Where a decision to reverse to open competition is taken the RFQ shall be cancelled immediately.

2.1.6 Where the Appointing Authority is satisfied that such amendments do not invalidate the basis on which competition was waived, the TEB Chairperson shall consult with the TEB in order to assess the impact of the proposed amendments on the RFQ and he shall take the appropriate measures, including if necessary re-issuing of the RFQ.

2.1.7 Any amendment to the RFQ – together with any extension of the related closing date for the receipt of tender, as may be required - shall be communicated in the same manner to that which was used at the time of the publication of the original RFQ. Such amendments and the associated decisions shall be kept in the contract file of the procurement.

2.2 Clarifications to the RFQ

2.2.1 The Agency may, before the closing date and time of receipt of the tender, issue clarifications on the RFQ either at the request of the Tenderer or on its own initiative.

2.2.2 Questions from the Tenderer will only be considered when submitted in writing to the responsible Contract officer in the manner specified in the RFQ and before the time-limits prescribed in the said RFQ.

2.2.3 Questions received outside the prescribed time-limits and concerning the understanding of the Agency's requirements may be answered if the interest of the Agency so requests.

2.2.4 The Contract officer shall transmit the questions to the Technical officer. Both will decide how the questions should be answered.

2.2.5 The answers to the questions will be prepared by the Technical officer or by the Contract officer or by both, and both the question and the answer shall be communicated to the TEB Chairperson for approval prior to its sending. The answer and the question shall be communicated in a manner identical with that applicable in respect of the original RFQ's publication. Such communications shall be kept in the contract file of the procurement.

2.2.6 Should the TEB Chairperson, the Technical officer or the Contract officer deem that the answer could constitute an amendment to the RFQ they shall:

- i. submit the answers to the Initiating Directorate/Department and to the Appointing Authority in order for the latter to assess whether the basis on which the initial decision to waive competition was made is still valid and decide accordingly.
- ii. where the Appointing Authority is satisfied that such answers do not invalidate the basis on which competition was waived, the TEB Chairperson shall consult with the TEB in order to assess the impact of the proposed amendment on the RFQ and he shall take the appropriate measures, including if necessary re-issuing of the RFQ.

2.2.7 Any clarification to the RFQ including as appropriate any extension of the closing date and time for the receipt of the tender shall be communicated in a manner identical with that applicable in respect of the original RFQ publication. Such clarifications and the associated decisions shall be kept in the contract file of the procurement.

2.3 Communications with the Tenderer

2.3.1 Communications with the Tenderer shall be formal, in writing, and restricted to what is necessary to ensure clarity of the Agency's requirements.

2.3.2 Any communication shall be issued through the local Procurement division/service and recorded in the contract file of the procurement.

2.4 Rescheduling of the TEB calendar

Any extension of the closing date for the receipt of the tender reschedules the TEB calendar established prior to the issuing of the RFQ accordingly, and is recorded as such. It shall also be recorded in the contract file of the procurement and communicated to the local Contract Planning officer.

Chapter 3: Briefing meetings with the Tenderer prior to or during the tendering period

Further to clarifications and amendments, the Agency may communicate at any time with the Tenderer through the organisation of briefing meetings when justified by the complexity of the RFQ.

3.1 Briefing meetings shall inasmuch as possible take place on the Agency's premises and shall be called or organised jointly by the Procurement Department and by the Initiating Authority.

3.2 Briefing meetings which take place after the issuing of the RFQ shall be chaired by the TEB Chairperson and their records shall be kept by the Joint Secretaries of the TEB.

3.3 The invitation to attend briefing meetings shall be communicated by the Contract officer in a manner identical with that applicable to the publication of the original or forthcoming RFQ.

Chapter 4: Receipt and opening of tender (Tender Opening Board Process)

Pursuant to Article 34 of the Procurement Regulations, the tender received shall be opened by a Tender Opening Board (TOB) after the closing date and time established for the RFQ.

4.1 Principles governing the proceedings of the TOB

The procedures regulating the receipt and opening of tenders in the frame of non-competitive tenders are primarily established at ensuring that the Tenderer has complied with both the general and special conditions of tender required in the RFQ.

4.2 The Tender Opening Board (TOB)

4.2.1 The TOB shall consist of the Joint Secretaries of the TEB. The Contract officer shall act as Chairperson of the TOB.

4.2.2 For some tender actions identified in specific implementing instructions, the TOB may consist of the Contract officer and the local Contract Planning officer (CPO), the latter acting as Chairperson of the TOB.

4.2.3 Where the Technical officer is in an establishment different from that of the Contracts officer or where the Technical officer is exceptionally absent, he may be replaced by another Contracts officer or the local Contract Planning officer (CPO).

4.2.4 In the framework of international agreements entered into by the Agency with public bodies (including International Organisations) - or in the case of collaborative programmes - and when expressly foreseen in the programme's legal instruments, the TOB may be supplemented by representatives of the public body. The latter shall be subject to the same obligations concerning in-confidence and non-interest as those applicable to TEB members.

4.3 Duties of the Tender Opening Board

4.3.1 Meeting.

The TOB shall convene as soon as possible after the closing date and time stipulated in the RFQ.

4.3.2 Conditions.

No opening may take place in the absence of a staff member of the Procurement Department.

Prior to the opening of the tender, the TOB shall verify that the dispatch conditions have been met.

4.3.3 Admissibility of tender

- i. The tender shall be admitted if it was received before the closing date and time and if it does not show prima facie evidence of a major non-compliance with the formal tender conditions (including specific key acceptance factors) which would render the tender incomplete.
- ii. A tender received after the closing date and time shall be admitted if the Tenderer has dispatched the tender in time to meet the closing date and has notified the Agency in writing (fax, e-mail with proof of dispatch...) of the dispatch.
- iii. If a tender, having been dispatched in time, with the proper written notification sent to the Agency, appears to have been lost or delayed in the transmission, the Agency shall grant the Tenderer an extension allowing for the dispatching of duplicates within defined time-limits.
- iv. A tender arriving after the expiry of the said limits and for which no proper written notification or proof of dispatch was sent to the Agency in due time shall only be taken into consideration if the interest of the Agency so requires otherwise it will be returned unopened to the Tenderer.

4.3.4 Non-admissible tender

When a tender is considered non-admissible by the TOB, the TOB Chairperson shall inform the TEB Chairperson and both shall submit the matter to the Head of the local Procurement division/ service for decision.

If the tender is ruled non-admissible, the local Procurement division/ service shall within 3 working days from the decision notify the Tenderer in writing (“notification of non- admissibility”), stating the reason(s) for which the tender was considered non admissible.

4.4 TOB decision-making

4.4.1 Decisions by the TOB shall be taken unanimously.

4.4.2 If a decision cannot be taken unanimously, the Chairperson of the TOB shall inform the TEB Chairperson and both shall submit the matter to the Head of the local procurement division/ service for decision.

4.4.3 If no tender has been received, the TOB Chairperson shall inform the TEB Chairperson and shall submit the matter to both the Initiating Authority and the Head of the local procurement division/service for decision.

4.4.4 Should they deem that re-issuing of the RFQ, even with amended specifications, would be unlikely to yield an acceptable tender, the overall tender action shall be cancelled. The Contract officer shall implement the decision accordingly, notify the local Contracts Planning officer, and this shall be recorded in the contract file.

4.5 TOB report

4.5.1 The TOB shall draw up a report containing as a minimum:

- i. the subject and reference number of the RFQ;
- ii. the date of issuance of the RFQ, its closing date and any modifications thereto;
- iii. the names and nationality of the Tenderer and of any subcontractors, their respective quoted price and price type;
- iv. the status of the tender as to its admissibility or not, and the reasons for non-admissibility, as the case may be;
- v. Any decision taken pursuant to the key acceptance factors established in the RFQ pursuant to Chapter 1 section 1.7 above.

4.5.2 The TOB report shall be drawn up through the TOB electronic report made available and it shall be distributed by the Contract officer to the TEB Chairperson and members.

4.5.3 The TOB report shall form the first part of the TEB evaluation report.

4.6 Debriefing to a Tenderer ruled non admissible

4.6.1 Pursuant to Article 34.8 of the Procurement Regulations, upon receipt of the notification of non-admissibility, a Tenderer ruled non admissible may formally request in writing an oral debriefing from the Contract officer as to the reasons for which his tender was not accepted for evaluation.

4.6.2 Such oral debriefing shall take place at the Agency's premises and be given by the concerned Contract officer (or in his absence by another Contract officer or his hierarchy) at a date to be agreed with the Tenderer. As a matter of guidance, such debriefings should be given within 10 (ten) calendar days as from the date by which the Agency received the formal written request. If agreed by the parties such debriefing may be given by means of teleconference.

4.6.3 Explanations shall be limited to the findings of the TOB on the tender.

4.6.4 Minutes of debriefing meetings shall be established using the standard form and only contain:

- i. the subject matter of the meeting and the reference number of the procurement;
- ii. the date of the debriefing meeting;
- iii. the way in which it was given (oral or teleconference);
- iv. the names and functions of those participating; and,
- v. a formal statement that the debriefing was given in accordance with Article 34.8 of the Agency's Procurement Regulations.

4.6.5 Minutes of debriefing meetings shall be signed by the participants present and the original shall be appended to the contract file of the procurement.

Where the debriefing was made by teleconference the minutes shall be established by the Agency's concerned Contracts officer and issued to the Tenderer ruled non admissible within one working day for his approval and signature.

The original bearing the signature of the Tenderer ruled non admissible shall be returned to the Agency who shall append it to the contract file of the procurement.

Chapter 5: Re-issuing of the RFQ

5.1 Pursuant to Article 35 of the Procurement Regulations, an RFQ may only be re-issued in the following cases:

- i. where it is found necessary to amend the RFQ after the closing date and time for the receipt of the tender;
- ii. where substantial errors or irregularities have actually occurred during the tendering process;
- iii. where the interest of the Agency so requires;
- iv. where the RFQ is superior or equal to 20 000 000 Euro and the Tenderer has not obtained an overall minimum weighted mark of 60.

5.2 Disposal of tender

Where a decision is taken to cancel or re-issue the RFQ with or without amended specifications, within ten working days of the notification of the said decision to the Tenderer, the tender received shall be disposed of by the Agency or dealt with as required by the Tenderer in writing at the time of the submission of the tender..

Chapter 6: Distribution of admitted tender

6.1 Following the closing of the TOB proceedings, each member of the TEB shall receive a complete copy of the admitted tender; when required, any other TEB participant shall receive either a complete or a partial copy of the admitted tender.

6.2 Where there are evaluation panels, the Chairperson of each panel shall receive a complete copy of the admitted tender. The decision on whether panel members are to receive the complete tender, or only such parts as relate to the aspects which are to be evaluated by the particular panel, shall be taken by the TEB Chairperson. The distribution of cost information shall be restricted to that information relevant to the aspect being evaluated by the individual concerned.

6.3 In support to evaluation, specific parts of the tender may be further distributed to:

- i. Cost Engineering services;
- ii. Procurement Audit and Industrial Policy services.

6.4 The Tender or part of shall not be distributed to any other persons.

6.5 Upon receipt of the documents the recipient shall sign off the receipt form.

6.6 A received tender shall be treated by the recipients as foreseen by and handled in accordance with the provisions of the ESA Security Directives such as to avoid the disclosure of its content.

Chapter 7: TEB responsibilities subsequent to the receipt of the tender

The TEB, with the assistance of tender evaluation panels where appointed, shall assess the tender, mark it, prepare a final report on the results and make a recommendation as to any contract action to be taken as an outcome of the evaluation, in accordance with the following procedures.

7.1 Preliminary assessment

7.1.1 Prior to a qualitative assessment of the tender admitted for evaluation by the TOB, the TEB shall undertake a second verification that the tender contains:

- i. a technical and managerial proposal;
- ii. a financial proposal including a binding price and price type;
- iii. a statement of contractual compliance;
- iv. a list of deliverables and associated delivery date(s);
- v. a confirmation of compliance with Article 18.1 and 18.5 of the Procurement Regulations; and,
- vi. a signature validating the tender.

7.1.2 If any of the above elements, or if any other element specifically required in the conditions of tender (including key acceptance factors established in the RFQ) is missing and that omission is such as to render the tender substantively incomplete, then the TEB may eliminate the tender from further evaluation.

7.2 Evaluation

7.2.1 The TEB shall evaluate against the set of criteria defined in the RFQ:

- i. the completeness and the quality of the tender against the requirements of the RFQ.
- ii. whether the RFQ requirements (including work statement and management requirements) are complied with.

7.2.2 The TEB shall identify the strengths and weaknesses of the tender in respect to the criteria.

7.2.3 If a statement contained in the tender needs clarification, the procedure to be followed in such a case is the one described in Chapter 8 below.

7.3 Discussion of findings

7.3.1 Prior to the marking of the tender the TEB shall discuss its findings and that of the panel (s) if any, on each aspect of the tender.

7.3.2 The TEB Chairperson shall guide the discussion in such a way that any significant difference of opinion may be reduced, and if this is not possible, then this is clearly identified and recorded.

7.4 Marking of tender

7.4.1 The TEB following its discussion of findings shall award marks to each of the criteria and sub-criteria where appropriate.

7.4.2 The price as opposed to the credibility of cost shall not be marked.

7.4.3 TEB members shall mark all criteria for which they have a general understanding and can make an assessment.

They shall not restrict themselves to criteria related to their professional specialty, or aspects of criteria related thereto.

7.4.4 The marks shall be a number between 0 (zero) and 100 (one hundred) for each criterion in accordance with the following scale:

Perfect	100
Excellent	90
Very Good	75
Good	60
Fair	50
Barely Acceptable	40
Worthless	0

7.4.5 Members shall restrict themselves to the indicated figures, but may if so authorised by the Chairperson award an intermediate mark by increments of 5 only if this would, to a significant extent, better reflect their judgment.

7.4.6 Any member of a TEB, whose mark differs significantly from the average of the marks given by the other members of the TEB under any criterion (20 points or more) shall state specifically why he disagrees under that criterion, and the reason shall be recorded as “minority statement” in the TEB report.

7.4.7 Unless the majority of the TEB members consider the tender unacceptable under any criterion, any member(s) of a TEB who give(s) a mark below 40 shall state specifically why he/they consider the tender unacceptable under that criterion, and the reason(s) shall be recorded as “minority statement” in the TEB report.

7.4.8 Where prior to the attribution of marks it was decided by the TEB to mark by consensus, any member who at the time of the marking cannot agree with the proposed consensus marking shall specifically state why he disagrees on which criterion, and this shall be recorded in the minutes by the Contract officer.

In the latter case the marking shall be performed individually.

7.4.9 When the Chairperson of the TEB is satisfied that further discussion will not lead to a reduction of any discrepancies, the marks shall be officially recorded on the marking sheets. Marks once thus recorded cannot be changed.

7.5 Assessment of results following the marking

7.5.1 If as a result of the marking the tender is marked acceptable (i.e. ≥ 40 under all evaluation criteria), the TEB shall:

- i. proceed in applying the weighting factors when applicable;
- ii. make its overall assessment and recommendation pursuant to paragraph 7.6 below; and,
- iii. finalise its final report and have it signed by all members.

7.5.2 If as a result of the marking the tender has received marks below 40 under one or more criteria, the TEB shall not apply the weighting factors when applicable, close the evaluation and draw up its final report. In such a case:

- i. the Chairperson of the TEB shall submit the report to the Initiating Authority and to the Head of the Procurement Department or the person to whom he has delegated his authority for their decision on whether to re-issue the RFQ; and,
- ii. The decision and the reasons therefore shall be recorded by the Contract officer in the contract file.

7.6 Application of weighting factors for RFQs superior or equal to 20 000 000 Euro

Once the TEB has proceeded with its marking (paragraph 7.5.1 above), it shall proceed with the application of the weighting factors.

The result of such application will be weighted marks which shall also be filled into the marking sheets together with their respective aggregate.

7.7 Overall assessment of tender and finalisation of recommendation

7.7.1 The TEB shall proceed with an overall assessment of the tender taking into consideration the price and when established in the RFQ at the time of its issuing the industrial policy measures and/or the geographical return requirements.

7.7.2 The TEB Chairperson shall guide the discussion in such a way that any possible significant differences of opinion may be reduced, or if this is not possible, that they are clearly identified and recorded.

7.7.3 As a result of the overall assessment of the tender, the TEB shall make a final recommendation for awarding the contract to the Tenderer.

Special case for RFQs superior or equal to 20 000 000 Euro

For RFQs superior or equal to 20 000 000 Euro a final recommendation for awarding the contract can only be made if the Tenderer has obtained a minimum overall weighted mark of at least sixty (60).

Where the admitted tender has not received an overall weighted mark superior or equal to 60 as a result of the evaluation carried out but has received an overall weighted mark comprised between 40 and 59, pursuant to Article 16 c) of the Procurement Regulations negotiations with the Tenderer are authorised.

The detailed procedure for carrying out such negotiations is established under Chapter 9 of the present Part III.

7.7.4 The TEB shall also identify the main items that would require negotiation with the Tenderer prior to the placing of a contract and such findings shall be clearly identified in its report.

In the case of ITTs superior or equal to 20 000 000 Euro for which negotiations shall be carried out pursuant to paragraph 7.7.3 above, the TEB shall identify the items that require negotiations and points which could be improved with the Tenderer.

7.7.5 The TEB may make in its final report any other remark it considers relevant to the evaluation.

7.8 Submission of the final evaluation report for decision

7.8.1 Pursuant to Article 42.4 of the Procurement Regulations, the Technical officer shall submit the final evaluation report to the Initiating Authority and to the Head of the local procurement division/ service for joint decision by attaching the scanned copy of the original final report signed by the TEB members to the appropriate electronic form.

In the case of RFQs superior or equal to 20 000 000 Euro for which negotiations have been carried out and an updated or a new tender submitted and evaluated in accordance with Chapter 9 below, the initial final report shall be supplemented by a second final report to which the negotiation report shall be attached.

7.8.2 In order to help them in their decision the Initiating Authority and/or the Head of the local Procurement division/ service may require a copy of the tender.

7.8.3 At this stage, the TEB Chairperson together with the Contract officer shall give an oral report to the Director General, the initiating Director, the Initiating Authority, the Appointing Authority and to the Head of the local Procurement division/ service, when required by them. This shall be recorded in the contract file.

7.9 Referral of the final report back to the TEB

Exceptionally, in case of doubt as to the correctness or completeness of the evaluation, the Initiating Authority and/or the Head of the local Procurement division/ service may refer the matter back to the TEB Chairperson and Contract officer in writing with their detailed comments for further evaluation by the TEB; they shall, however, not direct changes to evaluation criteria, weighting factors (when applicable) or marks.

7.10 Closing of evaluation by the TEB

7.10.1 A TEB is maintained until such time a final recommendation is made or the action cancelled.

7.10.2 On finalisation of the evaluation, the TEB Chairperson shall remind its members again not to disclose any information concerning the evaluation to any third party, unless expressly authorised by the Director General or called as a witness or interviewed in the framework of the Agency's Procurement Review Process.

7.10.3 Each TEB participant who has received the tender - or part(s) of - shall return such documents immediately to the Contract officer for further disposal.

7.10.4 The Contract officer shall keep the original of the tender and the Initiating Authority and the Technical officer may each retain one copy for the purpose of administering the resulting contract.

7.10.5 The Contract officer shall ensure that any other documents no longer needed for the sake of keeping the records are collected and disposed of.

Chapter 8: Communications with the Tenderer subsequent to the admittance of the tender for evaluation

Communications with the Tenderer shall be limited to clarifications, notifications and shall be in writing.

Any communication shall be issued through the local procurement division/ service and recorded in the contract file.

8.1 Clarifications

If an omission in the tender is considered unintentional or if a statement contained in the tender needs clarification, the local Procurement division/ service shall, on the request of the Chairperson of the TEB consult with the Tenderer concerned in writing in order to obtain any clarification necessary for evaluation.

8.2 Notification to the Tenderer after evaluation

A Tenderer who has not been selected for the placing of a contract will be notified by the Procurement Department of the outcome of his tender. Such notification shall be issued as soon as the decision not to place the contract with the Tenderer is taken by the Agency.

The above notification shall comprise a summary of the findings of the TEB together with the associated marks.

8.3 Debriefing to unsuccessful Tenderer

8.3.1 Within 10 calendar days following the receipt of the notification foreseen under paragraph 8.2, the Tenderer may require from the Contract officer an oral debriefing explaining the reasons why his tender was not successful.

8.3.2 Such a debriefing shall in principle take place at the Agency premises - unless otherwise decided by the Agency - and shall be given by the concerned Contract officer (or in case of unavailability, by another Contract officer designated by his hierarchy) and Technical officer at a date to be agreed with the Tenderer.

As a matter of guidance, such debriefing should be given within 20 calendar days from the date of receipt by the Agency of the formal written request.

8.3.3 For procurements which have been the subject of a submission to the IPC, the TEB Chairperson shall participate in the debriefing.

8.3.4 Explanations shall be limited to the findings of the TEB.

8.3.5 Minutes of the debriefing meeting shall be drafted by the Contract officer and shall be signed by him and the representative of the unsuccessful Tenderer. The original shall be placed in the contract file of the procurement.

Chapter 9: Negotiations with Tenderers (Second Stage of Tendering).

The Agency may engage in a second stage of tendering where following the initial evaluation carried out by the TEB in application of Chapter 7 of the present Part III, the admitted tender has received an overall weighted mark comprised between 40 and 59.

The present Chapter 9 describes the procedure to be followed in the second stage of this two Stage tendering procedure

9.1 Authorisation to enter into negotiation

On the basis of the report foreseen under Paragraph 7.8 above the Initiating Authority and the Head of the Procurement Department shall jointly authorise the entering into negotiations, the overriding objective of such negotiations being to obtain an acceptable tender (overall weighted mark of at least 60) .

They shall further determine:

- the topics for negotiations;
- the composition of the negotiation team; and,
- the period within which the negotiations shall take place.

9.2 Subjects and boundaries for negotiation

9.2.1 The topics for negotiation shall be determined by the need to improve the tender to an acceptable level (superior or equal to 60) and to allow a positive recommendation.

Such topics shall not lead in the deletion or modification of:

- any aspect, originally set forth in the solicitation documents having served as a basis for the initial evaluation, or
- any technical or quality characteristics of the supplies or services to be procured, and
- any evaluation criteria and weighting factor originally set forth in those documents for evaluating the tender.

Such topics shall neither result in the addition of new characteristics or criteria with respect to the solicitation documents having served as a basis for the initial evaluation.

Such topics shall not invalidate the basis on which the initial decision to waive competition was made.

9.2.2 In its negotiations with the Tenderer the team shall restrict itself to the topics and objectives set under paragraph 9.1 above.

Should it feel it needs to deviate, it shall state so in writing and obtain prior written approval from the Initiating Authority and the Head of the Procurement Department.

9.2.3 Prior to the start of negotiations, the Tenderer shall be reminded in writing that:

- i. where he accepts to enter into negotiations and such negotiations go beyond the validity period of the initial tender, pursuant to Article 37 of the Procurement Regulations the tender shall be considered implicitly extended until such time the negotiations are finalised, unless otherwise notified in writing by the Tenderer.
- ii. any refusal by the Tenderer to enter into negotiations shall be communicated to the Agency in writing and such refusal will result in the elimination of his tender.

9.3 Composition of the negotiation team

9.3.1 The Initiating Authority and the Head of the Procurement Department in consultation with the TEB Chairperson shall establish the negotiation team and the person (s) who shall lead it.

9.3.2 In any case the team shall include the Technical officer and the Contract officer.

9.3.3 The members of the team should be chosen from the TEB and Panel participants which are members of the project unless special expertise which cannot be found among such participants is required for the negotiations.

9.3.4 All members of the negotiation team are subject to the rules on secrecy and non-interest established under Chapter 5 of Part I to the present manual.

9.3.5 The names of the negotiation team members shall be recorded in the contract file.

9.4 Place of negotiations

9.4.1 Negotiations will normally take place on Agency premises.

9.4.2 Where necessary, negotiations may include inspections of the facilities of the Tenderer in order to assess the capability of the Tenderer.

9.5 Conduct of negotiations

9.5.1 Negotiations shall be led by the person(s) designed as such by the Initiating Authority and the Head of the Procurement Department at the time of the nomination of the negotiation team.

9.5.2 The Technical officer and the Contract officer under the authority of the TEB Chairperson shall fix the times and places for the negotiations, establish the agenda, prepare and issue the questions or demands to the Tenderer .

9.5.3 Negotiations will be conducted, under strict conditions of quality, recording and traceability, with an aim of achieving the best possible revised tender.

9.5.4 The negotiation team may lay down the required competences and any other appropriate conditions such as the size of the negotiation team of the Tenderer.

9.5.5 No negotiations can take place in the absence of the Contracts officer and Technical officer. If the Contracts officer is exceptionally absent he may be replaced by another Contracts officer. If the Technical officer is exceptionally absent he may be replaced by another member of the Initiating Service. Such replacements will be recorded in the contract file.

9.6 Recording of negotiations

9.6.1 All questions or demands put to the Tenderer shall be recorded in writing in the contract file, and responses shall be submitted in writing to the Contract officer who shall communicate them to the negotiation team and to the TEB for information.

9.6.2 Minutes of any meetings shall be kept and signed by both parties and a report on any visit to inspect facilities made and communicated to the TEB members. Such document will be attached to the contract file of the procurement.

9.6.3 A negotiation report summing up the negotiation(s) with the Tenderer shall be established by the person(s) leading the negotiation team at the end of each negotiation and attached to the second final report foreseen under paragraph 7.8.1 above.

9.7 Request for the submission of the revised tender and establishment of the submission period and validity period of the revised tender.

9.7.1 The request for the submission of a revised tender shall be under the responsibility of the TEB and always be in writing.

9.7.2 The Tenderer shall be informed that his response shall be formally regarded as constituting a revised binding tender and that he may revise the price of his tender.

9.7.3 The period granted for the submission of a revised tender and the terms of the request for submission shall be reasonable

9.7.4 The TEB chairperson together with the TEB secretaries shall establish the length of the period to be granted for submission of the revised tender.

As a rule this period shall never be less than 10 working days from the date of request for submission by the Agency.

9.7.5 An extension of the period of validity of the tender may be requested in order to take into account any factors such as the submission to the IPC.

9.7.6 The rules concerning the admissibility of the revised tender as described under paragraph 9.8.2 below shall be clearly indicated.

9.7.7 No extension of the period of submission of the revised tender shall be granted unless the interest of the Agency so requires.

9.8 Receipt and opening of the revised tender

9.8.1 The receipt and opening of the revised tender shall be done by the Tender Opening Board.

9.8.2 The revised tender shall be admitted if it is received before the closing date and time communicated by the Agency.

9.8.3 The rules of admissibility concerning the revised tender are the ones contained under paragraphs 4.3.3 ii),iii) and iv) and 4.3.4 above.

9.9 TEB responsibilities subsequent to the receipt of the revised tender

9.9.1 Upon receipt of the revised tender, the TEB in compliance with the provisions of Chapter 7 above shall consider the revised tender, mark it against the same evaluation criteria and weighting factors used at the time of the first evaluation, proceed with an overall assessment and draw up a final report with a recommendation for the award of a contract.

9.9.2 The TEB shall further certify based on the negotiations report that the negotiations carried out did not result in any deviations from the limitations set under paragraph 9.2.1 above.

9.10 Communications with the Tenderer subsequent to the admittance of the revised tender for evaluation.

Communications with the Tenderer shall be made in accordance with Chapter 8 above.

PART IV: PROCEDURE FOR RESTRICTED COMPETITIVE TENDERING IN FRAMEWORK AGREEMENTS

For the purpose of this Part IV of the present TEM and pursuant to Article 15.1 of the Procurement Regulations, a Framework Agreement is the aggregation of several frame contracts concluded in identical terms between the Agency and several contractors (hereinafter referred to as framework contractors) in order to ensure the delivery of supplies or rendering of services for a given period and/or within a given financial limit of liability.

In a Framework Agreement where frame contracts between the Agency and several contractors have been entered into, for each of the supplies or services to be procured under the Framework Agreement, restricted competitions shall be carried out between all or in some specific cases a limited number²³ of eligible framework contractors. Such supplies or services shall be procured through Request for Proposals (RFP) resulting in the placing of one or more Work Orders.

The present Part IV does not apply to Framework Agreements for multiple small units of work resulting in loan employment. In such cases specific procedures authorised by the Head of the Procurement Department shall be established at the time of the issuing of the Tender for the Framework Agreement.

Chapter 1: TEB Responsibilities prior to the issuing of the Request For Proposal (RFP).

Prior to the issuing of the RFP, the TEB under the responsibility of its Chairperson shall review the corresponding solicitation package.

Where a TEB is not nominated prior to the issuing of the RFP, the review of the corresponding solicitation package and the responsibilities of the TEB foreseen under the present Chapter 1 shall, unless specified otherwise, be performed jointly by the Technical Officer and the Contracts Officer. In such cases all resulting decisions and consultations shall be recorded in the RFP file.

²³ *Where a Framework Agreement covers a number of different supplies and services, there is no obligation on behalf of the Agency to invite those framework contractors participating in such Agreement whose framework contract does not cover the particular supplies or services that are the subject of the RFP.*

A Framework Agreement may be divided into categories, each covering different supplies or services. In that case the Agency only needs to invite within the Framework Agreement the eligible framework contractors in the categories that cover the goods and services required by the RFP.

1.1 Acceptability of RFP documents for review by the TEB

1.1.1 All solicitation documents which form part of the RFP package to be reviewed shall be distributed by the responsible Technical officer at least five (5) working days prior to the first meeting of the TEB²⁴.

In the absence of any such documents on the fifth working day preceding the first meeting of the TEB, the TEB Chairperson shall call off the said meeting.

1.1.2 Those contractual solicitation documents which shall form part of the RFP package to be published by the Agency shall be distributed by the Contract Officer at least two working days prior to the first TEB meeting. Such documents shall generally consist of a cover letter, draft Work Order and any specific conditions for tender.

In the absence of any such documents on the day preceding the first meeting of the TEB, the TEB Chairperson may call off the said meeting.

1.2 Amendments to the RFP solicitation documents

1.2.1 Amendments to the RFP solicitation documents which would result in one or more substantive modification to the terms set out in the Framework Agreement are not permitted.

1.2.2 Amendments to the RFP solicitation documents which would result in a substantial change or complete review of the programmatic and technical content of the approved tender action cannot be made by the TEB without the prior approval of the Initiating Authority who remains responsible for the procurement action.

Should the TEB feel that such amendments are needed, the proceedings of the TEB shall be suspended and the Chairperson together with the Joint Secretaries shall consult with the Initiating Authority or a person duly designated by it. All such matters shall be duly recorded in the summary minutes of the meeting.

1.2.3 When reviewing the documents the TEB shall ensure that when applicable to the specific subject of the RFP:

- i. they constitute a proper basis for a competitive tender;
- ii. the requirements are unambiguous and exhaustive so that retained framework contractors can understand them;
- iii. No elements of the RFP that have the effect of giving preference to some framework contractors or their products are included;
- iv. terminology and units of measurement used are those normal to the subject matter of the RFP;

²⁴ The Contract officer will organize the meeting, such meeting may be held by teleconference or video conference....

- v. the technical parts of the RFP do not contain contractual aspects:
- vi. where the proposed budget is to be published in the RFP, it is commensurate with the subject procurement. Should this not be the case, the Chairperson together with the Joint Secretaries shall consult with the Initiating Authority. All such matters shall be duly recorded in the RFP file;
- vii. all applicable industrial policy and geographical return requirements are correctly reflected and unambiguous; and,
- viii. the proposed schedule to complete the work is realistic. Should this not be the case, the Chairperson together with the Joint Secretaries shall consult with the Initiating Authority. All such matters shall be duly recorded in the summary minutes of the meeting.

1.3 Endorsement and approval of RFP documents for release

1.3.1 Once the TEB considers that all the conditions set forth in section 1.2 above are met, the documents shall be considered endorsed and shall be submitted to the Initiating Authority and the local Procurement division/ service for approval.

1.3.2 Should the Initiating Authority consider that the documents submitted result in a substantial change or complete review of the programmatic and technical content of the approved tender action or result in one or more substantive modification to the terms set out in the Framework Agreement it shall have the right to reject all or part of the documents endorsed by the TEB.

In such case it shall notify the Chairperson and the Joint Secretaries accordingly, provide them with his detailed comments and ask for the TEB to reconvene for taking his comments into consideration.

1.3.3 Should the local Procurement division/ service be of the opinion that the documents presented contain some elements or ambiguities which may impair the principles of transparency and fair and equitable treatment of all eligible framework contractors, or result in one or more substantive modification to the terms set out in the Framework Agreement, or do not comply with the applicable instructions or specific industrial policy measures, it shall return the form to the Initiating Authority with its comments for further implementation by the TEB.

1.3.4 Once approved by the Initiating Authority and the local Procurement division/ service, the documents shall be binding for the subsequent evaluation phase, unless modified in accordance with the provisions of Chapter 2 hereafter and distributed to the TEB when a TEB is not nominated prior to the issuing of the RFP.

1.4 Establishment and handling of the evaluation criteria and weighting factors

Pursuant to Article 25 of the Procurement Regulations and based on the proposal made by the Joint Secretaries, the TEB shall establish the evaluation criteria, and the associated weighting factors.

Evaluation criteria are applied by the TEB to determine the strengths and weaknesses of a proposal by separate evaluations of its various aspects.

The number of evaluation criteria shall never be less than two and no more than five.

1.4.1 Evaluation criteria shall be established and published for each RFP. Once approved, the evaluation criteria shall be binding for the evaluation.

1.4.2 For the establishment of the evaluation criteria:

- i. Where standard evaluation criteria for RFPs have been established within the Framework Agreement the TEB shall use such criteria.
- ii. Where, within the same Framework Agreement, for a previous RFP covering identical supplies or services evaluation criteria have been established by a TEB, such previously established evaluation criteria shall be used unless it was considered subsequently that such criteria were not adequate.
- iii. Where none of the two cases above apply, the TEB shall be free to establish such evaluation criteria as it sees fit, provided that:
 - a. all significant parts of the RFP are covered, and
 - b. such criteria do not repeat the criteria which served as a basis for the initial selection of the framework contractors.²⁵

1.4.3 When establishing criteria, the TEB shall inasmuch as possible follow established practice and shall take into consideration the following:

- i. evaluation criteria shall be well defined, logically distinct and avoid duplication; and,
- ii. evaluation criteria shall not create unfair advantage for one framework contractor over another.

1.4.4 Weighting factors

- i. The TEB shall attribute weighting factors against each of the evaluation criteria it establishes and shall publish them in the RFP.

²⁵ *Evaluation Criteria should not among others be ones covering the technical ability, or relevant experience of framework contractors etc. since this should have been the basis for their initial selection.*

- ii. Where a TEB is not nominated prior to the issuing of the RFP, the Initiating Service and the local Procurement division/ service shall jointly attribute weighting factors prior to the issuing of the said RFP.
- iii. For what concerns the attribution of weighting factors;
 - a) Where standard evaluation criteria and associated weighting factors for RFPs have been established within the Framework Agreement the TEB shall use such criteria and associated weighting factors.
 - b) Where, within the same Framework Agreement, for a previous RFP covering identical supplies or services evaluation criteria and weighting factors have been established by a TEB such previously established evaluation criteria and weighting factors shall be used unless it was considered subsequently that such weighting factors were not adequate .
 - c) Where none of the two cases above apply, the TEB shall be free to establish such weighting factors it sees fit.
- iv. Weighting factors shall not create an unfair advantage to one framework contractor over another
- v. The total of the weighting factors spread over the evaluation criteria shall add up to 100%.

1.4.5 Handling of approved evaluation criteria and weighting factors

Approval of the evaluation criteria and their corresponding weighting factors shall be the subject of a separate item in the records of the RFP.

1.5 Establishment of the calendar

1.5.1 Unless otherwise specified in the Framework Agreement the time-limits for the tendering period are:

- i. not less than 20 working days from the date of publication or dispatch of the RFP for the procurement of non-standard or complex supplies or services.
- ii. Not less than 10 working days from the date of publication or dispatch of the RFP for the procurement of standard or non-complex supplies or services.

1.5.2 A calendar shall be established for each RFP in such a way that the recommendation shall be reached within a reasonable time-limit following the receipt of the proposals (ideally 15 calendar days with the exception of major RFPs).

1.5.3 Where a TEB has been nominated prior to the issuing of the RFP, the TEB Chairperson shall, on the basis of the proposal made by the Joint Secretaries, establish in consultation with the other members a calendar of meetings for the TEB further actions up to the recommendation.

As a rule, extensions to the closing dates shall not be granted.

1.6 Key Acceptance Factors

The TEB shall when relevant decide on key acceptance factors to be verified by the TOB. Such factors shall in any case be clearly indicated in the RFP.

Chapter 2: TEB responsibilities during the tendering period

Where a TEB has not been nominated prior to the issuing of the RFP and up to its nomination the TEB responsibilities foreseen under the present Chapter 2 shall be performed jointly by the Initiating Service and the local Procurement division/service who shall have the obligation to distribute the issued RFP to the nominated TEB members. In such cases all resulting decisions and consultations shall be recorded in the RFP file.

2.1 Amendments to the RFP

2.1.1 Provided they do not result in one or more substantive modification to the terms set out in the Framework Agreement, amendments to the RFP may be proposed by the Initiating Directorate/Department at any time before the closing date and time of receipt of proposals.

2.1.2 Such amendments will be submitted to the Chairperson of the TEB and the Head of the local Procurement division/ service for consultation.

2.1.3 Following such consultation, the TEB Chairperson shall assess the impact of the proposed amendment on the RFP and he shall take the appropriate measures, including if necessary an extension of the closing date or re-issuing of the RFP.

2.1.4 Where such amendments would have the effect of making eligible framework contractors originally not declared eligible to participate, the RFP shall be re-issued.

2.1.5 Any amendment to the RFP – together with any extension of the related closing date for the receipt of proposals, as may be required - shall be communicated simultaneously to all framework contractors concerned in the same manner to that which was used at the time of the publication of the original RFP.

2.2 Clarifications to the RFP

2.2.1 The Agency may, before the closing dates and time of receipt of proposals, issue clarifications on the RFP either at the request of a concerned framework contractor or on its own initiative.

2.2.2 Questions from framework contractors will only be considered when submitted in writing to the responsible Contract officer in the manner specified in the RFP and before the time-limits prescribed in the said RFP.

2.2.3 Only questions received within the above time-limits and concerning the understanding of the Agency's requirements will be answered.

2.2.4 The Contract officer shall transmit the questions to the Technical officer. Both will decide how the questions should be answered.

2.2.5 The answers to the questions will be prepared by the Technical officer or by the Contract officer or by both. They shall be published without communicating the name of the framework contractor asking the question. The answer and the question shall be communicated simultaneously to all framework contractors concerned on the same date in a manner identical with that applicable in respect of the original RFP's publication. Such communications shall be kept in the RFP file.

2.2.6 Should the Technical Officer or the Contract officer deem that the answer could constitute an amendment to the RFP they shall:

- i. Submit it to the Chairperson of the TEB and the Head of the local Procurement division/ service for consultation.
- ii. Following such consultation, the TEB Chairperson shall consult with the TEB in order to assess the impact of the proposed amendment on the RFP and he shall take the appropriate measures, including if necessary re-issuing of the RFP.

Where such amendments would have the effect of making eligible framework contractors originally not declared eligible, the RFP shall be re-issued.

2.2.7 Any clarification to the RFP - including as appropriate any extension of the closing date and time for the receipt of proposals - shall be communicated simultaneously to all framework contractors concerned in a manner identical with that applicable in respect of the original RFP publication. Such clarifications shall be kept in the RFP file.

2.3 Communications with framework contractors

Communications with framework contractors shall be formal, in writing, and restricted to what is necessary to ensure clarity of the Agency's requirements and to preserve fair competition.

Any communication shall be issued by the responsible Contracts Officer or in his absence through the local Procurement division/ service and recorded in the work order file of the procurement.

2.4 Rescheduling of the TEB calendar

Any event having the effect of extending the closing date for the receipt of proposals reschedules the established calendar accordingly, and is recorded as such. It shall also be recorded in the work order file of the procurement and when required communicated to the local Contract planning officer.

Chapter 3: Receipt and Opening of proposals²⁶

Pursuant to Article 34 of the Procurement Regulations, all proposals received shall be opened by a Tender Opening Board (TOB) after the closing date and time established for the RFP.

3.1 Principles governing the proceedings of the TOB

The procedures regulating the receipt and opening of proposals are primarily established at ensuring that no distortion of competition or unfair advantage to a particular framework contractor occurs, and that all framework contractors having submitted a proposal have complied with the conditions required in the RFP.

3.2 The Tender Opening Board (TOB)

3.2.1 The TOB consists at least of two persons, including the responsible Contract Officer, one at least being a staff member of the Agency.

3.2.2 Where a TEB was nominated prior to the issuing of the RFP or during the tendering period the TOB shall consist of the Joint Secretaries of the TEB.

3.2.3 The admission of the proposals shall be made by the Contracts Officer. Where the latter considers that one or more proposals are not admissible as per paragraph 3.3 below, the decision shall be taken by the TOB.

3.2.4 In the framework of international agreements entered into by the Agency with public bodies (including International Organisations) - or in the case of collaborative programmes - and when expressly foreseen in the programme legal instruments, the TOB may be supplemented by representatives of the public body. The latter shall be subject to the same obligations concerning in-confidence and non-interest as those applicable to TEB members.

²⁶ Where and RFP requires that proposals be received electronically by e-mail or posted on a dedicated server, specific provisions modifying the provisions of Chapter 3 shall be established at the time of the issuing of the RFP and communicated to the framework contractors in the RFP.

3.3 Duties of the Tender Opening Board

3.3.1 Meeting.

The TOB shall convene as soon as possible after the closing date and time stipulated in the RFP.

3.3.2 Opening Conditions.

No opening may take place in the absence of a member of the Procurement Department.

Prior to the opening of the proposals, the TOB shall verify that the dispatch conditions have been met.

3.3.3 Admissibility of proposals

- i. Proposals shall be admitted if they were received before the closing date and time and if they do not show prima facie evidence of a major non-compliance with the RFP's formal conditions (including specific key acceptance factors) which would render the proposal incomplete or could impair the fairness or secrecy of the competition.
- ii. Proposals received after the closing date and time may be admitted if the framework contractor has dispatched the proposal in time to meet the closing date and has notified the Contracts Officer in writing (fax, e-mail with proof of dispatch...) of the dispatch.
- iii. If a proposal, having been dispatched in time, with the proper written notification sent to the Agency, appears to have been lost or delayed in the transmission, the Agency may grant the concerned framework contractor an extension allowing for the dispatching of duplicates within defined time-limits.

In such a case, the Contract officer shall request the concerned framework contractor to send within 1 (one) working day the summary description, price and schedule of delivery by telecopy, and when technically feasible the full proposal by e-mail in Pdf format.

- iv. Proposals arriving after the expiry of the said limits and for which no proper written notification or proof of dispatch was sent to the Agency in due time shall not be taken into consideration and will be returned unopened to the framework contractor concerned.

3.3.4 Non-admissible proposals

When a proposal is considered non-admissible by the TOB, the TOB Chairperson shall inform the TEB Chairperson and both shall submit the matter to the Head of the local Procurement division/ service for decision. If the proposal is ruled non-admissible, the local Procurement division/ service shall within 3 working days from the decision notify the concerned framework contractor in writing ("notification of non-admissibility"), stating the reasons for which the proposal was considered non-admissible.

3.4 TOB decision-making

3.4.1 Decisions by the TOB shall be taken unanimously.

3.4.2 If a decision cannot be taken unanimously the TOB Chairperson shall inform the TEB Chairperson and both shall submit the matter to the Head of the local Procurement division/ service for decision.

3.4.3 If no proposals have been received, the TOB Chairperson shall inform both the Initiating Authority and the Head of the local procurement division/service and the overall tender action shall be cancelled.

The Contract officer shall implement the decision accordingly, notify the local contracts planning officer, and this shall be recorded in the RFP file.

3.4.4 Where all proposals received have been ruled non-admissible pursuant to paragraph 3.3.4 above, the Initiating Authority and the Head of the local Procurement division/service shall jointly decide on whether to re-issue the RFP, either unchanged or amended. The contract officer shall implement the decision accordingly, record it in the work order file and notify the local contract planning officer.

3.5 TOB Report

3.5.1 The TOB shall draw up a report containing as a minimum:

- i. the subject and reference number of the RFP;
- ii. the date of issuance of the RFP, its closing date and any modifications thereto;
- iii. the names and nationality of the framework contractors and of any subcontractors, their respective quoted price and price type;
- iv. the status of the proposals as to their admissibility or not, and the reasons for non-admissibility, as the case may be; and,
- v. Any decision taken pursuant to the key acceptance factors established in the RFP.

3.5.2 The TOB report shall be drawn up through the TOB electronic report made available and it shall be distributed by the Contract officer to the TEB Chairperson and members and in the case where the tender action has been delegated from one Directorate to another it shall further be distributed to the delegating Directorate for information.

3.5.3 The TOB report shall form the first part of the TEB evaluation report.

3.6 Debriefing to the framework contractors ruled non admissible

3.6.1 Pursuant to Article 34.8 of the Procurement Regulations, upon receipt of the notification of non-admissibility, framework contractors having submitted a proposal ruled non admissible may formally request in writing an oral debriefing from the Contract officer as to the reasons for which their proposal was not accepted for evaluation.

3.6.2 Such oral debriefing shall be made by teleconference unless otherwise requested by the concerned framework contractor, in such case the debriefing shall take place at the Agency's premises. Debriefings shall be given by the concerned Contract officer (or in his absence by another Contract officer or his hierarchy) at a date to be agreed with the concerned framework contractor. As a matter of guidance, such debriefings should be given within 10 (ten) calendar days as from the date by which the Agency received the formal written request.

3.6.3 Explanations shall be limited to the findings of the TOB on the proposal in question.

3.6.4 Minutes of debriefing meetings shall be established using the standard form and only contain:

- i. the subject matter of the meeting and the reference number of the procurement;
- ii. the date of the debriefing meeting;
- iii. the way in which it was given (oral or teleconference);
- iv. the names and functions of those participating; and
- v. a formal statement that the debriefing was given in accordance with Article 34.8 of the Agency's Procurement Regulations.

3.6.5 Minutes of debriefings made by teleconference shall be established by the Agency's concerned Contracts Officer and issued to the concerned framework contractor within one working day for his approval and signature. The original bearing the signature of the concerned framework contractor shall be returned to the Agency who shall append it to the RFP file. Where debriefings take place on the Agency's premises minutes shall be signed by the participants present and the original shall be appended to the RFP file.

3.7 Public Opening of Proposals.

Where pursuant to Article 34.10 of the Procurement Regulations the Agency elects to open publicly, the following shall apply:

- i. the decision to open publicly shall be taken by the Procurement Department;

- ii. the public opening shall be indicated in the RFP together with the date and place of the public opening;
- iii. public openings shall take place on the Agency's premises
- iv. participation shall be limited to the framework contractors having submitted a proposal and not to framework contractors which did not submit a proposal nor to economic operators who would be acting as subcontractors in any resulting contracts;
- v. information made public at the time of the opening shall be limited to the name of the framework contractors having submitted a proposal;
- vi. the list of proposals received will be communicated on request to the framework contractors having submitted a proposal and that are not present at the time of the public opening: and,
- vii. the proceedings of the public opening shall be recorded in the procurement file

Chapter 4: Re-issuing of the RFP

4.1 Pursuant to Article 35 of the Procurement Regulations, an RFP may only be re-issued in the following cases:

- i. where it is found necessary to amend the RFP after the closing date and time for the receipt of tenders;
- ii. where substantial²⁷ errors or irregularities have actually occurred during the tendering process;
- iii. where the interest of the Agency so requires;
- iv. where pursuant to Chapter 3 above it has been decided to re-issue the RFP, either unchanged or amended;
- v. where as a result of the evaluation carried out by the TEB no admitted proposal is acceptable.
- vi. where the RFP is superior or equal to 20 000 000 Euro and none of the framework contractors having submitted a proposal have obtained an overall minimum weighted mark of 60.

The justification for the re-issuing of the RFP shall be recorded in the contract file.

²⁷ A substantial error or irregularity shall be any infringement of the Procurement Regulations and/or its Implementing Instructions or any other pertaining Regulations of the Agency resulting from an act or an omission during the tender process which causes or might cause the principles of transparency and fair and equitable treatment of all economic operators to be jeopardised.

4.2 Disposal of proposals

Where a decision is taken to cancel or re-issue the RFP with or without amendments, within five working days of the said decision all proposals received shall be disposed of by the Agency. A letter shall be sent to the concerned framework contractors notifying them of the Agency's decision.

Chapter 5: Distribution of admitted proposals²⁸

5.1 Following the closing of the TOB proceedings, each member of the TEB shall receive a complete copy of each admitted proposal unless otherwise required pursuant to the ESA Security Directives; when required, any other TEB participant shall receive either a complete or a partial copy of each admitted tender.

5.2 In support to the evaluation, specific parts of the proposals may be further distributed to:

- i. Cost Engineering services.
- ii. Procurement Audit and Industrial Policy services.

5.3 Proposals or part of shall not be distributed to any other persons.

5.4 Upon receipt of the documents the recipient shall sign off the receipt form.

5.5 Proposals received shall be treated by the recipients as foreseen by and handled in accordance with the provisions of the ESA Security Directives such as to avoid the disclosure of their content.

²⁸ Where and RFP requires that proposals be received electronically by e-mail or posted on a dedicated server, specific provisions modifying the provisions of Chapter 5 shall be established at the time of the issuing of the RFP and communicated to the framework contractors in the RFP.

Chapter 6: TEB responsibilities subsequent to the receipt of proposals

The TEB, shall assess proposals, mark them, apply weighting factors when applicable, prepare a final report on the results and make a recommendation as to any action to be taken as an outcome of the evaluation, in accordance with the following procedures.

6.1 Preliminary assessment

6.1.1 Prior to a qualitative assessment of the proposals admitted for evaluation by the TOB, the TEB shall undertake a second verification that each proposal is compliant with the formal conditions specific to the RFP.

6.1.2 If any of the above formal conditions, or if any other element specifically required in the conditions of the RFP (including key acceptance factors) is missing and that omission is such as to render the proposal substantively incomplete, then the TEB shall eliminate such proposal from further evaluation.

6.2 Evaluation

6.2.1 The TEB shall evaluate against the set of criteria defined in the RFP:

- i. the completeness and the quality of the proposal against the requirements of the RFP.
- ii. whether the RFP requirements are complied with.

6.2.2 The TEB shall identify the strengths and weaknesses of each proposal in respect to the criteria²⁹.

6.2.3 If a statement contained in a proposal needs clarification, the procedure to be followed in such a case is the one described in Chapter 7 below.

6.3 Discussion of findings

6.3.1 Prior to the marking of proposals the TEB shall discuss its findings on each aspect of a proposal.

6.3.2 The TEB Chairperson shall guide the discussion in such a way that any significant difference of opinion may be reduced, and if this is not possible, then this is clearly identified and recorded.

6.4 Marking of proposals

6.4.1 The TEB following its discussion of findings shall award marks to each of the criteria.

6.4.2 TEB members shall mark all criteria for which they have a general understanding

²⁹ *This shall be done by comparing the proposal with the RFP requirements, and not by comparing proposals among themselves.*

and can make an assessment. They shall not restrict themselves to criteria related to their professional specialty, or aspects of criteria related thereto. If a member marks one proposal under a particular criterion, he shall mark all proposals under the said criterion.

6.4.3 The marks shall be a number between 0 (zero) and 100 (one hundred) for each criterion in accordance with the following scale:

Perfect	100
Excellent	90
Very Good	75
Good	60
Fair	50
Barely Acceptable	40
Worthless	0

6.4.4 Members shall restrict themselves to the indicated figures, but may if so authorised by the Chairperson award an intermediate mark by increments of 5 only if this would, to a significant extent, better reflect their judgment.

6.4.5 Any member of a TEB, whose mark differs significantly from the average of the marks given by the other members of the TEB under any criterion (20 points or more), shall state specifically why he disagrees under that criterion, and the reason shall be recorded as “minority statement” in the TEB report.

6.4.6 Unless the majority of the TEB members consider the proposal unacceptable under any criterion, any member(s) of a TEB who give(s) a mark below 40 shall state specifically why he/they consider the proposal unacceptable under that criterion, and the reason(s) shall be recorded as “minority statement” in the TEB report.

6.4.7 Where prior to the attribution of marks it was decided by the TEB to mark by consensus, any member who at the time of the marking cannot agree with the proposed consensus marking shall specifically state why he disagrees on which criterion, and this shall be recorded in the minutes by the Contract officer.

In the latter case the marking shall be performed individually.

6.4.8 When the Chairperson of the TEB is satisfied that further discussion will not lead to a reduction of any discrepancies, the marks shall be officially recorded on the marking sheets. Marks once thus recorded cannot be changed.

6.5 Assessment of results following the marking

6.5.1 If as a result of the marking one or more proposal is marked acceptable (i.e. ≥ 40) under all evaluation criteria, the TEB shall:

- i. eliminate the proposal(s) having received one or more mark below 40;
- ii. proceed in applying the weighting factors only to the proposal or those proposals marked acceptable under all evaluation criteria;
- iii. make its overall assessment and recommendation pursuant to paragraph 6.7 below; and,
- iv. finalise its final report and have it signed by all members.

6.5.2 If as a result of the marking all of the proposals received are marked below 40 under one or more criteria, the TEB shall not apply the weighting factors, close the evaluation and draw up its final report. In such a case:

- i. the Chairperson of the TEB shall submit the report to the Initiating Authority and to the Head of the local procurement division/service for decision on whether to re-issue the RFP;
- ii. The decision and the reasons therefore shall be recorded by the Contract officer in the contract file.

6.6 Application of weighting factors

6.6.1 Once the TEB has proceeded with its marking (paragraph 6.5.1 above) the TEB shall proceed in applying the weighting factors.

6.6.2 The result of such application will be weighted marks which shall also be filled into the marking sheets together with their respective aggregate for each proposal.

6.7 Overall assessment of proposals and finalisation of recommendation

6.7.1 Following the application of the weighting factors the TEB shall proceed with an overall assessment of the proposals taking into consideration:

- i. the weighted marks³⁰,
- ii. when established in the RFP at the time of its issuing the industrial policy measures and/or the geographical return requirements ,
- iii. any other requirements provided they were clearly indicated as such in the RFP.

6.7.2 The TEB Chairperson who is responsible for the correct proceedings of the board shall guide the discussion in such a way that any possible significant differences of opinion may be reduced, or if this is not possible, that they are clearly identified and recorded.

³⁰ Where it is established in the Framework Agreement or in the RFP that no Work Order will be attributed to framework contractors the proposals of which have not obtained a certain overall weighted mark (e.g. ≥ 60) such proposals shall be eliminated from further evaluation.

6.7.3 As a result of the overall assessment of proposals, the TEB shall make a final recommendation for awarding the work order to the framework contractor who offers the most economic and effective employment of the Agency's resources. This shall be the best combination of the total weighted mark and when applicable the industrial policy measures and/or the geographical return requirements or any other requirements established in the RFP at the time of its issuing. In the case of general procurements, this shall be the lowest price proposal acceptable under all the evaluation criteria.

For RFPs superior or equal to 20 000 000 Euro a final recommendation for awarding the work order can only be made for a proposal if the latter has obtained a minimum overall weighted mark of at least sixty (60).

6.7.4 The TEB shall also identify the main items that would require negotiation with the recommended framework contractor prior to the placing of a work order and such findings shall be clearly identified in its report.

6.7.5 The TEB shall recommend only one proposal unless it was indicated in the RFP that more than one work order could be placed. In such a case, the TEB shall recommend the proposals which come in decreasing order in the overall assessment provided they are of a good quality.

6.8 Submission of the final evaluation report for decision

6.8.1 The Technical officer shall submit the final evaluation report to the Initiating Authority and to the Head of the local procurement division/ service for joint decision.

6.8.2 In order to help them in their decision the Initiating Authority and/or the Head of the local Procurement division/ service may require a copy of the proposal (s) recommended.

6.8.3 At this stage, the TEB Chairperson together with the Contract officer shall give an oral report to the Director General, the responsible Director, the Head of the Procurement Department, the Initiating Authority, the Appointing Authority and to the Head of the local Procurement division/ service, when required by them.

6.9 Referral of the final report back to the TEB

Exceptionally, in case of doubt as to the correctness or completeness of the evaluation, the Initiating Authority and/or the Head of the local Procurement division/ service may refer the matter back to the TEB Chairperson and Contract Officer in writing with their detailed comments for further evaluation by the TEB; they shall, however, not direct changes to evaluation criteria, weighting factors or marks.

6.10 Closing of evaluation by the TEB

6.10.1 A TEB is maintained until such time a final recommendation is made or the action cancelled.

6.10.2 On finalisation of the evaluation, the TEB Chairperson shall remind its members again not to disclose any information concerning the evaluation to any third party, unless expressly authorised by the Director General.

6.10.3 Each TEB participant who has received a proposal - or part(s) of - shall return such documents immediately to the Contract officer for further disposal.

6.10.4 The Contract officer shall keep the originals of the recommended proposal(s) and the Initiating Authority and the Technical officer may each retain one copy for the purpose of administering the resulting work order(s).

6.10.5 The Contract officer shall ensure that any other documents no longer needed for the sake of keeping the records are collected and disposed of.

Chapter 7: Communications with Framework Contractors subsequent to the admittance of their proposals for evaluation

Communications with framework contractors shall be limited to clarifications, notifications, shall be in writing and shall preserve fair competition.

Any communication shall be issued through the local procurement division/ service and recorded in the RFP file.

7.1 Clarifications

If an omission in a proposal is considered unintentional or if a statement contained in a proposal needs clarification, the local Procurement division/ service shall, on the request of the Chairperson of the TEB consult with the framework contractor concerned in writing in order to obtain any clarification necessary for evaluation.

7.2 Notification to framework contractors after evaluation

Pursuant to Article 45 of the Procurement Regulations, framework contractors who have not been selected for the placing of a work order will be notified by the Procurement Department of the outcome of their respective proposals. Such notification shall be issued after the necessary internal approvals within the Agency have been obtained, or after the signature of the work order and/or PATP by the Agency with the successful framework contractors, whichever takes place first.

The above notification shall comprise a summary of the findings of the TEB together with the associated marks on the proposal in question, and shall not cover the quality or contents of other proposals.

7.3 Debriefing to unsuccessful framework contractors

7.3.1 Within 10 calendar days following the receipt of the notification foreseen under paragraph 7.2, unsuccessful framework contractors may require from the Contract officer an oral debriefing explaining the reasons why their proposals were not successful.

7.3.2 Such oral debriefing shall be made by teleconference unless otherwise requested by the concerned framework contractor, in such case the debriefing shall take place at the Agency's premises. Debriefings shall be given by the concerned Contract officer (or in his absence by another Contract officer or his hierarchy) at a date to be agreed with the concerned framework contractor. As a matter of guidance, such debriefings should be given within 10 (ten) calendar days as from the date by which the Agency received the formal written request.

7.3.3 Explanations shall be limited to the findings of the TEB on the proposal in question, and shall not cover the quality or contents of other proposals. The following information may nonetheless be given:

- i. name of the successful framework contractor;
- ii. difference in points (with respect to the overall weighted mark) between the successful framework contractor and the debriefed framework contractor; and
- iii. number of proposals evaluated and ranking of the debriefed framework contractor.

7.3.4 Minutes of debriefing meetings shall be drafted by the contract officer and shall be signed by him and the representative of the unsuccessful framework contractor. The original shall be placed in the contract file of the unsuccessful framework contractor and shall contain:

- i. the subject matter of the meeting and the reference number of the procurement;
- ii. the date of the debriefing meeting;
- iii. the way in which it was given (oral or teleconference) ;
- iv. the names and functions of those participating;
- v. a formal statement that the debriefing was given in accordance with Article 45 of the Agency's Procurement Regulations.

7.3.5 Minutes of debriefings made by teleconference shall be established by the Agency's concerned Contracts Officer and issued to the concerned framework contractor within one working day for his approval and signature. The original bearing the signature of the concerned framework contractor shall be returned to the Agency who shall append it the contract file of the concerned framework contractor. Where debriefings take place on the Agency's premises minutes shall be signed by the participants present and the original shall be appended to contract file of the concerned framework contractor.

PART V: PROCEDURE BY TENDER EVALUATION PANELS (TEP)

Pursuant to Article 23.9 of the Procurement Regulations, where the complexity of the subject matter of a tender action so warrants, the TEB shall, normally prior to receipt of tenders, appoint tender evaluation panels, to advise it on specific aspects of the tenders. These aspects shall, as far as possible, correspond to the evaluation criteria and sub-criteria established by the TEB prior to the issuing of the ITT or RFQ.

The marks and the assessment of the TEP only constitute advice to the TEB, the latter shall in no case be bound by the marking and findings of the TEP.

Chapter 1: TEP Composition

1.1 General principles

1.1.1 Any TEP established pursuant to the present TEM and to the ESA Procurement Regulations shall be composed of members with voting and marking rights with the exception of members appointed under the provisions of section 1.1.8 below who shall not have voting and marking rights.

1.1.2 In all cases a TEP shall comprise a majority of ESA staff members and only ESA staff members³¹ may perform the duties of Chairperson, Deputy Chairperson and secretary.

1.1.3 TEPs composition shall be such that it covers all the required appropriate experience and qualification in the pertaining technical and/or administrative disciplines in consideration of the nature of the subject panel.

1.1.4 Where the tender action contains classified information, TEP members shall possess the required Personnel Security Clearance (“PSC”) as established by the ESA Security Directives.

1.1.5 Appointment to - and membership of - a TEP is personal, and cannot be delegated. Participation in a TEP is an integral part of ESA staff professional duties, and once appointed, the related tasks shall be given priority.

1.1.6 Once appointed, no member of the TEP shall be subject to the instructions of his hierarchical superiors in respect of his activities as a member of the TEP.

³¹ *Unless it is foreseen differently in the frame of international agreements entered into by the Agency with public bodies (including International Organisations), or in the case of collaborative programmes and when this is expressly foreseen in the programme’s legal instruments.*

1.1.7 Members of a TEP shall be:

- i. ESA staff members, or
- ii. staff members of public bodies (including International Organisations) pursuant to the provisions of international agreements concluded by the Agency or when this is expressly foreseen in the programme Declaration and Implementing Rules, and/or
- iii. staff of public bodies seconded to the Agency, except when their employing organisation has a direct or indirect interest in the outcome of the tender action in question.

1.1.8 Appointment of TEP members other than those foreseen under paragraph 1.1.7 above shall be made on a case by case basis upon written justification at the time of the proposal for the TEP nomination. Such justification shall be recorded in the minutes of the TEB appointing the TEP.

1.1.9 Not more than half of the members of a TEP can be from the Department of the Initiating Authority responsible for the ITT or RFQ.

1.2 Specific function-related composition requirements

1.2.1 Chairperson

The Chairperson of the TEP shall always be a member of the TEB.

1.2.2 Secretary of TEP

- i. A Secretary shall be appointed for every TEP.
- ii. The Secretary of a TEP shall be appointed by the TEP Chairperson from among the members of the TEP.
- iii. Such appointment shall be communicated in writing to the TEB Chairperson and the Contracts Officer for inclusion in the records.

Chapter 2: Appointment of the TEP

2.1. Membership proposal

2.1.1 The proposal for the membership of the TEP is the responsibility of the Joint secretaries of the TEB who shall prepare the required TEP Nomination Form(s). The Nomination Form shall include the names of all members and the proposal for the TEP Chairperson and the subject matter of the panel.

2.1.2 In proposing members to TEPs, the Joint secretaries of the TEB shall take account of their expertise with the matter being evaluated by the TEP in question, and their availability.

2.1.3 Such proposal for membership of a TEP shall be made in agreement with the hierarchy of the persons concerned.

2.1.4 The TEP Nomination Form(s) may only be submitted by the Joint secretaries to the TEB Chairperson once the TEB has been appointed.

2.2 TEP Appointing Authority

2.2.1 The TEB Chairperson shall be the TEP Appointing Authority and following consultation with the TEB shall appoint the TEP members including its Chairperson.

2.2.2 Upon receipt of the complete TEP Nomination Form(s), the TEB Chairperson following consultation with the TEB may require for justified reasons, any modification in the composition of the proposed TEP including in the overall number of its participants.

2.2.3 On appointment of the TEP(s), the Joint secretaries of the TEB shall inform the TEP members in writing and provide them with the necessary documentation.

2.3 Changes in appointments

2.3.1 Once appointed, a TEP can only be modified in the following cases:

- i. member's termination of employment irrespective of the reason;
- ii. member's short or long term illness, or sabbatical leave;
- iii. disciplinary actions engaged against a participant;
- iv. conflict of interest;
- v. duly justified exceptional circumstances.

2.3.2 In all cases, changes in the composition of a TEP shall only be authorised by the TEB Chairperson.

Chapter 3: TEP member's duties

3.1 Duties of the Chairperson of the TEP

The Chairperson of the TEP, shall:

- i. be responsible for the correct proceedings of the TEP;
- ii. give guidance to the TEP members as to the scope of their tasks;
- iii. assign particular tasks to individual TEP members;
- iv. establish and maintain the schedule of meetings of the TEP up to its evaluation report consistent with the overall schedule set by the TEB;
- v. refer to the TEB any questions from the TEP; and,
- vi. report immediately to the TEB Chairperson and the TEB's Contracts Officer on any case which he may consider constituting a breach of the principles of transparency and fair and equitable treatment of all economic operators.

3.2 Duties of the Secretary of the TEP

The Secretary of the TEP is specifically responsible for:

- i. taking minutes and ensuring their distribution to all members;
- ii. drafting of the TEP report(s);and,
- iii. ensuring that the reports and minutes of the TEP are signed by the members.

Chapter 4: TEP proceedings

TEPs shall follow any procedural instructions given by the chairperson of the TEB. In case of doubt as to how the TEP should proceed, the TEP chairperson shall consult the Chairperson of the TEB.

Unless otherwise provided for by the level of classification of the tender action, TEP proceedings and any documents produced in that framework are categorised and handled in the same way as that of the Tender Evaluation Board in accordance with the provisions of the ESA Security Directives.

Tenders or part of shall be treated as foreseen by and handled in accordance with the provisions of the ESA Security Directives.

4.1 Quorum

4.1.1 A TEP can only meet if a simple majority of its members are present including its Chairperson.

4.1.2 Members who participate in the meeting by means of teleconference or videoconference are to be considered present.

4.2 Voting and marking rules.

4.2.1 The decisions of the TEP shall normally be taken by a simple majority vote of members present.

4.2.2 Decisions of the TEP may be taken by consensus if so proposed by the Chairperson at the start of the meeting. If a member objects, the simple majority vote rule shall apply.

4.2.3 In case of a tie, the Chairperson shall have a casting vote.

4.2.4 Marking shall be given individually by the TEP members.

4.2.5 Members who have communicated their marks or vote in writing but are not present in the way described under paragraph 4.1.2 above are not to be considered as present and their marks or vote shall not be taken into account.

4.3 TEP member's right to challenge

4.3.1 Should a TEP member find that in the course of the TEP's proceedings there is cause to challenge the proceedings of the TEP on grounds of respect of the applicable rules and regulations or the principles of transparency and fair and equitable treatment of all economic operators, he may challenge the proceedings. Such challenge shall be recorded in writing in the minutes of the TEP meeting during which such request was made.

4.3.2 In such cases, the TEP's Chairperson shall immediately inform the TEB's Chairperson and the TEB's Contract officer for resolution.

4.3.3 Until such time the matter is resolved, the TEP proceedings may continue but in no case will the TEP proceed with any marking.

4.3.4 The outcome of the challenge and any decisions taken in this context shall be recorded in the files.

4.4 Minutes of TEP meetings

4.4.1 The minutes of each TEP meeting shall be in such form as the TEB or the TEP's chairman may direct. They shall however contain as a minimum:

- i. the subject matter of the meeting and the reference number of the procurement;
- ii. the date of the TEP meetings;
- iii. the names of those present ;
- iv. any matter which any member of the TEP may ask to have recorded; and,
- v. a summary record of any decisions taken by the TEP.

4.4.2 In addition, the minutes of the first TEP meeting shall contain:

- i. a statement by the Chairperson that he has reminded the members that they must declare any conflict of interest;
- ii. the confirmation that the Chairperson and each member has completed and signed the Declaration of non-interest;
- iii. a statement by the Chairperson that he has reminded the members of their duty not to disclose any information concerning any aspect of the proceedings to third parties to the TEP, and to keep all documents pertaining to the TEP proceedings safe from access by third parties;
- iv. the calendar and schedule of the next meeting(s) consistent with the overall schedule set by the TEB; and,
- v. in attachments, all Declarations of non-interest signed by the participants.

4.5 TEP's Evaluation report

4.5.1 The TEP's evaluation report shall be signed by the TEP members present at the time of the marking and shall be kept in the contracts file.

4.5.2 The evaluation report shall contain as a minimum:

- i. the reference and subject of the ITT or RFQ;
- ii. Identification of the aspects which the TEP is to evaluate;
- iii. the list of the criteria and sub-criteria established by the TEB for the aspects to be evaluated, together with any interpretation by the TEP;
- iv. Any special instructions given by the TEB;

- v. A table containing the marks given to each tender for each criterion or sub-criterion established by the TEB;
- vi. the overall assessment of each tender providing a reasonable understanding of the marks given;
- vii. any points of negotiation which would need to be settled prior to a contract being placed; and,
- viii. A special section reporting any unresolved disagreements between member of the panel.

Chapter 5: In-confidence and non-interest

5.1 In confidence

5.1.1 Unless otherwise provided for in this TEM all deliberations of the TEP must be treated strictly in confidence and documents handled according to their level of classification.

This obligation of confidentiality can only be waived by a direct written instruction of the Director General, or when the TEP member is called as a witness or is interviewed in the framework of the Agency's Procurement Review Process.

5.1.2 Once appointed, TEP members shall not be subjected to instructions from their hierarchy or employer in respect of their activities as participant to a TEP.

5.1.3 The TEP Chairperson shall give an oral briefing on the on-going proceedings of the TEP to the TEB.

In such a case any information provided shall be treated strictly in confidence by the recipients.

5.1.4 Should a TEP member be requested - or put under any pressure - to disclose the proceedings or any documentation - or part of - to any unauthorised third party to the TEP or to the TEB, he shall immediately report the matter to the TEB's Contract Officer for recording and shall inform the TEP's Chairperson, the TEB's Chairperson and the Head of the Procurement Department for taking the appropriate action.

5.2 Conflict of interest

Pursuant to Article 22 of the Procurement Regulations, whether in the frame of competitive tendering or none competitive tendering, there is a conflict of interest when the impartial and objective exercise of the functions of a TEP member is compromised for reasons involving family, emotional life, political affinity, economic interest or any other shared interest with Tenderers. This may consist of but not be limited to:

- i. an immediate member of the family of a TEP member directly employed by or sitting on the board of one of the Tenderers³² or of its subsidiaries or subcontractors;
- ii. cases covered by regulation 3 “Loyalty” of the ESA Staff Regulations, Rules and Instructions;³³
- iii. a TEP member who has applied for a position with one of the Tenderers or with one of its subsidiaries or subcontractors and is currently awaiting for an answer or has already been offered a position;
- iv. a TEP member recruited by the Agency or by his current employer since less than twelve months and whose last employer is one of the Tenderers or one of its subsidiaries or subcontractors.

5.3 Declaration of non-interest

5.3.1 At the time of their appointment or at the time of the first TEP meeting whatever the earliest, TEP members are required to declare any known or potential conflict of interest which may impair the outcome of the tender action.

³² for the purpose of the subject provision, are considered as Tenderers any companies who will be considered as sub- contractors or major suppliers in case of contracts award.

³³ **ESA STAFF REGULATIONS ; REGULATION 3 LOYALTY**

- 3.1 A staff member may not accept any honour from a government or other source external to the Agency without the permission of the Director General.
- 3.2 Staff members shall abstain from all political activities and, more generally, from any public action or statement or publication if such activity, statement or publication is incompatible with the duties or obligations of an international civil servant or liable to involve the moral or material responsibility of the Agency.
- 3.3 A staff member shall not hold any posts or have any regular or paid occupation outside the Agency without the Director General’s permission.
- 3.4 A staff member, or his spouse, may not directly or indirectly hold such interests in a commercial firm as could, by their nature, compromise his independence in the discharge of his duties in the Agency.

Rule 3/1 Loyalty – General provisions

- (i) The Director General shall have discretion to judge whether or not honours, and outside remunerations, activities and interests, are compatible with employment by the Agency and with the performance of a staff member's duties.
- (ii) The staff member concerned shall submit in writing, through his Personnel Officer, any applications for permission and statements which the Director General will need in order to form his judgement in the cases referred to above. The provisions relating specifically to certain of such statements and applications are given in Rules 3.1/1 to 3.4/1.
- (iii) An omission or false statement in infringement of Regulation 3 may lead to the termination of a staff member’s appointment under Regulation 15.3(iii) or his dismissal under Regulation 25.2(iv)

5.3.2 Where a TEP member declares a conflict of interest at the time of his appointment or of the first TEP meeting, the TEP's Chairperson shall immediately inform the TEB's chairperson and Contracts officer who in consultation with the Initiating Authority (and when applicable for ESA staff the Director General), shall assess whether or not such interests are compatible with his participation to the TEP.

5.3.3 At the time of receipt of the tenders or part of for evaluation TEP members will be requested to review this declaration in the light of the tenders received or part of. This shall be recorded in the tenders distribution receipt.

5.3.4 Where a TEP member declares a conflict of interest at the time of the receipt of the tenders or part of, the Contract Officer in consultation with the TEP Chairperson shall immediately inform the TEB Chairperson who shall propose a replacement.

5.4 Sanctions

5.4.1 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEP members who are ESA staff members may lead to disciplinary action as foreseen under the ESA Staff Regulations, Rules and Instructions.

5.4.2 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEP members who are seconded to ESA may lead to the immediate termination of their secondment.

5.4.3 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEP members who have been nominated in the frame of international agreements entered into by the Agency with public bodies (including International Organisations) or in the case of collaborative programmes, may lead to their immediate removal from the TEP.

A notification to the concerned body shall be issued immediately by the Head of the Procurement Department for further evaluation of the case.

5.4.4 Any breach, omission or false statement of the above in-confidence and non-interest obligations by TEP members who are contractors staff on ESA sites shall lead to their immediate removal from ESA's premises and may further result in the termination of the contract for fault in case of wilful act.

Chapter 6: TEP's responsibilities upon receipt of tenders or parts of

6.1 Handling of the evaluation criteria established by the TEB

For the purpose of assessment the TEP may break down the criteria and sub-criteria established by the TEB into further subdivisions but shall mark according to the criteria and sub-criteria as established by the TEB.

6.2 Establishment of the calendar

The TEP shall establish the calendar and schedule of its next meetings up to its evaluation report consistent with the overall schedule set for it by the TEB.

6.3 Evaluation

6.3.1 The TEP shall evaluate against the set of criteria defined by the TEB in the ITT/RFQ:

- i. the quality of the tender or part of against the requirements of the ITT/ RFQ.
- ii. whether the ITT/ RFQ requirements are complied with.

6.3.2 The TEP shall identify the strengths and weaknesses of each tender in respect to the criteria This shall be done by comparing the tender with the ITT requirements, and not by comparing tenders among themselves.

6.3.3 If a statement contained in a tender needs clarification, the procedure to be followed in such a case is the one described in Chapter 7.1 below.

6.4 Discussion of findings

6.4.1 Prior to the marking of tenders or part of the TEP shall discuss its findings on each aspect of a tender or part of.

6.4.2 The TEP Chairperson shall guide the discussion in such a way that any significant difference of opinion may be reduced, and if this is not possible, then this is clearly identified and recorded.

6.5 Marking

6.5.1 The authorised TEP members following the discussion of findings shall award marks to each of the criteria and sub-criteria where appropriate.

6.5.2 If a member marks one offer under a particular criterion, he shall mark all tenders under the said criterion.

6.5.3 The marks shall be a number between 0 (zero) and 100 (one hundred) for each criterion in accordance with the following scale:

Perfect	100
Excellent	90
Very Good	75
Good	60
Fair	50
Barely Acceptable	40
Worthless	0

6.5.4 Members shall restrict themselves to the indicated figures, but may if so authorised by the Chairperson award an intermediate mark by increments of 5 only if this would, to a significant extent, better reflect their judgment.

6.5.5 Any member of a TEP, whose mark differ significantly from the average of the marks given by the other members of the TEP under any criterion (20 points or more) shall state specifically why he disagrees under that criterion, and the reason shall be recorded as “minority statement” in the TEP evaluation report.

6.5.6 Unless the majority of the TEP members consider the tender unacceptable under any criterion, any member(s) of a TEP who give(s) a mark below 40 shall state specifically why he/they consider the tender unacceptable under that criterion, and the reason(s) shall be recorded as “minority statement” in the TEP evaluation report.

6.5.7 When the Chairperson of the TEP is satisfied that further discussion will not lead to a reduction of any discrepancies, the marks shall be officially recorded on the marking sheets. Marks once thus recorded cannot be changed.

6.6 Finalisation of the evaluation report

6.6.1 Following the recording of the marks the TEP shall finalise its evaluation report and have it signed by all its members.

6.6.2 In its report the TEP shall also identify the main items that would require negotiation with Tenderers prior to the placing of a contract and such findings shall be clearly identified.

6.6.3 In all cases, the TEP may deem it appropriate to point out in its evaluation report the implications resulting from the choice of a given Tenderer, and may make any other remark it considers relevant to the evaluation.

6.7 Submission of the evaluation report to the TEB and oral reports

6.7.1 The TEP's Chairperson shall submit the evaluation report to the Joint secretaries of the TEB for distribution to the TEB.

6.7.2 The Chairperson of a TEP panel shall also give an oral report to the TEB.

6.7.3 Individual members of the TEP may also be called upon to make a report and explain their marks.

6.7.4 The marks and the assessment of the TEP only constitute advice to the TEB.

6.8 Closing of evaluation by the TEP

6.8.1 A TEP is maintained until such time the TEB is maintained.

6.8.2 On finalisation of the evaluation, the TEP Chairperson shall remind its members again not to disclose any information concerning the evaluation to any third party, unless expressly authorised by the Director General or called as a witness or interviewed in the framework of the Agency's Procurement Review Process.

6.8.3 Each TEP member who has received a tender - or part(s) of - shall return such documents immediately to the TEP's Secretary who shall in turn return them to the Contract Officer of the TEB for further disposal as required in the present TEM.

6.8.4 The TEP secretary shall provide the TEB Contracts Officer with all original minutes and reports of the TEP for the sake of keeping the records.

Chapter 7: Communications with TEB and Tenderers

7.1 A TEP shall not undertake consultation with a Tenderer but refer in writing any question to the TEB Chairperson and TEB Joint Secretaries.

7.2 If a request for specific information or comment is received, through the Chairperson of the TEB, from another panel, the TEP chairperson shall allocate this question to a member of the TEP.

**ANNEX IV : IMPLEMENTING INSTRUCTION CONCERNING THE
GENERAL CONDITIONS FOR TENDER ¹**

(Article 24.2 of these Procurement Regulations)

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General Conditions of Tender **For ESA Contracts**

Nothing in or related to these General Conditions of Tender shall be deemed a waiver of any of the privileges and immunities of the European Space Agency.

Contents

This document contains the following parts:

General Information on Agency's ITTs

Part 1 – General Conditions for Participating in a Tender.

These are the Agency's general conditions stemming directly from the Agency's Procurement Regulations² adopted by the Agency's Member States and regarding the eligibility of economic operators to participate in a tendering procedure of the Agency and the obligation of economic operators to satisfy information and registration requirements prior to submitting a tender and being awarded any subsequent contract.

Part 2- General Conditions for the Presentation and Submission of Tenders

These are the Agency's general conditions regarding the presentation and submission of tenders. These address the more formal and legal aspects of tenders to ensure fair and open competition.

Part 3 – General Conditions for the Contents of a Tender

These are the Agency's general conditions regarding the structure and contents of a tender. They ensure a consistent approach is followed by all Tenderers in order to facilitate the subsequent evaluation by the Agency.

Annexes - Guidelines for Tenderers

With the exception of Annex G "Cover Letter's Annex Compliance Template", and the use of PSS Forms, these guidelines are not mandatory requirements, unless otherwise specified in the Special Conditions of Tender. They provide additional details on the preferred contents of some proposal elements, and of methods and techniques acceptable to the Agency. It is at Tenderer's discretion as to whether they follow these guidelines, or whether they choose to prepare proposals with different contents or using different methods and techniques. In either case it is important that tenders meet the specified tender requirements.

² The Agency's Procurement Regulations can be found and downloaded at emits.esa.int

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General information on Agency's ITTs

An Invitation To Tender (ITT) in the case of a competitive tendering procedure or Request For Quotation (RFQ) in the case of a non-competitive tendering procedure, both hereinafter referred to only as "ITT", specifies the Agency's requirements against which an economic operator (also referred to in some cases as potential Tenderer) is to submit his tender for evaluation by the Agency.

The issuing of an ITT by the Agency does not bind the Agency in any way to place a contract.

An ITT is considered closed when the resulting contract is placed by the Agency or when the Agency informs economic operators or tenderers of either the cancellation of the ITT or of its re-issuing.

The purpose of this part is to bring the attention of economic operators on the specific features of an Agency 's ITT.

The Invitation To Tender

An Agency's ITT will typically but not necessarily include the following elements:

1. A Cover Letter
2. General Conditions of Tender
 - For the Presentation and Submission of the Tender
 - For the Structure and Contents of the Tender
3. Special Conditions of Tender
 - For the Presentation and Submission of the Tender
 - For the Structure and Contents of the Tender
4. The Evaluation Criteria and Weighting Factors
5. The Draft Contract including the Statement of Work and any other technical and management requirements
6. Other specific documents

The normal contents of each of these ITT elements are outlined below.

The Cover Letter

The Cover Letter contains a number of essential prerequisites and key information on the Agency's ITT. Economic operators should read it carefully since it may contain specific requirements such as key acceptance factors which may not necessarily be found in the other elements of the ITT (including in the Special Conditions of Tender) or highlight changes made to standard requirements found in the other elements of the ITT.

Any specific requirements set in a cover letter and which cannot be found in the other elements of the ITT shall be addressed in the tender and will be the subject of evaluation by the Agency.

A standard Agency's Cover Letter would typically contain the following information:

- i) The reference to the programme/activity concerned

- ii) The name and address of the Agency's establishment
- iii) The name of the Agency's contracts officer
- iv) The formal conditions of submission: date and time of delivery of the tender.
- v) The required period of validity of the tender
- vi) The subject and type of procurement
- vii) The type of contract/price
- viii) The main conditions specific to the ITT for what concerns :
 - planning targets and constraints
 - geographical distribution requirements³
 - industrial policy requirements⁴

Some ITTs indicate an amount, which may represent either a guideline for the preparation of the price submission, or a budgetary limit of funding available. These amounts should be taken into account by economic operators, recognising that the latter represents a formal requirement of the ITT, failure to comply with a budgetary limit may result in the non-admissibility of the tender for evaluation.

Some ITTs indicate "key acceptance factors". These represent formal requirements established by the Agency. Failure to comply with such factors shall result in the non-admissibility of the tender for evaluation.

1. General Conditions of Tender

The Agency's General Conditions of Tender are detailed in the present document.

Whilst forming an integral part of an Agency's ITT, the Agency's General Conditions of Tender are not attached to the ITT and are directly downloadable in their latest version from the Agency's Electronic Tender System (EMITS).

2. Special Conditions of Tender

The Special Conditions of Tender will state the applicability of the Agency's General Conditions of Tender to a specific Agency's ITT and may either modify them, supplement them or add further specific conditions to be addressed by economic operators in their tenders.

The following exemplifies specific details regarding Part 2 of the General Conditions of Tender which might be subject to modifications and will therefore be addressed in the Special Conditions of Tender⁵:

- i) The presentation standards to be used.
- ii) The maximum length of the tender or parts of the tender.
- iii) The language(s) of the tender.
- iv) The closing date for submission of a tender and the required tender validity period.
- v) Delivery instructions.
- vi) Requirements for submission of electronic copies of tender or parts of tender
- vii) Subcontracting:

³ When necessary a dedicated separate Annex covering geographical distribution and industrial policy requirements may be required.

⁴ *ibid*

⁵ In some cases specific details regarding Part 2 of the General Conditions of Tender which might be subject to modifications may only be addressed in the Cover Letter.

- Whether it shall be competitive or not.
 - The Agency's participation in subcontract placing, procedures definition and setting of contract conditions.
- viii) The need to notify interest to tender.
- ix) A list of documents that may be available to economic operators on request.
- x) A list of participating countries to define permissible Tenderers.
- xi) The required signatories on the tender.

In addition, specific details regarding Part 3 of the General Conditions of Tender, addressing which elements are to be included in the tender, how they may be combined where appropriate and practical, and the specific contents required in each, are normally addressed in the Special Conditions of Tender⁶.

3. The Evaluation Criteria and Weighting Factors

The Evaluation Criteria are the criteria that the Agency applies in the qualitative evaluation of submitted tenders in order to determine the strengths and weaknesses of a tender by separate evaluation of its various aspects. These criteria may vary from one ITT to another as appropriate.

Evaluation Criteria are established and published for each ITT.

Weighting Factors are attributed against each of the Evaluation Criteria including in some specific cases non-competitive tendering procedures (RFQ) and are specified in the ITT.

As a result of the overall assessment of tenders, a final recommendation for awarding the contract to the Tenderer who offers the most economic and effective employment of the Agency's resources is made. This shall be the best combination of the total weighted mark, price and when applicable the industrial policy measures and/or the geographical return requirements established in the ITT at the time of its issuing, meaning that the resulting contract will not necessarily be attributed to the Tenderer having received the highest overall weighted mark.

In the case of general procurements, this shall be the lowest price tender acceptable under all the evaluation criteria.(i.e. not below 40 for each criteria).

For tender action above 20 000 000€ only tenders having received an overall weighted mark of 60 or more shall be considered for the placing of a contract.

4. The Draft Contract

The draft contract is attached to the ITT in order to specify the requirements and conditions that will be applicable during execution of the work should a contract be awarded. This would typically include:

- Specific Contract Conditions, including price, delivery and payment provisions
- Statement of Work
- Technical Specification(s)/Requirements
- Project Management Requirements Document

The Statement of Work (SOW) together with any other Technical Specification(s)/Requirements, Project Management Requirements Document are clearly identified separately in the ITT.

⁶ In some cases specific details regarding Part 3 of the General Conditions of Tender which might be subject to modifications may only be addressed in the Cover Letter.

5. Other Specific Documents

The ITT package may also include reference documents for the purpose of preparing the tender.

Part 1 – General Conditions for Participating in a Tender

A. Eligibility Requirements

All economic operators are eligible to submit a tender ⁷ provided:

- a) they satisfy the requirements set under Article II.3 of Annex V to the ESA Convention for what concerns their belonging to an Agency's Member State, Associate State or Cooperating State;
- b) they possess the necessary professional and technical qualifications, professional and technical competences, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, and the personnel, to perform a contract;
- c) they have the legal capacity to enter into the procurement contract;
- d) they are not bankrupt or being wound up, are having their affairs administered by the courts, have not entered into an arrangement with creditors, have not suspended business activities, are not the subject of proceedings concerning those matters, or are not in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- e) they have not been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*;
- f) they have not been guilty of grave professional misconduct proven by any means which the Agency can justify;
- g) they have fulfilled their obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or those of the country where the contract is to be performed;
- h) they have not been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organization or any other illegal activity detrimental to the Agency's interests; and,

⁷ The attention of economic operators is brought to the following:

- "In the placing of all contracts, the Agency shall give preference to industry and organisations of the member States. However, within each optional programme covered by Article V,1b of the Convention, particular preference shall be given to industry and organisations in the participating States.
- Where specific geographical return and/or industrial policy measures requirements are mentioned in an ITT preference in the placing of contracts shall be given to industry and organisations responding to such requirements.
- Where an ITT involves information classified ESA Confidential or higher, economic operators have to or will have to obtain a Facility Security Clearance (FSC) at the latest at signature of the contract.

- i) they are not currently subject to a suspension by the Agency for having been found guilty of misrepresentation in supplying the information required under points d), e), f), g) and h) above.

The Agency may suspend economic operators from participating in the Agency's procurements if they are found guilty of misrepresentation in supplying the above information or when formally required by the Agency, they fail to supply this information on three consecutive accounts.

Special cases

In the frame of arrangements and/or of procurements made with non-Member States, Associate States, Cooperating States or International Organizations, economic operators from those States or from the Member States of the International Organization shall be required to satisfy the above requirements unless otherwise agreed in the arrangement.

Information and Registration requirements

The Agency maintains a database of Potential Suppliers containing basic data on their capabilities, resources, types of activity, etc.

The registration of any economic operators within the ESA database is a prerequisite for access to the non-public part of the Agency's electronic tender system (EMITS), for downloading of ITTs, for expressing interest in an ITT, for submission and acceptance of tenders and for the award of a subsequent contract.

Registration is therefore compulsory and applies to every economic operator acting as Prime Contractor or subcontractor. Contracts shall only be placed with economic operators and other organisations having met ESA requirements of information and registered accordingly.

The registration implies to fill out or update an online questionnaire and submit it duly completed to the Agency prior to the closing date of the tendering period for the ITT in question. The registration process is specified within the ESA Industry Portal at the following address:

<http://www.esa.int/industry> , item: Become an ESA Supplier.

Economic operators shall keep this information current and shall update it every twelve (12) months and this in accordance with Article 18.5 of the Agency's Procurement Regulations.

Failure by economic operators to provide or update required information within a period of three months following the due date for the update may in accordance with Article 19 of the Agency's Procurement Regulations result in them being denied access to the non-public part of EMITS.

Special cases

In the frame of arrangements and/or of procurements made by the Agency with non-Member States, Associate States, Cooperating States or International Organizations, economic operators from those States or from the Member States of the International Organization shall be required to satisfy the above requirements unless otherwise agreed in the arrangement and may be granted full or partial access to the non-public part of EMITS.

Part 2 - General Conditions for the Presentation and Submission of Tenders

A. General standards of presentation

1. Length of tender documents

The tender should be precise and concise. Unless expressly stated in the ITT there is no limitation on the number of pages, but it should be borne in mind that the quality of the tender is not increased by unnecessary length, or by needlessly detailed descriptions. Mere repetition of the Agency's requirements should be avoided.

2. Language of Tender

The tender and all correspondence relating to it shall be in English or French, unless stated otherwise in the ITT.

Protective marking of tender documents

The tender documents can bear company-internal protective markings, but to avoid confusion with formal and internationally agreed markings for Classified Information, the following terminology shall be avoided:

- Restricted (or Restreint)
- Confidential (or Confidentiel)
- Secret
- Top Secret

The tenderer shall be aware that company internal protective markings cannot impose any other obligations upon ESA beyond the standard non-disclosure protection measures ESA provides in accordance with its internal rules and regulations.

Formal conditions, commitments, undertakings

1. Certification of eligibility

The Tenderer shall specifically self-certify that he and when applicable any of his subcontractors satisfy the qualification requirements established under Part 1 A "Eligibility requirements" of the Agency's General Conditions of Tender and are thus eligible to participate in the ITT in question.

2. General information on Tenderer's status

In relation to Part 1 B above if the Tenderer has submitted up to date information he shall state in his tender the date of submission, including his ESA Bidder Code and that of each proposed subcontractor, their addresses and when applicable their respective Supplier Codes.

If he has not done so, he shall proceed with the registration process as specified on the ESA Industry Portal. He shall also ensure that the subcontractors are properly registered, meeting ESA requirements of information.

Failure by economic operators to provide or update required information may result in the contract not being awarded.

3. Certification of free competition

The Tenderer shall specifically certify that:

- a) The prices in the tender have been arrived at independently without consultation, communication or agreement with any other Tenderer or competitor for the purpose of restricting competition;
- b) Unless otherwise required by law, the prices quoted in the tender have not knowingly been disclosed by the Tenderer and will not knowingly be disclosed, directly or indirectly, to any other Tenderer or competitor, until he has been informed of the result of the ITT;
- c) No attempt has been made or will be made by the Tenderer to induce any other Tenderer or competitor to submit or abstain from submitting a tender, for the purpose of restricting competition; and,
- d) The Tenderer has not entered into any exclusive teaming arrangement where this would restrict competition due to any of the following reasons:
 - Where the teaming partner could be considered to be a single source due to technical reasons or other considerations;
 - Due to limited potential participants as a consequence of industrial return requirements;
 - Where the industrial category of the teaming partner restricts other choices for industrial policy reasons, for instance when the fact of being an SME is important and there are few participants in this category;
 - In the case of any doubts concerning the application of the above, the Tenderer should seek clarification by contacting in writing, the Agency's nominated Contract Officer.

4. Restriction on publicity actions

Economic operators are not authorised to mention in their publicity that they have been invited to tender, are tendering or have tendered, until after notification of the result of the ITT by the Agency.

5. Validity period of tender

The tender shall specifically state a period of validity of not less than 4 months (120 calendar days) from the closing date for the receipt of tenders, or such other period of validity as may be specified in the ITT.

Unless otherwise notified in writing in the Cover Letter (Part 3 A 1), pursuant to Article 37 of the Agency's Procurement Regulations the Tenderer shall specifically state that he accepts that the period of validity of his tender is implicitly extended in the following cases:

1. Where negotiations have been entered into between the Agency and Tenderers and, due to their complexity, go beyond the validity period of the tenders, the validity period of such tenders shall be considered implicitly extended until such time the negotiations are finalised and a contract is placed and/or ;
2. Where in application of the Agency's regulatory procedures a submission for approval by internal committees is foreseen which will take place beyond the validity period of the tenders, the validity period of such tenders shall be considered implicitly extended until such time the submission has taken place and a contract is placed.

6. Period for tender preparation

The closing date for receipt of tenders is stated in the cover letter to the ITT. As a rule extension of this period shall not be granted.

Should an economic operator nonetheless require an extension such request shall be made not later than ten (10) working days prior to the stated closing date mentioned in the ITT , in writing together with a justification, to the responsible Contracts Officer designated in the Agency's Cover Letter. Absence of such justification or any request made within ten (10) working days from the stated closing date shall result in the request not being considered.

In any event such request may be granted by the Agency only if operational requirements so permit, and if, in the case of competitive tendering, fair competition is not thereby impaired.

Refusal by the Agency to grant extensions may not give rise to any claims by economic operators.

7. Right to audit

Pursuant to Article 10.8, 10.9 and Annexes I and II of the Agency's Procurement Regulations, the Agency will be entitled, after receipt of the tender to audit any aspects of the tender and of the Tenderers and subcontractors financial viability and to request the Tenderer and any of its subcontractors when applicable, to provide:

- evidence of any element of his quotation and may call for additional detailed information irrespective of the type of price proposed. The Agency reserves the right to audit the quoted prices and rates.
- any evidence that they belong to one of the Member States, Associate Member States or Cooperating States of the Agency and this in line with the requirements set under Article II.3 of Annex V to the ESA Convention.
- any evidence to ascertain the financial viability of the Tenderer or his subcontractor(s).

The attention of Tenderers is further drawn to ANNEX 1 to the General Clauses and Conditions for ESA Contracts⁸.

8. Negotiation prior to contract award and notification of award

The Agency prior to placing a contract and following internal authorisation reserves the right to negotiate with the Tenderer for which a final recommendation for awarding the contract was made. The tender, as modified by such negotiations and agreed in writing shall be binding for the contract.

Should such negotiations not be successful the Agency shall terminate negotiations and reserves the right to enter into negotiation with another Tenderer. Such decisions by the Agency may not give rise to any claims by Tenderers.

Pursuant to Article 45 of the Agency's Procurement Regulations, award notices may be published at the Agency's discretion.

⁸ The General Clauses and Conditions for ESA Contracts can be found and downloaded at *emits.esa.int*

9. Retention of tenders

The Agency will solely use the commercial confidential or proprietary information of the tenders for cost reference purposes (including the development of cost estimating expertise) and for the purpose of the evaluation of tenders and the selection of a contractor. In the case of a successful tender, documentation and information incorporated in the subsequent contract will be governed by Part II of the General Clauses and Conditions for ESA Contracts. The Agency reserves the right to eliminate from consideration tenders, which seek to restrict the use of documents or information beyond these provisions. Unless otherwise specifically required in the tenders, unsuccessful tenders or tenders for which a decision to re-issue or cancel the ITT is taken by the Agency subsequent to the opening of the tenders shall be disposed of by the Agency in accordance with its regulations.

10. Non reimbursement of tender expenses

Expenses incurred in the preparation and dispatch of the tender will not be reimbursed.

11. Non commitment by the Agency

The Agency reserves the right at any time to suspend or cancel the ITT. Such suspension or cancellation may not give rise to any claims by economic operators.

The ITT does not bind the Agency in any way to place a contract, and the Agency reserves the right to negotiate and place a contract for only part of the activity covered by the ITT. Such decision by the Agency may not give rise to any claims by Tenderers having submitted a tender in response to the ITT.

As a result of the overall assessment of tenders, a final recommendation for awarding the contract to the Tenderer who offers the most economic and effective employment of the Agency's resources is made . Unless otherwise stated in the ITT, this shall be the best combination of the total weighted mark, price and when applicable the industrial policy measures and/or the geographical return requirements established in the ITT at the time of its issuing, meaning that the resulting contract will not necessarily be attributed to the Tenderer having received the highest overall weighted mark. In the case of general procurements, this shall be the lowest price tender acceptable under all the evaluation criteria. Such decision by the Agency may not give rise to any claims by Tenderers having submitted a tender in response to the ITT.

12. Responsiveness of the tender

In his Cover Letter (Part 3 A1) the Tenderer shall explicitly state compliance with and acceptance of the following points:

- i. Certification of Eligibility (Part 2 B1)
- ii. General information on Tenderer's status (Part 2 B2)
- iii. Certification of Free Competition (Part 2 B3)
- iv. Validity period of tender (Part 2 B5)
- v. Agency's right of Audit (Part 2 B7)
- vi. Non Commitment by the Agency (Part 2 B11)⁹
- vii. Compliance with conditions relating to IPR (Part 2 C)
- viii. Compliance with conditions relating to Export/Import (Part 2 D)
- ix. Certification of non-benefit (Part 2 H)
- x. Compliance with conditions relating to security screening (when applicable) (Part 2 I)
- xi. Compliance with Financial requirements (Part 3 F)

⁹ No tender shall be accepted for evaluation in the absence of such statement of compliance

- xii. Compliance with technical and management requirements (Part 3 G)
- xiii. Compliance with contract conditions (Part 3 G)
- xiv. Compliance with Industrial Policy and Geographical Return requirements (when applicable)

Any non-compliance or reservations to the requirements, proposed modifications or amendments to the contract conditions, shall be clearly identified in the Cover Letter with a reference to the compliance matrix in the tender.

The absence of the above information in the Cover letter and/or its Annex may result in the tender not being accepted for evaluation by the Agency's Tender Opening Board.

Any compliance statement made in the Cover Letter and its annex which would contradict the content of the tender may result in the subsequent elimination of the tender by the Agency's Tender Evaluation Board.

13. Use of Test Facilities

The Tenderer will be responsible for identifying the test facilities to be used in the programme, for their procurement and for managing the related contract(s).

Testing at the ESTEC Test Centre shall have priority unless there are important programmatic or technical reasons to deviate from this approach.

As a general rule, the contractor places a test contract with the corresponding test centre. Exceptionally the Agency itself places a test contract with the corresponding test centre, it being understood that those test services would then be mentioned as an Agency undertaking in the related contract and indicated as such in the ITT.

The Tenderer shall supply the following information:

- Identification of proposed/selected facilities;
- The cost for the use (and/or developing/building) of these facilities shall be included in the price quoted;
- Verification of compatibility of test requirements with facility capabilities;
- Details of the required tests, test schedule, and availability of facilities;
- Identification of possible back-up facilities.

Any modifications to existing facilities need to be described and justified, including costing, also with respect to facilities which might be available.

Unless otherwise required in the ITT, Tenderers shall include the cost of intended tests in their quoted price. The selected Contractor shall be managerially and contractually responsible for all testing co-ordination.

Conditions relating to intellectual property rights (IPR)

1. Statement concerning the use of existing intellectual property rights of the Tenderer

If the Tenderer intends to use own background data corresponding to existing intellectual property rights owned by the Tenderer or by a proposed sub-contractor or by any other third party, he is expected to state

this in his tender and he may already identify such background data either in the tender itself or during the Contract negotiation. Failing such advanced notification, Clause 43.1 of the General Clauses and Conditions for ESA Contract shall apply.

The Tenderer shall further specify if such background data is needed only for the development or whether it is also necessary subsequent to the delivery. In the latter case the Tenderer shall along with the lines established under Part 2 C 2 “Third Party Commitments” below, confirm the conditions of access (any limitation/restriction, licensing and related costs) and confirm that the Agency can use them for the intended use/objective of the ITT detailed in the Statement of Work.

2. Third party commitments

The Tenderer shall indicate if he has entered into any arrangements or licence agreements as to intellectual property rights concerning the subject of the ITT, either as part of a general arrangement or with specific reference to the ITT. A copy of the document recording the commitment, or an appropriate part thereof, shall be submitted with the tender or, unless otherwise specified in the ITT, during the Contract preparation. If such arrangement or agreement could result in costs to be borne by the Agency these must be separately identified, in accordance with Part 3 F 10 “Royalties and licence fees” below. Unless otherwise specified in the special conditions laid down in the ITT, the costs corresponding to the implementation of Clause 43.7 of the General Clauses and Conditions for ESA Contracts shall be included in the total amount of the price quoted in the tender. In case of quotation of a fixed price for the contemplated contract, its amount shall be construed as covering all such costs even those listed to any background information not planned to be used at the time of the contract negotiation and signature.

3. Reservations and restrictions

If as a result of:

- A commitment with a third party as to intellectual property rights, or
- An existing intellectual property right of the Tenderer, or
- A claim by the Tenderer that intellectual property rights will be generated under the contract which are not paid for by the Agency, or
- Any other reason

the Tenderer wishes to make any restriction on the rights of distribution and use, as foreseen and defined in Part II of the General Clauses and Conditions for ESA Contracts, of any data, including documentation, related to the work under the contract, such proposed restriction must be clearly defined and justified in the tender. It will be taken into account in the evaluation and if contrary to the stated objectives of the ITT, may render the tender unacceptable. The Agency will not accept reservations made subsequent to the closing date of the ITT.

Conditions relating to Export/Import licences/authorizations and related Documentation

At the time of the submission of his tender, the Tenderer (or his subcontractors) shall indicate any export or import restrictions he is subject to in accordance with national legislation and state the necessary licences, authorisations or preliminary authorisations and related Documentation:

- he (or his subcontractors) has obtained in order to submit a tender; and/or
- he (or his subcontractors) has or will need to obtain prior to placing of the Contract; and/or,
- he (or his subcontractors) has or will need to obtain for the implementation of the Contract.

Conditions relating to subcontracts

1. Placing of subcontracts

Unless otherwise provided for in the Special Conditions of Tender or Cover Letter, if the Tenderer intends to place subcontracts, he shall do so on a competitive basis wherever possible unless there are valid reasons not to do so (i.e. requirements from the Agency in terms of Industrial Policy or Geographical Return) . Subcontracts are defined in the explanatory text to point 3.15 of form PSS A2 (Company price Breakdown).

In submitting a tender containing proposed subcontractors, the Tenderer shall indicate the reasons why, and means by which, he has selected the proposed subcontractor, and the status of agreements with the subcontractor.

In order to ensure impartiality in the selection process carried out by the Tenderer, the Agency shall be entitled to conduct an audit on the Tenderers' preparation, evaluation process and selection of subcontractors, including the right to perform an audit of the overall assessment.

2. Information on subcontracts

When identifying proposed subcontracts, the Tenderer shall specify the country to which the subcontractors belong, the place of execution of the subcontracted work and also the corresponding percentage of the total price of the tender represented by the subcontract price.

3. Agency participation in subcontractor evaluation

Where the Agency wishes to participate in the evaluation and/or selection of subcontractors, the Special Conditions of Tender shall so specify, together with the procedures and conditions applicable to such participation.

Amendments to documents and communications

1. Notification of Interest to tender

Economic operators are required to notify their interest to tender to the Agency.

Economic operators registered as EMITS users shall notify their interest to tender only via EMITS.

Those considering tendering and not yet registered are requested to notify in writing the responsible Contracts Officer of the Agency of their interest, together with contact details for the responsible person in the company for future communications and a statement that they have taken the necessary steps to register as EMITS users.

Failure by an economic operator to notify his interest to tender may result in him not receiving answers to other economic operators' queries or other correspondence related to the ITT. No extension of the tendering period will be granted on these grounds. No claims due to a failure to notify interest shall be receivable.

2. Amendment of the ITT

The Agency reserves the right to issue amendments to the ITT.

3. Questions relating to the ITT

Any questions by economic operators concerning the ITT shall be submitted in writing to the nominated Contracts Officer not later than ten (10) working days before the closing date.

Questions should make specific reference to the appropriate section(s) of the ITT documents. When the Agency gives a reply it will normally publish the reply(ies) together with the question(s) in EMITS with an automatic notification to all who have notified an interest. Failure by the Agency to give a reply may not give rise to claims.

Any request for applicable documentation specified in the ITT shall be sent to the nominated Contracts Officer. The Agency will not make any document available unless the ITT documents specifically state that such document is available on request for the purpose of the ITT.

4. Amendment, withdrawal or resubmission of the tender

Amendment, notice of withdrawal or resubmission of the tender will be permitted if the appropriate documents reach the Agency before the closing date and time, in accordance with the dispatch conditions.

5. No contact with Agency staff or information about evaluation during evaluation period

Tenderers are not entitled to contact Agency staff during the evaluation and selection period to ask for information on the evaluation. The Agency reserves the right to eliminate from the evaluation a Tenderer contravening this provision. Such elimination shall not be a cause for claims.

6. Non-admissibility and elimination of tenders

Based on a preliminary verification by the Agency, it may decide not to admit a tender for evaluation if the Agency observes a significant non-compliance with the formal requirements for submission of tenders. Tenders initially admitted for evaluation may subsequently be eliminated by the Agency following a more detailed review. In either case the Agency will inform the Tenderer of its decision in writing.

7. Questions relating to the tender

The Agency reserves the right to ask Tenderers for clarifications of their tenders during the evaluation period. Answers, addressed in writing to the nominated Contracts Officer, must be received within three days of dispatch of the request if no other period is stated by the Agency at the time of its request. Clarifications shall not be regarded as amendments or modifications of the tender, in the case of competitive tenders.

8. Information after tender evaluation

Tenderers will be informed in writing whether or not their proposal has been selected for placing of a contract. Upon receiving notice that his tender has been unsuccessful, a Tenderer may require in writing from the nominated Contracts Officer an oral debriefing explaining the reasons why his tender was not successful. Any information will be limited to the findings of the Agency's Tender Evaluation Board on the tender in question and shall not cover the quality or content of other tenders.

Dispatch and receipt conditions

Unless other conditions are specified in the ITT, in particular the submission of tenders by electronic means, the following conditions shall apply.

1. Packing of tenders

Tenders shall be dispatched in double envelope. The inner envelope shall be sealed and shall be without indication of origin but marked with the definition of the supplies or services and the reference number of the ITT.

Unless otherwise provided for by the level of classification of the tender action, both sides of the envelope shall be marked as follows:

COMMERCIAL-IN-CONFIDENCE
TO BE OPENED BY THE TENDER OPENING BOARD ONLY

The outer envelope, carrying the Tenderer's name and address shall be sent to the establishment issuing the ITT.

Competitive Tenders shall be marked for the attention of the Central Registry.

Non-competitive tenders may be addressed for the attention of the responsible contracts officer.

2. Dispatch of tenders

Tenders shall be sent by post, by courier or delivered by hand. If sent by post they shall be registered and dispatched at least five days before the closing date.

At the time of the dispatch of a competitive tender, the Tenderer shall notify the responsible Contracts Officer by providing the following information:

- i) Reference of the ITT
- ii) Date of posting
- iii) Place of posting as defined by postmark
- iv) Number of registered parcels
- v) Airway bill number
- vi) Name of the person or the Tenderer responsible for posting
- vii) Name of the Tenderer.

If, the above-mentioned formalities having been fulfilled, the tender does not reach the Agency by the closing date, the Tenderer will be informed and an extension may be granted in order to allow him to forward duplicates. Tenders arriving after the expiry of this extension will not be taken into consideration.

3. Receipt of tenders

Only personnel of the Central Registry of the Agency's establishment concerned are authorised to issue a receipt upon delivery of competitive tenders or to issue an official signature in the case of a registered parcel.

Non benefits requirements

The Tenderer shall warrant that no official of the Agency or any individual participating in the evaluation of the tenders submitted in response to the ITT has received or will be offered by the Tenderer or any of his subcontractors any direct or indirect benefit arising from the ITT or the award of any subsequent contract.

If found guilty of any false statement to that effect on his behalf or that of his subcontractors, this will result in:

- the immediate elimination of the tender from evaluation and where a resulting contract has been awarded the immediate cancellation of the said resulting contract; and,
- the suspension of the Tenderer or of the subcontractor guilty of misrepresentation, from participating in any further procurements of the Agency.

Such elimination or cancellation shall not be a cause for claims.

Conditions relating to security screening of Tenderers personnel

The present requirement only apply to ITTs where personnel of the Tenderer or any of his subcontractors shall be working on-site in an ESA establishment, site or station in the life span of any resulting contract.

The Tenderer (and any of his subcontractors) is responsible for the execution of the basic security screening of any such personnel.

The Tenderer (and any of his subcontractors) shall, to this extent, provide in his tender a basic security screening verification sheet per individual concerned, and shall be able to produce, upon request by the Agency, the evidence of the verification results.

The basic security screening verification sheet shall list all of the verifications made, the date of verification and the person having made the verification.

The basic security screening shall consist of at least the following verifications:

1. Identity verification: copy of ID card or passport of concerned individual.
2. Verification of diploma or degree.
 - a) Provide a copy of the relevant diploma or degree
 - b) Contact the relevant university or school to verify that the concerned person obtained his/her degree there
3. Request the individual concerned to produce a formal statement of good conduct, issued by an official government entity, or – should local law not permit this – to have the candidate sign a statement of non-conviction and good conduct (Annex F).
4. Contact at least 3 reference persons and/or previous employers. For personnel already employed by the tenderer prior to applying for this tender this verification is not required.

Evidence of the verification shall be kept on hand for the duration of the validity period of the tender including any extension and for the duration of the subsequent contract, and shall be made available to the Agency upon request.

The required Reference Validation Template and Statement of Non-conviction and Good Conduct form to be attached to the tender are given in Appendix F.

Part 3 - General Conditions for the Contents of a Tender

The tender shall comprise the following elements, unless the Special Conditions of Tender have special requirements as to which of these elements is to be included in the tender, and how they may be combined where appropriate and practical:

- A. Cover Letter and its Annex (See Annex G)
- B. Executive Summary (See Annex A)
- C. Technical Proposal (See Annex B)
- D. Management & Administrative Proposal (See Annex C)
- E. Implementation Proposal (See Annex D)
- F. Financial Proposal (See Annex E)
- G. Contractual Proposal

The required content of each of these elements is outlined below. The Special Conditions of Tender may modify or expand upon these requirements, and the Tenderer may include additional elements, or contents within an element, if he feels it is necessary to improve the quality of the tender and to improve its understanding by the Agency.

Annexes A to E, as noted above, provide additional guidelines on the contents of a tender. These should be followed by all Tenderers, and may be made mandatory, in whole or in part, by the Special Conditions of Tender.

A. Cover Letter

1. Contents

The tender cover letter should not go into detail, particularly if an Executive Summary is required, but should be a brief introduction to the contents of the proposal as a whole. Further to the mandatory requirements set under Part 2 B12, the following items are considered to be of major significance, and shall be included:

- Major critical areas
- Compliance with special procurement requirements
- Exceptions and non-compliances to contract conditions
- Exceptions and non-compliances to technical requirements
- Exceptions and non-compliances to management requirements
- Identification of subcontractors
- Total proposed price and price type
- Summary price breakdowns
- Certification that the prices of the subcontractors contained in the tender have been agreed and constitute a firm commitment on their behalf.
- Overall annual expenditure profiles
- Geographical Distribution projection
- The name, ESA Bidder Code and ESA Supplier Code (when applicable), address, telefax, e-mail address and telephone number of the Tenderer's contact person to whom all communications relating to the tender/ITT should be addressed
- The name, ESA Bidder Code and ESA Supplier Code(when applicable), address, telefax, e-mail address, telephone numbers and contact person of any proposed sub-contractor.

- Certification that key acceptance factors when specified in the ITT, have been complied with.
- Certification that any specific Industrial Policy requirements have been addressed and are part of the proposal

In order to facilitate the opening of tenders and assessing their acceptability for evaluation, Tenderers are required to fill in and annex to their cover letter the compliance template found in Annex G.

The absence of the above information in the Cover letter and/or its Annex may result in the tender not being accepted for evaluation by the Tender Opening Board of the Agency.

Any compliance statement made in the cover letter and its annex which would contradict the content of the tender may result in the subsequent elimination of the tender by the Agency's Tender Evaluation Board.

2. Signature

The cover letter and its annex (Annex G) shall be signed by the authorised representative (s) of the Tenderer.

B. Executive Summary

The Executive Summary shall provide an introduction to the contents and layout of the tender, with a summary of the key points from each element of the tender. (See Annex A)

C. Technical Proposal

The following items shall be included in the Technical Proposal element of the tender (See Annex B):

1. Requirements/specifications/plans
2. Design references
3. Ground Support Equipment
4. Compliance Matrix with Technical System Requirements
5. Cost drivers
6. Schedule critical developments and contingencies
7. New technology items and other risk factors
8. PA/QA/Safety aspects

D. Management & Administrative Proposal

1. Management Plans and Requirements on Subcontractors

i) The Tenderer shall propose the following items:

- A Management Plan, which, in one complete, or in separate plans, shall state how the Tenderer will meet the functional project management requirements (See Annex C, Item A)
- Project Requirements Documents, to be placed on its lower tier Contractors.

ii) The Tenderer shall submit evidence of concurrence by its proposed Subcontractors to the Management Plan(s) and the Project Requirements Document (See Annex C, Item B).

2. Project Organisation

i) The Tenderer shall propose the following items:

- Its project organisation in the form of a Project Organisation Breakdown Structure(OBS). (See Annex C, Item C)
- The key personnel to be deployed on the work for inclusion in the contract, and include in the proposed Project OBS (See Annex C, Item C)
- The geographical and company/contract breakdown in the form of a Country/Company Grouping (CCG). (See Annex C, Item D)
- Its contractual hierarchy in the form of a Contract Structure (CS) in accordance with the Agency's requirements (See Annex C, Item E)

ii) The proposal shall state the time allocation/project commitment of each of the key personnel and the involvement of consultants

iii) Resumes of key personnel of the tenderer and his subcontractors shall be included in the proposal.

E. Implementation Proposal

1. Identification of risks to the project

In order to minimise risk, the Tenderer shall state in the proposal any identified risks resulting from any source. (See Annex D, Item A)

2. Product Tree

Based on any input made by the Agency, the Tenderer shall propose further levels of the Product Tree for all its products down to the deliverable end items, and incorporate the Product Trees of proposed lower tier Contractors. (See Annex D, Item B)

3. Model Matrix

The Tenderer shall propose a Model Matrix describing the applicability of models to each element of the Product Tree. (See Annex D, Item C)

4. Work Breakdown Structure (WBS)

Based on any input made by the Agency, the Tenderer shall propose a WBS for the total scope of its participation based on its proposed Product Tree, extending the applicable elements to include all appropriate development models and Support Functions necessary to produce the deliverable end items, and incorporate the WBS's of proposed lower tier Contractors (See Annex D, Item D).

Furthermore, the Tenderer shall propose:

- i) Work Package Descriptions (WPD) for each Work Package with information as on form PSS-A20 (See Annex D, Item D, Point 3)
- ii) Control Work Packages based on the level of visibility of the Tenderer's data (Schedule, cost, progress, etc.) required by the Agency for reporting purposes, and representing the total proposed work scope of the Tenderer (See Annex D, Item D, Point 4)
- iii) A list of deliverable items

5. Cost Breakdown Structure (CBS)

The Tenderer shall propose the cost categories for resources, including labour, equipment, facilities, etc., to be expended in the performance of work in the form of a Cost Breakdown Structure. (See Annex D, Item E)

6. Schedule Requirements

a) Schedule Tree

The Tenderer shall propose an activity-numbering scheme in the form of a Schedule Tree describing the breakdown of the Programme/Project Schedules into hierarchical levels, and a common set of calendars to be used for all schedules.

b) Agency Milestones

Milestones specified by the Agency shall be included in the relevant schedules, and additional milestones shall be proposed as required, agreed with its proposed lower tier Contractors with a list of activities to be performed for the achievement of each milestone. (See Annex D, Item F, Point 2a)

c) Detailed Schedules

Each Tenderer shall propose Detailed Schedules, developed by the work performers, for each major system constituent, which shall:

Represent the work proposed in the WBS with a number of activities relative to the size and importance of the related proposed Control Work Packages

Include critical components and materials order and delivery, and all critical items and functions

The Tenderer shall prepare a list of activities for each Control Work Package, including both those related directly to it, and those for related lower level work packages. (See Annex D, Item F, Point 2b)

d) Control Level

The Tenderer shall propose the Control Level, that is the content and level of detail of the Master Schedule, to be regularly reported and delivered to the Agency. (See Annex D, Item F, Point 2c)

e) Master Schedule

The tender shall include a Master Schedule, formed by the integration, at the proposed Control Level, of the proposed detailed schedules and interface milestones, connected with constraints, for all proposed work and that of lower tier Tenderers' proposed work. (See Annex D, Item F, Point 2c)

f) Planning constraints and assumptions

The tender shall identify the schedule planning constraints and assumptions on which the proposed schedule is based, including any proposed provisions of the Agency and the time allotted for the review of intermediate deliverables by the Agency.

The tender shall include in narrative form, a Critical Path Analysis of the proposed schedule.

g) Specific plans

The tender shall include the following specific plans:

- a) Design & Development Plan
- b) Manufacturing Plan

- c) AIV Plan

7. Configuration Management Requirements

a) Configuration Baselines

The tender shall include the set of Configuration Baselines to be established and the points in the project when they shall be created.

b) Configuration Items

The tender shall include in the Product Tree, the Configuration Items to be controlled, representing the complete system.

8. Lists of Deliverables

a) Document Delivery List (DDL)

The tender shall include an index of all deliverable documents, including these identified in the Document Requirements List (DRL) a Template of which is found in the Annexes.

b) Deliverable Items List (DIL)

The tender shall also include a draft of the list of deliverable hardware and software items which will be finalized during the negotiation of the contract. All the items, which are planned to be produced or procured under the resulting contract and to be paid or amortized with the price quoted for the contract shall be included in that list, it being understood that its contents will not be limited to those of the draft “deliverable items” which are listed in the Agency’s Special Conditions of Tender. The list of deliverable hardware and software items will be finalized during the negotiations of the contract.

9. Logistics And Inventory Management Requirements

a) Transportation Plan

The tender shall include a Transportation Plan indicating all major shipments envisaged in the course of work and proposed lower tier Contractors work.

b) Logistics Plan

The tender shall include a Logistics Plan identifying the location of all hardware at all times.

10. Project Reviews Requirements

To ensure a coordinated review programme is established, the tender shall include a Review Programme of the review events and major milestones for the project.

Financial Proposal

1. Estimating

- i) The Tenderer shall comply with the cost estimating requirements included in ECSS-M-ST-60 (latest version downloadable from www.ecss.nl)
- ii) The Tenderer shall use an adequate estimating system when preparing estimates for its work, with the following features, which are considered to be essential to ensure an estimating system that can produce verifiable, supportable and documented cost estimates:
 - Proven methods
 - Appropriate source data
 - Sound techniques
 - A consistent approach
 - Established procedures
 - Accountability
 - Experience and training of personnel and supervision
- iii) The tender shall state the methods of estimating used for different elements of the system and the rationale for that choice. Corresponding detailed documentation and parametric data shall be provided on the Agency's request. (See Annex E, Item C)

Use of the ESA Costing System and Forms

- i) The use of the ESA Costing Software application (ECOS)¹⁰ for WBS costing presentation is mandatory for any proposals for major projects¹¹. This includes all cost proposals submitted for Phase C/D and may also include cost proposals for Phase B or Phase E. The Agency may decide to apply ECOS to projects with less than 10 M Euros industrial content by specifying this in the Special Conditions of Tender.

Furthermore, should industry elect to do so, any other financial proposal can be submitted electronically, generated by ECOS, and will be accepted for evaluation, provided that the Tenderer also includes a hard copy summary of the financial proposal as well as the electronic copy (e.g. CD) of the detailed data.

(See Annex E, Item A, Point 1)

It is the responsibility of the Tenderer to get acquainted with the use of ECOS in time in order to prepare the related data for its own share of work, get contributions from its sub-contractors and produce ECOS integrated tender file in due time. No time extension for proposal delivery will be granted on the basis of late elaboration and delivery of ECOS files.

It is therefore recommended to ESA newly registered potential Tenderers to install the application and get acquainted with its use as soon as registered.

¹⁰ An executable version, related documentation and associated video training are provided free of charge to ESA Tenderers by application to ecoshelp@esa.int.

¹¹ In this context, a major project is to be considered to be any project with an industrial content of 10 MEuros or more, for the total programme of the Agency (from Phase A or B up to Phase C/D or E, as the case may be).

In case of contract award, the Agency reserves its right to withhold payments until a proper ECOS integrated tender file has been provided.

- ii) Each Tenderer shall use the following Agency's designated forms for presenting the cost and manpower figures of its work (See Annex E, Item A, Point 2), which are available in their latest version on EMITS under "Reference Documents" "Administrative Documents":

- PSS-A1
- PSS-A2
- PSS-A4
- PSS-A6
- PSS-A8
- PSS-A10
- PSS-A15
- PSS-A15.1
- PSS-A40
- PSS-A45

The Special Conditions of Tender will state which of the costing forms have to be submitted in the tender. This information shall be included in the pages of the tender unless the Tenderer has been requested instead to provide all or some of the cost data in electronic form (using the ECOS software).

- iii) Each Tenderer shall ensure that all proposed cost and manpower data is related to the proposed WBS and the proposed CBS.
- iv) To ensure an authorised submission is made, each Tenderer shall submit a completed Agency PSS-A2 Cost Form, signed by an authorised person, for each proposed contract, whether using ECOS or the Agency's other cost forms for submission of cost and manpower data.

Time phased Cost Data

- i) The Tenderer shall define a cost calendar for use in the time phasing of all cost and manpower data.
- ii) Each Tenderer shall ensure that the time phasing of its cost and manpower data is consistent with the proposed schedule (See Annex E, Item A, Point 4).
- iii) Where appropriate, as determined by the price type, the tender shall include proposed Price Variation Formulae to be applied.

Profit fee

The tender shall confirm acceptance of the nominal profit fee stated in the special conditions of tender and this fee shall be clearly stated in the price breakdown forms.

Payments

- i) Tenderers shall state acceptance of any payments scheme given in the ITT. They may also, unless specified to the contrary, propose an alternative payment scheme, which reflects the foreseen cost accrued whilst complying with the general requirements of the General Clauses and Conditions for ESA Contracts as amended by the draft contract.

Proposed payments may not exceed the limits stated in the General Clauses and Conditions for ESA Contracts or any other instructions given by the Agency to that effect, and shall be subject to negotiation. Payments shall be linked to the completion of well defined milestones (work packages, tasks, phases, etc.) or may, in the case of cost reimbursement contracts be made at regular intervals.

- ii) For each payment the tender shall include details of activities constituting its achievement and the payment amount by means established in the contract and consistent with the information proposed on the PSS-A15 forms (See Annex E, Item A, Point 4).

Statement of Geographical Distribution

The tender shall include a Statement of Geographical Distribution resulting from the proposed distribution of the work to be performed and significant purchases, showing the countries concerned. (See Part 2, Item E, Point 2)

Currency and Conversion rates

It is a binding requirement that tenders be presented in EURO.

For any Tenderer or proposed subcontractor located in countries not participating in the EURO, the exchange rate shall be stated on the PSS forms and shall be clearly explained in the exhibit to form PSS-A2 and any other factors (e.g. hedging costs, forward buying rates, etc.) used for the purpose of their calculations shall be indicated.

The exception is when tendering for a Fixed Price Contract with price variation, the base exchange rate must be that published on EMITS for the month of the base economic conditions required in the tender.

Should the countries to which Tenderers belong adopt the EURO following the submission of the tenders, the applicable conversion rates shall be those then adopted by the appropriate European Authorities.

Quotations free of taxes and customs duties

Prices shall be quoted free of taxes and customs duties. In cases where the Tenderer considers that he will remain subject to the payment of taxes or customs duties, he shall indicate separately the applicable rates, the corresponding estimated total tax or customs duty amount, and the reason why he believes exemption from tax or customs duties cannot be obtained. Attention is drawn to the pertaining provisions of the General Clauses and Conditions for ESA Contracts.

Royalties and licence fees

The Agency will only accept to pay licence fees or royalties on the condition that:

- They are clearly identified in the tender, with the financial basis for their calculation, method of application and total amount and
- They are demonstrated to be of direct and necessary benefit to the work to be performed
- They are not merely the consequence of a general agreement or commitment to a third party
- They are applied only to that part of the effort to be performed by a contractor or subcontractor that is directly related to the subject matter of the licence or royalty agreement.

A copy of the documents justifying the request for the payment of a licence fee or royalty, or the appropriate part thereof, shall be included in the tender.

F. Contractual Proposal

1. Compliance with the ITT Conditions

The tender shall comply in all respects with the ITT. This element of the tender shall include explicit statements of compliance, and identify all reservations, modifications and amendments as follows:

- i) Compliance with Intellectual Property Rights and Software requirements
- ii) Compliance with technical and management requirements

The tender shall explicitly state that the technical and management requirements will be met. Any reservation must be clearly identified in this chapter of the tender, and identify:

- The requirement concerned
 - The consequences of the reservation
 - The reasons for it
 - The possibility of it being withdrawn and conditions
- iii) Compliance with contract conditions

The Tenderer shall explicitly state that the contract conditions have been read, are understood and accepted, and that any sales conditions of his own do not apply. In case, exceptionally, that he wishes to propose modifications or amendments, the full text of such modifications or amendments shall be given and the reasons for their being requested shall be clearly explained.

Any reservations to the requirements, or any proposed modifications or amendments to the contract conditions will be taken into account in the evaluation. Acceptance of a tender containing reservations, or proposed modifications or amendments is not to be construed as acceptance of these, unless and until such modifications or amendments are confirmed in a contract.

2. Options

If the Special Conditions of Tender call for the submission of options or alternatives, or if the Tenderer wishes of his own initiative to submit these, the Agency reserves the right to disregard such a submission if a tender compliant with the requirements is not also made.

Annex A - Executive Summary

The Executive Summary shall include the following:

Introduction, contents and layout of the Tender

- Summary of the Contractual Proposal
 - Statement of compliance and a summary of the Reservations, Exceptions and Non-compliances
 - A description of relationships with the Agency

Summary of the Technical Proposal:

- Specification/document tree
 - Description of design(s)
 - Description of major external interfaces
 - Approaches to PA/QA/Safety/etc.
- Summary of the Management & Administrative Proposal:
 - The proposed organisation structure
 - The overall management approach
 - For each company:
 - Its responsibilities
 - A list of key personnel
 - Interfaces to Agency
 - The available resources
 - A statement on the involvement of consultants
 - The Management Systems to be deployed
 - Summary of the Implementation Proposal:
 - A brief description of the major risks
 - The overall planning
 - A summary of the proposed work:
 - A synopsis of the Statement of Work
 - Distribution of work by company
 - A description of the Work Breakdown Structure
 - A list of deliverable Items
 - A brief description of the distribution of work by end item
 - The proposed Configuration Baselines to be established
 - The Project Reviews to be held
 - Proposed options
 - Summary of the Financial Proposal
 - Cost and Price summaries
 - For the total tender
 - A breakdown by major constituent
 - A breakdown by company
 - A geographical distribution projection
 - The annual expenditure profiles
 - A breakdown per option proposed

Annex B - Technical Proposal

Due to differences between projects, a standard list of contents cannot be specified. However while not exhaustive the following contents are to be considered when preparing the Technical Proposal element of the tender:

- Requirements/specifications:
 - A Specification Tree
 - Specifications
- Design references:
 - Mission assessment
 - System analysis
 - System budgets
 - Concept of designs
 - Mechanical design
 - Thermal design
 - Electrical design
 - Software
 - Interfaces
 - Integration and Test logic
 - Operations logic(e.g. autonomy, availability, FDIR.)
- Ground Support Equipment
- Compliance Matrix with Technical System Requirements
- Draft Delivery Lists (Documents, Hardware and Software)
- Cost drivers:
 - Cost saving options
- Schedule critical developments and contingencies:
 - Schedule critical path
 - Technically complex
 - Technological readiness Level (TRL) assessment
- New technology items and other risk factors
 - New or innovative technical solutions
 - Technology development
- PA/QA/Safety aspects
 - Single Point failure

Where the Special Conditions of Tender require different contents in the Technical Proposal, these should be provided. Where specific contents are not required, the Tenderer should consider the above list as the basis for his proposal, with additions as he feels necessary.

Annex C - Management & Administrative Proposal*

A. The Management Plan

1. Overall Contents

The Management Plan is proposed to describe how the project organisation, including the proposed subcontractors, will operate in conjunction with their company organisations, in order to accomplish the contract objectives, within the framework of the Agency's Management Requirements. The Management Plan may be proposed either as one integrated plan, or as separate dedicated plans for each function. It describes the complete organisation and its management (Project Management, Project Control, Engineering, Product Assurance, etc.) and demonstrates the integration and interaction of these management functions. In addition, it describes the supporting infrastructure that provides the Agency with the necessary information for decision-making and management, that allows efficient management of its own activities and those of lower tier Contractors throughout the Industrial structure, and at the interface to the Agency. The Management plan shall identify the roles and responsibilities of each member in the Industrial Structure.

Following contractor selection, the Management Plan shall be updated and resubmitted for final approval, to reflect the contract negotiations. Specific reference shall be made to each of the following management functions:

Project Control
Risk Management
Project Breakdown Structures
Schedule Management
Cost Estimations
Financial and Cost Management
Contract Change Management
Configuration Management
Document Management
Logistics and Inventory Management
Project Phasing and Review Management
Progress & Performance Evaluation/Management
Information Management
Product Assurance

The Management Plan shall document the following areas in detail, in order that the Tenderer and the Agency may agree that all matters are adequately addressed:

Organisation:

Roles and responsibilities
Authorities of key personnel
Interfaces between all organisation elements
Legal agreements and special arrangements between organisation elements

Procedures covering:

Contractor management, including a subcontracting plan describing the policy and the procedures for the selection and management of subcontractors
Progress reporting
Cost Control
Interface management
Composition and conduct of boards, meetings and reviews

* Note: Please note that the term "Customer" may refer to the Agency or otherwise the direct customer at lower level of the contractual hierarchy.

Facilities:	Action Item Control
Accommodation and location of project staff	Procurement and functional support
Computer hardware & software to be deployed	Problem resolution
Communication means	Quality assurance
	Engineering
	Safety
	➤ Agency access to data
	➤ Information, data and documentation management and security

2. Describing the Project Management & Control Organisations

A project control organisation is to be established, providing effective management and control of its own activities, and those of its subcontractors, in a proactive manner. The description of the project control organisation is an important element of the Management Plan. Particular attention shall be given to describing not only the internal structure, roles and responsibilities of the project team, but also its external relationships and positioning within the Tenderer's corporate structure.

The following Project Control aspects are to be considered when developing the Management Plan:

- Responsibility for maintenance of all project control data.
- Responsibility to inform the Agency of all critical situations that could lead to adverse programmatic impacts to the project.
- Its role in the implementation of the applicable contract and management requirements.
- Its reporting line to the project manager.
- Its access to the contractor's data as necessary.
- Its place in its project organisation such that fundamental management control functions can be performed effectively, and work performed by others in the organisation can be actively and effectively controlled.
- The support of the Tenderer's management and access to relevant levels of management, both internally and between members of the industrial consortium.

Where a Prime Contractor is proposed its organisation, roles, responsibilities, authorities and interfaces, are to be described in detail, with due consideration of the following aspects:

- Responsibility for the overall implementation and execution of the industrial development programme, including overall management, cost and schedule performance, technical performance, direction of the industrial consortium, and implementation of the Agency's industrial policy requirements.
- The need to establish a project management organisation to act as the single point authority within its company and vis-à-vis the Agency, for the agreement on and execution of the work assigned to its company.
- The nomination of a Project Manager with a team dedicated to the project.
- The responsibility for the project team and their lines of reporting.
- The Project Manager's access to the company management hierarchy for resolution of conflicts.
- The separation of project management for the current project from other projects and operations.
- The need for the Project Management Office to monitor all technical, managerial and administrative activities, provide the directive to accomplish the project, expedite resolution of problems, and interface with the Agency's Project office with identification of Key personnel.
- Leadership of the Industrial team to ensure compliance with the requirements.

B. Project Requirements Documents For Lower Tier Contractors

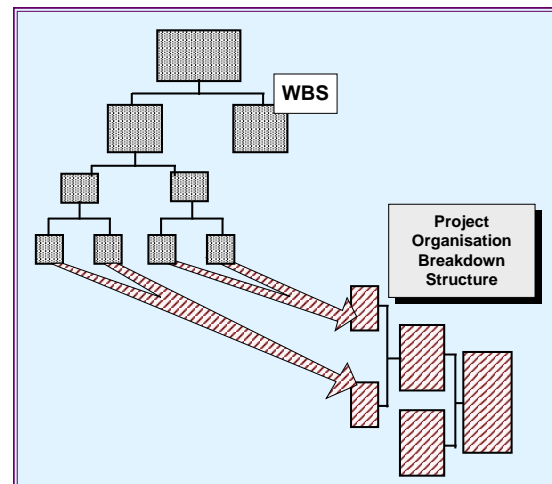
In order to ensure a uniform approach to the applicability of requirements and the performance of project management functions and procedures, throughout the contractual hierarchy, the Tenderer shall propose Project Requirements Documents to be placed on its lower tier Contractors, demonstrating a cost-effective tailoring of requirements to be met during contract execution, in line with the specific project's profile. The tailoring shall be such as to ensure that:

The contractual obligations will be met
 Mandatory requirements specified by the Customer are included
 No additional risks are introduced
 No unnecessary requirements are added.

C. The Project Organisation Breakdown Structure

Identification of responsibility for all items of work is essential. This facilitates correction of problems and aids in establishing correct channels of communication. The Project Organisation Breakdown Structure (OBS) depicts the proposed project organisation, as opposed to a Tenderer's Company OBS, which depicts the functional aspects of the company.

It shows the key personnel to be deployed on the work, who will also be identified in the contract, and the assigned responsible parties for each Work Package in the WBS. The following project management functions are to be included as appropriate:



Project Manager
 Contracts officer
 Project Controller
 Configuration management officer
 Documentation management officer
 Information systems officer
 Product assurance and safety officer
 Technical officer(s) responsible for design, development, verification of the product(s) under its responsibility

D. The Country / Company Grouping (CCG)

The Agency's obligation to record Industrial Return to the Member States requires identification and recording of expenditures by country. Identifying the contractor for each Work Package allows for the interrogation of data from the contract/Contractor/country view by use of the CCG. The CCG shows the relationships between countries, companies and proposed contracts.

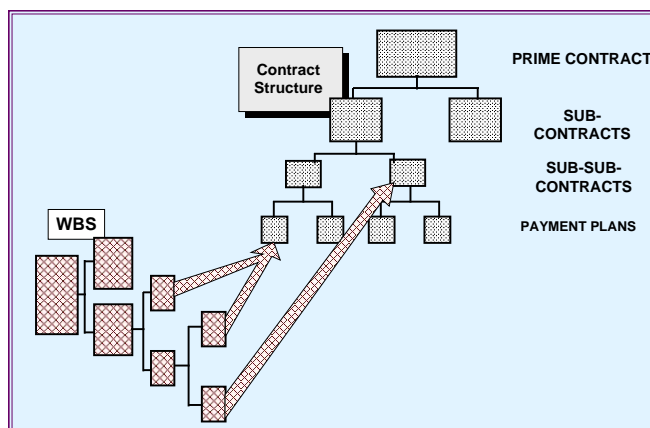
Where practical, such as in projects with simple contractual hierarchies, it may be combined with the Contract Structure, providing meeting Industrial Return policy is not complicated as a result. The Country/Company Grouping and Contract Structure are typically determined by the Prime Contractor where a complex contracting scheme is envisaged.

The Tenderer develops the CCG by taking into account all work and the proposed contracts/subcontracts it intends to place. (Suppliers are included where they affect Industrial Return)

Countries and Contractors shall be identified by the codes, where available, as specified in the current version of ECOS. Contract element coding is to be agreed with the Agency.

E. The Contract Structure

The Contract Structure (CS) depicts the proposed contractual hierarchy in the project. The contract and Contractor codes used shall be the same in both the CCG and CS. The CS for the total Project is to be consistent.



Annex D - Implementation Proposal

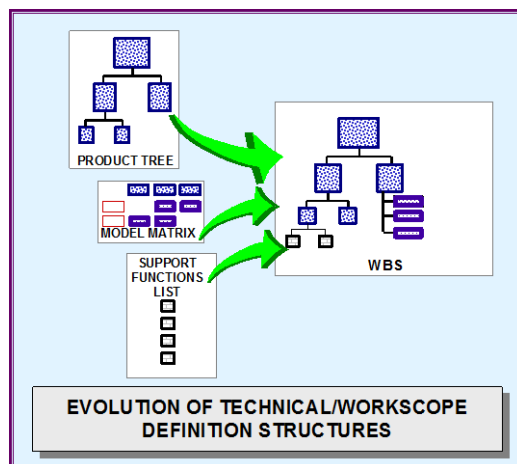
A. Assessment of Major Areas of Risk

In order to minimise risk, the Tenderer shall state in the proposal any identified risks resulting from any source, including:

New or innovative technical solutions
Technology development
Inadequate, unstable or unclear requirements
Level of definition and stability of external interfaces
Adequacy, availability and quality of resources, facilities and tools
Short time scales
High cost items and work packages
Industrial organisation

Tenders will be assessed to verify that the level of risk is adequately identified and assessable and that the risk is adequately covered (See [Annex E, Item A 3](#)) and acceptable.

The Product Tree

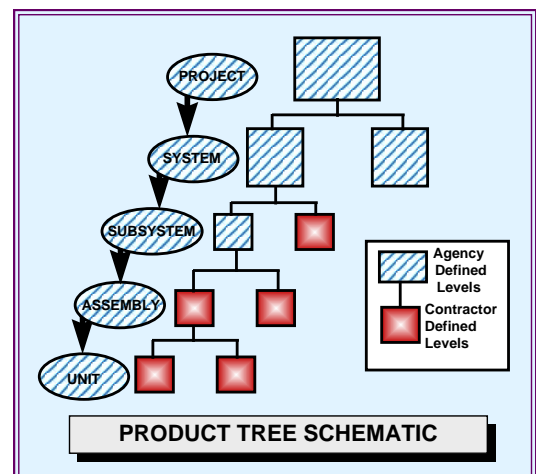


The following structures are developed in an evolutionary manner, as the project progresses through the definition steps. As such, they reflect the increasing knowledge of the system requirements and design, and require the minimum effort to produce.

The Product Tree (PT) establishes a uniform agreed definition of the project's constituent systems, subsystems, assemblies, units, etc., for use by all project participants, and to provide a basis for the development of the WBS.

The Product Tree depicts a product-oriented breakdown of the project into successive levels of detail, down to the configuration items. Based on any input given by the Agency, the Product Tree is further developed by the Tenderer proposing to perform the work, with the approval of their Customers. The breakdown should be limited to items where management control is required for any of the following aspects:

Engineering
Configuration Management
Product Assurance
Schedule
Cost



Operations and Logistics - all items that are the subject of a delivery are to be included.
The Product Tree **excludes**:

Supporting functional work, such as Project Management
The development models, such as Qualification Model

as these are components of the WBS.

The Product Tree for the total Project is to be consistent and shall incorporate the Product Trees of proposed lower tier Contractors.

The Model Matrix

The Model Matrix describes the applicability of models for each element of the Product Tree, and their utilisation. It ensures the model philosophy, identified in the Development Plan, is realised. It also provides a means to support the development of the WBS from the Product Tree.

The Work Breakdown Structure

1. Objectives of the WBS

The Work Breakdown Structure (WBS) is the primary project management structure. It is produced by extending the Product Tree elements to include the Agency defined support functions necessary to produce the deliverable end items, the necessary services, and the appropriate development models, by reference to the Model Matrix as applicable. It is used as:

- A common focal point for data creation, collection, summarisation and reporting, and performance monitoring in, and between, all other functions of project management such as Schedule Management, Cost Management, etc. for all project participants.
- A means to define deliverable end items and tasks to be performed.
- A basis for tender comparisons and contract negotiations.
- A means to support the definition of Control Work Packages for management reporting and visibility.
- A basis for the definition of technical interfaces and other relationships between project elements and participants.
- A basis for the development of the Documentation Tree and relating specifications to end items.

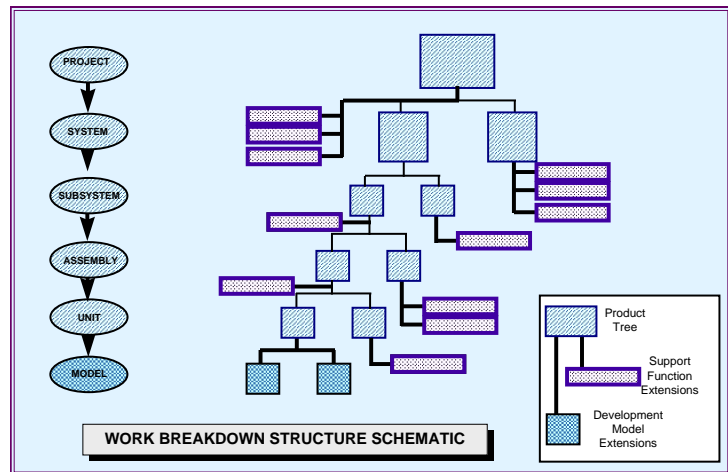
The development of the Work Breakdown Structure begins during the tendering process in order to:

Obtain a systematic description of the tasks to be performed
Provide a basis for evaluation of the work content
Provide a framework for the management of any subsequent contracts.

Thus it is important that the terminology used throughout the tender is consistent with the ITT.

A top down approach is employed to the development of the WBS to ensure all major work areas are considered and to avoid omissions and duplications. Starting with the Product Tree as a basis the Tenderer shall produce its part of the WBS by:

- Reviewing each element of its Product Tree
- Appending the required development models as children to the applicable elements.
- Adding the required support functions as children of the element to establish the Work Packages.
- Determining Work Packages on the basis of management complexity.
- Incorporating the WBS's of its proposed contractors
- Confirming, by means of a bottom up approach, the completeness of the WBS:
- All models and work items are included
- The correct location of each Work Package beneath its parent product.
- The correct inclusion of all products, assemblies, subsystems and systems.



To ensure work is included at the appropriate level, work related to manufacturing, assembly, integration and test shall be shown against the models, and Engineering work shall be identifiable in connection with its related Product Tree element, such as System, Subsystem or Unit level.

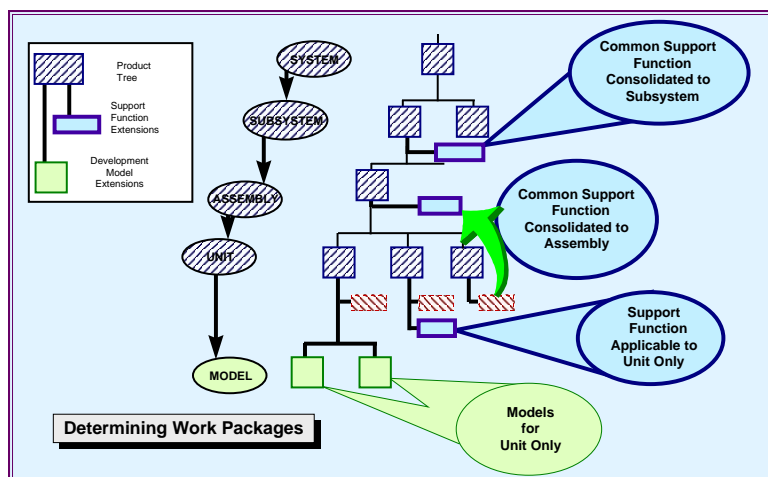
Establishing Work Packages in the WBS

Work Packages are established primarily for the purposes of establishing cost, planning and other baselines, and for the collection of progress information, such as actual costs and man hours expended. They are used in these processes by the Contractor responsible for the work, and as such are determined at a level of detail adequate to allow control to be exercised by the Contractor. This requires that work packages be defined in sufficient detail to relate each with:

- The lowest level contractor applicable
- The most detailed, required schedule data
- The most detailed, required cost data
- The most detailed, required contractual deliveries.

While reporting to ESA may be at a summary level, (See Annex D, Item D, Point 4 "Determining Control Work Packages" below), data collection shall be performed at the Work Package level, and thus allow more detailed reporting and data submission when requested by ESA.

Support functions may be shown in the WBS at any level, but effort must not be duplicated. Support Functions used are those defined in the Support Function File of the current version of the Agency's costing system, ECOS. This supports a common definition both within the project and between projects, aiding the collection, comparison, and understanding of data. ECOS is available to all Tenderer on a free of charge basis. The Tenderer shall use the contents of the Support Function File for reference.



In addition to product related Work Packages, Work Packages, which are functional in nature can be one of two types:

- Apportioned Effort (i.e. effort related in direct proportion to product oriented Work Packages)
- Level Of Effort (i.e. effort which cannot be directly associated with any end products but only with the total project or contract).

Each Work Package shall:

- Have a unique identifier and concise description, and a clearly defined start and end.
- Wherever possible produce deliverable items and be confined to one development model. For control purposes, especially Schedule and Cost Management, non-product related work is difficult to assess in terms of performance and value to the project. Where such work is required it should, wherever possible, be apportioned to product oriented work for measurement and control purposes.
- Be established on the basis of management complexity:

Be manageable by one person.

Contain an adequate number of work elements to facilitate control.

Facilitate the incorporation of contract changes.

Factors to be considered in the final, detailed partitioning of Work Packages are summarised in the table below.

FACTOR	PRODUCT WP's	FUNCTIONAL WP's
Number of End Items (Product complexity)	X	
Models or Production Volume	X	
Apportioned Efforts		X
Functional Specialisations		X
Duration		X
Geographical Locations	X	X
Responsibilities	X	X
Organisations	X	X
Contract Type	X	X
Cost	X	X
Activities (Project Complexity)	X	X

Work Package Descriptions

Work Package Descriptions shall be completed for each Work Package, to indicate a good and complete understanding of the work involved and the products to be produced.

Contractually the Statement of Work defines the work to be performed.

The completion of Work Package Descriptions is intended to demonstrate that consideration has been given to all aspects, to avoid duplication and omissions, thus benefiting both Tenderer and Agency.

The required data shall provide visibility and understanding of the distribution of tasks.

The Tenderer shall use the PSS-A-20 form. The form at its latest version is directly downloadable from <http://emits.esa.int> where it can be found under:

- Reference Documentation
 - Administrative Documents
- PSS Forms

Work Package Description – PSS-A-20

The purpose of this form is to obtain a detailed description of the work to be performed under this Work Package (WP).

Unless specified otherwise in the Special Conditions of Tender, WP descriptions are to be supplied at the task/equipment level. Each form shall contain the following information:

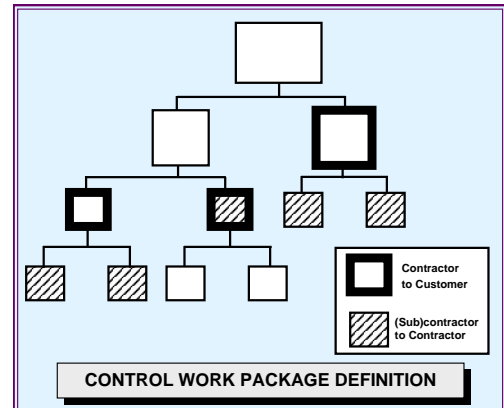
- Name of project
- Designation of project phase (if applicable)
- Work package reference defined in Work Breakdown Structure
- Title of Work Package
- Firm responsible
- Number of the sheet and total number of sheets pertaining to a given Work Package Description (use continuation sheets as appropriate)
- Major constituent to which the work package belongs. This shall not be limited to hardware subsystems but shall cover, as appropriate, functional task areas, such as management, product assurance, etc.
- Identifier of the start event which denotes commencement of the work package activities on the respective network
- Plan date of the work package start event. The date shall be based on planning calculations
- Issue number of the Work Package Description
- Identifier of the end event, which denotes completion of the work package activities on the respective network
- Plan date of the work package end event. The date shall be based on planning calculations
- Date of latest issue of the Work Package Description
- The name of the contractor's employee responsible for the work package (WP manager)
- List of items (documentation and/or hardware) which must be completed, or be available to start the work package
- List of tasks specifically excluded, if appropriate, in order to increase clarity of the scope of the work package.

Determining Control Work Packages

Control Work Packages are those elements of the WBS for which data and reports, including financial, cost and manpower, are required to be submitted to the Agency.

Control Work Packages:

- Are agreed between the Contractor and its direct Customer during contract negotiations
- Are at any level of the WBS
- For reporting purposes, represent the total scope of work of the Contractor
- May be at different levels of the WBS dependent on the Contractor's level in the Contract Structure
- Are determined based on the level of visibility of the Contractor's data, required by the direct Customer.



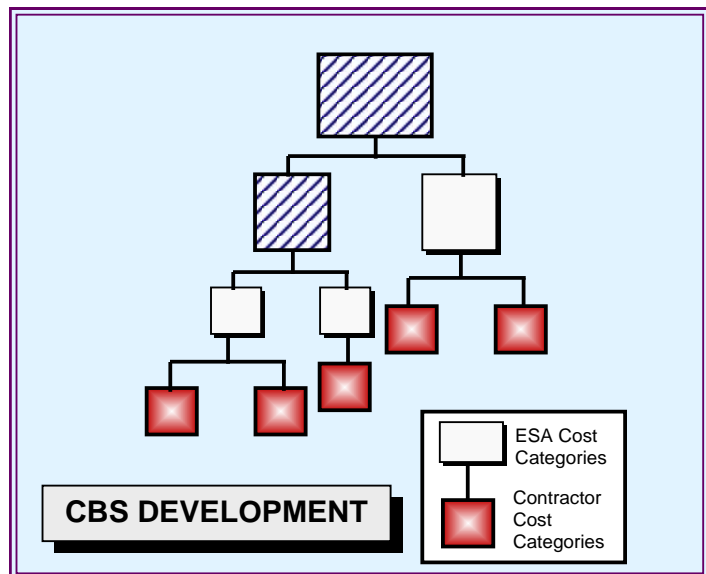
As noted above and depicted in the figure, the selection of Control Work Packages is dependent on the Contractor's level in the contractual hierarchy. The Control Work packages established for a Subcontractor are agreed on the basis of the visibility of its work required by its higher level Contractor.

In turn, the Contractor's Control Work Packages are established and agreed, with its higher level Customer, on the basis of the visibility of its work required by the Customer. Normally, these are at a higher level in the WBS, but may be the same as some Subcontractor's Control Work Packages, where the work is of an important or critical nature, and visibility is required to be maintained.

The Cost Breakdown Structure

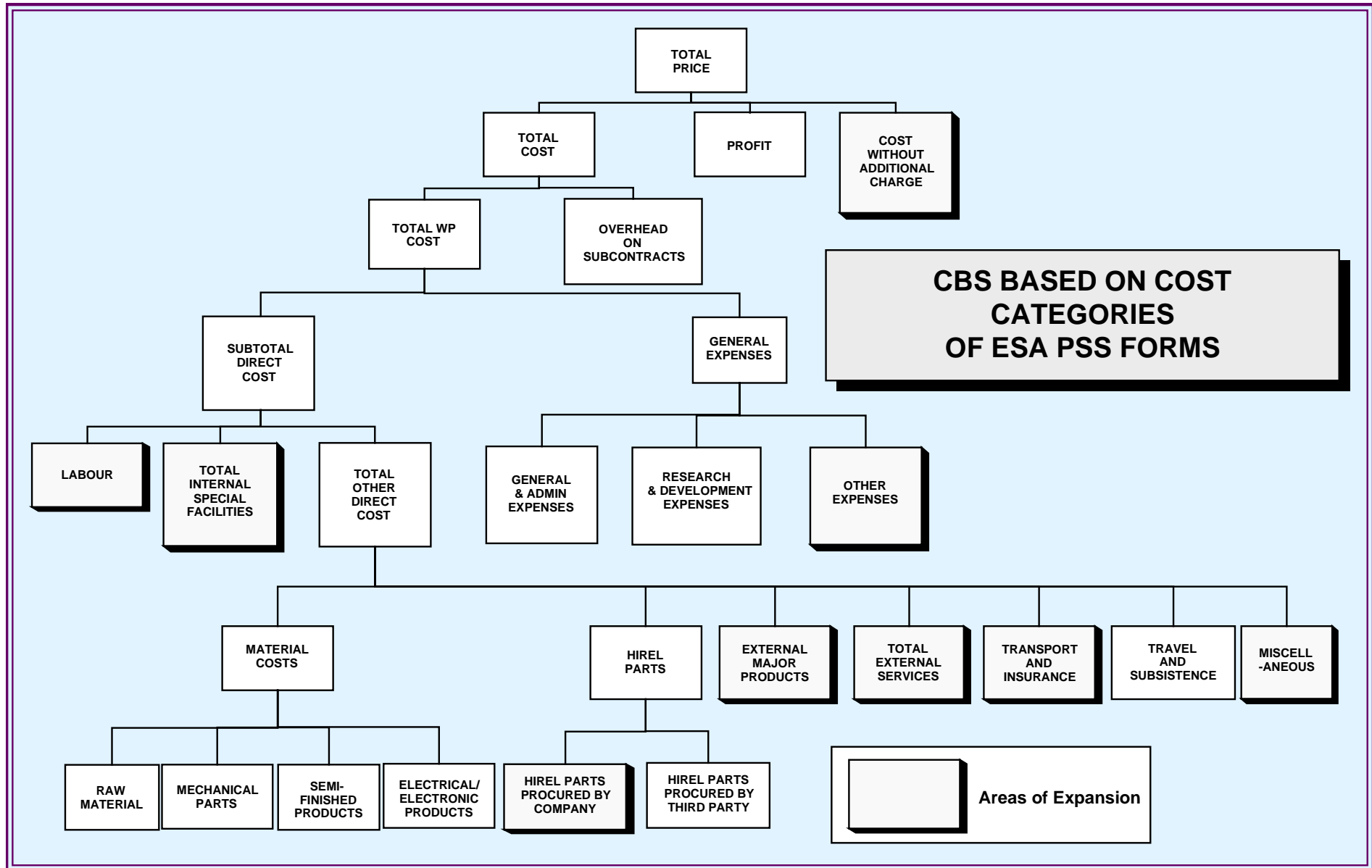
The Cost Breakdown Structure (CBS) defines the breakdown of all the costs of the project, including labour, equipment, facilities, etc., into agreed cost categories to be used for Financial and Cost Management, and provides the framework for cost summarisation with other structures.

To ensure that cost collection and analysis can be performed in the Agency's standard cost categories across the whole project, the CBS is based on the Agency's standard cost headings, as defined in its PSS series of Cost Breakdown Forms.



Where the Agency's cost categories alone are not sufficient they may be extended to include the Tenderer's own categories, within each applicable Agency category by assigning its internal cost categories to the applicable Agency cost categories, taking account of all work to be performed and resources required. This includes the possibility of assigning only one Contractor cost category to an Agency category, as illustrated above.

The CBS based on the Agency's standard cost headings is shown on the facing page, with typical areas of expansion highlighted.



Schedule Requirements

1. Purpose & Objectives

The purposes of proposing schedules are:

- To present the main objectives, in the form of milestones, of the envisaged work
- To Identify the tasks required to achieve these objectives
- To clearly and realistically present the logical sequence of the proposed tasks
- To provide the basis for subsequent schedule management, control and reporting during execution of the work.

Basis of Proposed Schedules

The proposed schedules shall take account of, and be based on:

- The schedule and financial targets
- Detailed analysis of the tasks
- Critical review of all activity interdependencies and durations
- Significant interfaces and constraints
- Available resources
- Adequate lead times for procurement
- Availability of planned facilities
- Normal downtime of facilities
- Allowances for resolving interferences and incompatibilities during integration and testing
- Time phasing consistent with cost and manpower data in the Work Package Manpower and Cost Plan, and the Price Projection.

a) Milestones in the Schedule

i) Milestones Specified by the Agency

The milestones specified by the Agency for setting targets for major events and for monitoring schedule progress are to be included in the planning and supporting schedules developed, and presented by the Tenderer.

ii) Milestones Specified by the Contractor

In turn the Tenderer similarly identifies additional milestones for its work and its lower tier tenderers work, representing key points in the project, which are to be used for target setting and schedule progress monitoring. From these milestones, the Tenderer shall propose Payment Milestones, which when approved by the Customer, shall be separately identified and documented as part of Milestone Payment Plans.

b) Detailed Schedules

Detailed Schedules shall be proposed which support, and include, the milestone targets and expand upon the work depicted by the Work Breakdown Structure. A Detailed Schedule shall be produced for each major system constituent and participant. If more than one proposed Contractor is working within a major system constituent then a Detailed Schedule for each shall be developed, and combined, (using the same principles of integration as the creation of Master Schedules from Detailed Schedules), to make a Detailed Schedule for each major system constituent.

These schedules serve as the basis for schedule management between the Contractor and its lower tier contractors during execution of the work, and shall include the activities and tasks, as appropriate and applicable to the level of the work (product/system/subsystem/unit/etc.), associated with:

Design, Development, Production, Construction
Assembly, Integration
Testing, Acceptance, Delivery
Procurement
Reviews
Software development
Support equipment, materials, supplies & services
Logistics and transport.

To facilitate progress measurement, and the creation of the Master Schedule, at least the following type of milestones shall be identified and included in the Detailed Schedules:

Payment milestones
System and Subsystem reviews
Software reviews
Interfaces*
Deliveries (Major documents, hardware & software)
Any other as required by the Customer

*Interface milestones shall be defined that represent the logical relationships between proposed Contractors, such as deliveries of items and the completion of required information such as designs, specifications etc. Each Milestone is included in the schedules of both the provider and the recipient of the item or information, and connected via relationships.

Risks to the attainment of any milestone shall be highlighted, and alternative solutions provided to minimise these. Reference is to be made to the corresponding technical, schedule and cost sections of the tender.

Where risks to a milestone have been recorded, detailed schedules are to be prepared to allow, during execution of the work, early identification of adverse impacts and the implementation of contingency plans where required.

The Detailed Schedules represent the work scope as identified by the WBS. In order to ensure that this is achieved the Tenderer shall:

- Identify the parent work package for each activity, which may be a Control Work Package or, as is more often the case, a lower level work package
- Agree these relationships with work performers
- Delete activities without parent work packages or add work packages if the work is required
- Create activities for work packages without activities or delete work packages without activities (unless LOE work package)
- Ensure that all tasks in WPD's are included in a Detailed Schedule.

c) Master Schedules

Master Schedules shall be created, by each proposed Contractor, by integrating, at the Control Level, the Detailed Schedules and milestones, for its own work (typically product/system level activities) and that of its proposed lower tier Contractors (typically subsystem/unit level activities).

During execution of the work, following contract negotiations and award, these schedules shall become the basis for routine reporting; and monitoring, progress assessment and co-ordination by the Agency.

i) The Control Level

In order to provide visibility and traceability of schedule data at the level of detail required by the Agency, the Tenderer shall propose the Control Level, (the content and level of detail of the Master Schedule), to be regularly reported and delivered to the Agency. The Control Level for schedule management, and its corresponding Master Schedule is not to be created by simply summarising the Detailed Schedules to their Control Work Package parents, which are primarily determined for Cost Management and other management purposes.

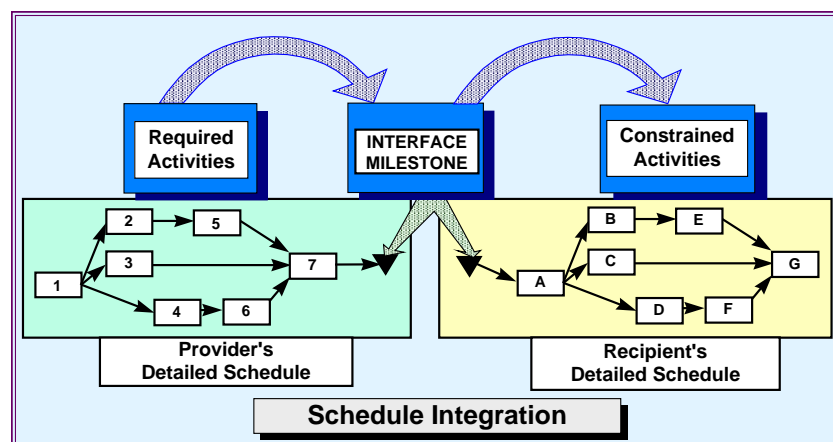
Rather, normally the Control Level, and its corresponding Master Schedule, are to comprise specified milestones, and the major activities supporting and connecting them. This shall include all Agency specified milestones and other milestones as agreed.

Dependent on the content and level of detail of the proposed Control Level, this may involve the integration of any of the following:

Complete Detailed Schedules (such as product/system level work)
Summaries of the Detailed Schedules (such as subsystem/unit level work)
Specific extracts of the Detailed Schedules

The Master Schedule may be expanded, during execution of the work, to include more detailed information if circumstances necessitate, for example, where delays are forecast, or where the Agency is required to perform a co-ordinating role with participants other than industry contractors.

ii) Developing the Master Schedules



To ensure that integrated schedules allow for a complete critical path analysis, the interface milestones, in the Detailed Schedule of the provider, are constrained by all required activities that must be completed in order for the milestone to be achieved.

Similarly, in the Detailed Schedule of the recipient, the interface milestones constrain all activities that are dependent on the completion of the milestone.

After the Detailed Schedules are produced each proposed Contractor shall:

- Integrate its and all its proposed Contractors Detailed Schedules into a single Master Schedule, at the agreed Control Level, including interface milestones between them and shall submit it to the Agency
- Ensure that the work being performed and the Detailed Schedules are in agreement
- Assess the realism of Detailed Schedules and assess the associated risks.

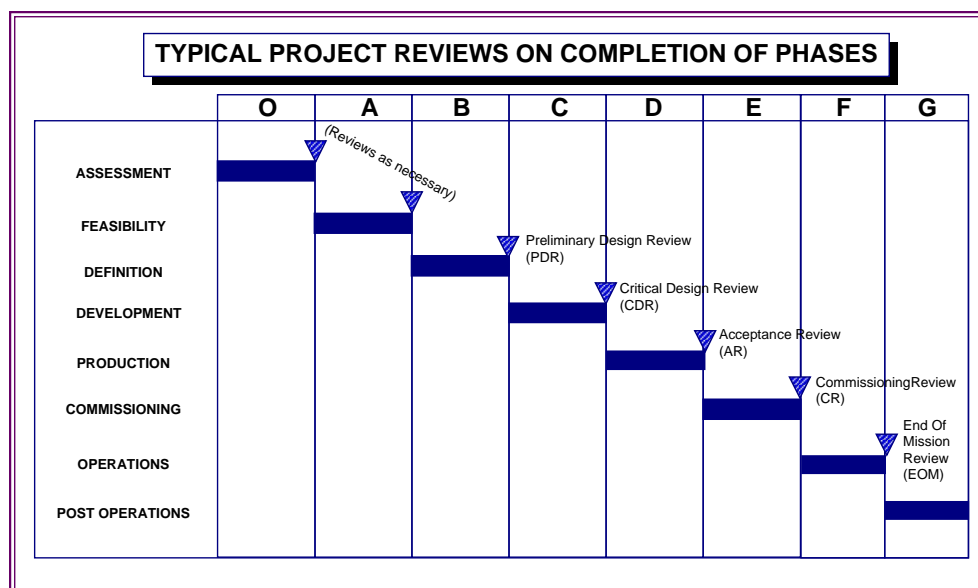
Project Reviews

1. The Project Lifecycle

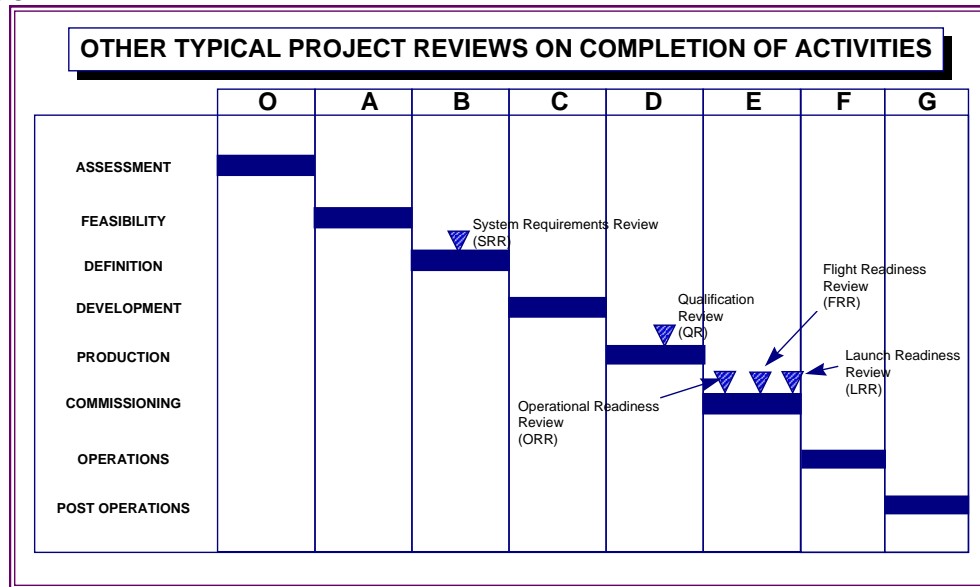
A typical Agency project is comprised of a series of activities performed in a number of phases, punctuated by Project Reviews to assess the status, conformance and progress of the work, and approve the baseline for the next stage of work.

2. Reviews

Each phase is concluded by a Project Review to establish the satisfactory completion of the preceding phase and establish an agreed baseline for the succeeding phase. The typical reviews are illustrated below.



Additional reviews are also held at the completion of a major development stage, to assess the development status, such as those illustrated below.



The Agency will, based upon consideration of the size and complexity of the programme concerned, select from the reviews at the programme or project/element level during Phases B to G, those to be considered as Agency reviews.

Reviews applicable to a specific project, or element will normally be selected from these reviews. The Contractor for a project/element concerned will propose the reviews to be conducted at lower tiers, and their schedule, ensuring that all technical data required to support a review at a given level (element, subsystem,...) are properly reviewed and confirmed at the subordinate levels, in concert with reviews at higher levels. The Agency may participate in any such lower level reviews.

Reviews are normally organised and chaired by the Customer (by the Agency for Agency reviews). The Agency will chair reviews at the Prime Contractor level and selected Agency reviews at lower levels as noted above.

A number of independent experts will be involved in each review, depending on the project complexity, and the innovative character of the technology and techniques applied. These independent experts are not members of the project team directly involved in the project concerned.

Reviews are normally organised into discipline oriented review panels, which may include programmatic aspects (cost, schedule, organisation,...) and conducted in a formal manner with review results being recorded and followed up in a controlled manner.

Annex E - Financial Proposal

A. Preparing and Submitting Cost Data in a Tender

Regardless of the final contract type awarded, all tenders are required to be submitted in the same manner, to ensure that sufficient data is provided to enable proper review, comparison and selection. Estimates are to be developed using an adequate estimating system, and cost data shall be submitted using the Agency's Cost forms(PSS-A forms), and the ESA Costing Software, (ECOS), unless otherwise stated in the ITT.

1. Using ESA's Costing Software ECOS

The use of ESA's Costing Software, (ECOS), for WBS based costing presentation is mandatory for any proposals for major projects. This includes all cost proposals made in Phase B for subsequent phases and may also include the presentation of cost estimates made in Phase A for subsequent phases. In this context, a major project is to be considered to have an industrial content of 10 MEuro, or more, for the total programme.

The application of ECOS to projects with less than 10 MEuro industrial content will be considered on a case-by-case basis. In principle, should industry elect to do so, any other financial proposal can be submitted via ECOS and will be accepted for evaluation.

ECOS ensures a consistent approach by all Tenderer, to facilitate consolidation and analysis of the data across the entire project, and to ensure all data is related to the:

Product Tree
WBS
CBS
Cost Calendar

Using the Agency's Cost Forms

The Tenderer shall also complete and submit the Agency's PSS Series of Cost Breakdown Forms¹² for its work, together with those received from its proposed subcontractors for their work.

The Forms cover that might be specifically required in the ITT are the following:

- a) PSS-A1 Issue no 5 - Company Rates and Overheads
- b) PSS-A2 Issue no 5 - Company Price Breakdown Form and Exhibits A and B
- c) PSS-A4 Issue no 5 - Project Manpower & Price Breakdown Form
- d) PSS-A6 Issue no 5 - Contract Price Summary Form
- e) PSS-A8 Issue no 5 - Company Manpower & Price Summary
- f) PSS-A10 Issue no 5 - Company Manpower & Cost Plan

¹² The forms at their latest version together with the full instructions for completing them are directly downloadable from <http://emits.esa.int> where they can be found under: -Reference Documentation/Administrative Documents/PSS Forms

- g) PSS-A15 Issue no 5 - Contract price projection in Thousand Euro
- h) PSS-A15.1 Issue no 5 - Company Price Projection vs. Payment Plan in Thousands Euro
- i) PSS-A40 Issue no 5 - High-Reliability Parts Procurement Questionnaire
- j) PSS-A45 Issue no 5 - Product Tree And Hardware Breakdown

These forms are available in EMITS at their latest issue as Excel-files with the corresponding instructions to complete them.

Identifying the Areas of Risk

The Tenderer is to give special attention to detailed costing of areas of risk and prepare and submit an analysis of areas:

Which are not yet fully defined

Which are uncertain

Which represent a high degree of innovation

Which have items of significant cost not fully under the control of the Tenderer.

Ensuring Consistency of the Cost and Manpower Data with The Proposed Schedule

Consistency between the cost and manpower data, and the schedule is essential for budgeting and the correct assessment of progress. Thus the Tenderer shall compare the proposed schedule with the following formats to ensure the consistent time phasing of cost and manpower data:

Company Manpower and Cost Plan (PSS-A10)

Price Projection by Contractor (PSS-A15, PSS-A15.1).

B. Proposing the Control Level For Reporting to The Agency

In order to minimise data transfer, reporting and delivery of Estimates at Completion, whilst still providing visibility and traceability of cost and manpower data by the Agency, an agreed level of detail and content for regular reporting and delivery between contractors and the Agency shall be established. This shall be done by the Tenderer proposing, and then agreeing with the Agency during contract negotiations, a set of Control Work Packages. These may be at different levels of detail depending on the Contractor's position in the contract hierarchy, and are to be determined by identifying specific work packages in the proposed WBS as Control Work Packages, or by identifying an agreed aggregation of work packages in the proposed WBS.

C. The cost estimating process

The cost estimating process is a vital element in considering technical options, cost/benefit trade-offs, in establishing budgets, in the submission and evaluation of price proposals, as a basis for negotiation and in the assessment of changes to existing designs.

Cost estimating is not a precise science, particularly with respect to items produced as “one or few of a kind” and involving development activity. In these circumstances it is important for both customer and contractor that the most effective tools and methods are used to estimate the most realistic cost outcome.

To that effect the Tenderer shall comply with the cost estimating requirements as included in the following document : ECSS-M-ST-60 (latest version downloadable from www.ecss.nl)

As stated in paragraph 7 of Section F of these General Conditions of Tender, unless the ITT specifies otherwise, the binding price shall be the total price stated in Euro. The currency conversion rates to be applied are as stated in paragraph 8 of Section F of the General Conditions of Tender.

As further stated in paragraph 7 of Section F above, if the company's cost accounting system records costs in the national currency (NC) and the hourly rates and overheads are established in national currency, the details of the price as required in the PSS forms described below shall be completed in national currency prior to conversion to Euro.

The following PSS forms cover all the costing requirements that might apply to ESA tenders. For any particular ITT only a selection of these forms are to be used, and these will be specified in the Special Conditions of Tender for that ITT.

In particular, it should be noted that in the case of major proposals, which include the participation of Sub-contractors, some of the forms specified as being required for that ITT have only to be completed by the Prime Contractor and not by each participating Sub-contractor.

SUMMARY DESCRIPTION OF FORMS

The following gives a summary description of the forms.

PSS-A1 - COMPANY RATES AND OVERHEADS

This form is to provide the Agency with the rates, overheads and other cost elements which are established on the basis of the company's normal accounting method, taking into account the provisions of ANNEX 1, to the General Clauses and Conditions for ESA Contracts and on which the offered prices have been calculated. PSS-A1 is to be completed by the Tenderer and each sub-contractor, regardless of the type of price under which the proposal is made.

If this data, referring to the same economic conditions, has been submitted to the Agency for previous ITTs, it does not need to be resubmitted. In such case, the date and reference of the earlier submission shall be given.

PSS-A2 - COMPANY PRICE BREAKDOWN FORM

With this document, the Tenderer and each participating sub-contractor shall provide the Agency with a complete price calculation, corresponding to the total supplies and/or services to be provided.

The amount (item 17 of PSS-A2) of all company price breakdown forms shall be the total price for ESA of the tender.

Exhibit A of the PSS-A2 shall be completed to detail the major cost contributors with regard to various "Other Direct Cost" items as further detailed in the instructions to compile the PSS-A2 and to provide details of any "Financial provision for escalation", item 13.

Exhibit B of the PSS-A2 shall be completed by listing for all WBS Work Packages the travel plan that justifies the budgetary Travel and Subsistence cost as reported in the PSS-A2.

PSS-A4 – PROJECT MANPOWER AND PRICE BREAKDOWN FORM

This summary form is to be completed by the Tenderer only (prime contractor) - and not separately by each proposed subcontractor.

Its purpose is to obtain a summary of all work packages, giving direct labour hours and price (in Euro) so that the sum of all work packages will amount to the total hours and price of the undertaking.

PSS-A6 – TOTAL CONTRACT PRICE SUMMARY

This summary form is to be completed by the Prime Contractor only.

Its purpose is to identify by participating company (including Subcontractors) the type of contractual price envisaged for their part of the undertaking. The total of all the various prices shall amount to the total price offered.

PSS-A8 – COMPANY MANPOWER AND PRICE SUMMARY

This form is to be completed by the Prime Contractor and each participating Subcontractor.

It shall identify the price breakdown as per the WBS level specified in the Special Conditions of Tender.

PSS-A10 – COMPANY MANPOWER AND COST PLAN

This form is to be completed by the Prime Contractor and each participating Subcontractor.

The purpose is to identify the planned expenditure versus time on the WBS level and time periods as specified in the Special Conditions of Tender. If the time periods are not specified, then shall be months.

PSS-A15 – CONTRACT PRICE PROJECTION IN THOUSANDS EURO

The Prime Contractor and each Subcontractor shall identify on this form the proposed price projection versus time on the basis of expenditure. The totals at company level are to be stated in Thousands Euro and shall serve the Agency to assess the overall financial requirements.

The PSS-A15 supports the proposed Payment Plan and any Provision for Escalation in case of Firm and Fixed Price quotations. And it serves as a basis, in case of a “cost reimbursement” type contract, for monitoring the expenditures.

PSS-A15.1 – COMPANY PRICE PROJECTION VS PAYMENT PLAN IN THOUSANDS EURO

This form is to be used in the case of fixed price or firm fixed price quotations and is to be completed by the Prime Contractor and each participating Subcontractor.

The Tenderer shall identify the proposed price projection (total price for ESA) versus the Milestones Payment Plan on the basis of expenditure.

A graphic display of the cumulative expenditure plan versus payment plan shall be presented as part of this form.

PSS-A40 – HIGH-RELIABILITY PARTS PROCUREMENT QUESTIONNAIRE

The purpose of the PSS A40 is to identify all activities related to High-Reliability Parts (Hi-Rel Parts, a.k.a. EEE Parts) for both Programmatic and Cost aspects.

The PSS A40 is filled-in at proposal level. The cost breakdown per component types and the quantities per types are estimated. The bidder fills in the form for EEE Parts that he procures either for its own needs or for other Users.

PSS-A45 – PRODUCT TREE AND HARDWARE BREAKDOWN

The purpose of the PSS A45 is to list all hardware products at equipment level with Technical and Programmatic details in line with the Technical Proposal.

The PSS A45 is filled-in at proposal level as required by the tender conditions.

The Tenderer shall identify all hardware products in relation to their WBS/PT number. The name of the company responsible for the Development, Integration and Qualification of the Equipment. If this information is unknown at the time of the proposal, the tender shall be consistent to what indicated in the Procurement Plan.

Annex F - Basic Security Screening Template

A. Statement of Non-Conviction and Good Conduct

The undersigned, born in
(name, first name) (place + country)

....., on
(place + country) (date)

herewith officially declares that he/she has never been convicted by a court of his/her Nation nor to have been convicted by a court of any other nation.

In addition to this, the undersigned states that he/she has no criminal record.

Date: Place:

Signature:

Annex G – Tenderer's Cover Letter's Annex Compliance Template

ANNEX TO COVER LETTER

ITT/RFQ Reference:

Subject:

By submitting the present Annex to the cover letter to tender

Tender Reference:

I/we the undersigned herewith officially declare that [name of Company] accepts and/or is compliant with the Agency's tender requirements listed hereunder*:

- i. Certification of Eligibility (Part 2 B1)
- ii. General information on Tenderer's status (Part 2 B2)
- iii. Certification of Free Competition (Part 2 B3)
- iv. Validity period of tender (Part 2 B5)
- v. Agency's right of Audit (Part 2 B7)
- vi. Non Commitment by the Agency (Part 2 B11)
- vii. Compliance with conditions relating to IPR (Part 2 C)
- viii. Compliance with conditions relating to Export/Import (Part 2 D)
- ix. Certification of non-benefit (Part 2 H)
- x. Compliance with conditions relating to security screening (when applicable) (Part 2 I)
- xi. Compliance with Financial requirements (Part 3F)
- xii. Compliance with technical and management requirements (Part 3 G)
- xiii. Compliance with contract conditions (Part 3 G)
- xiv. Compliance with Industrial Policy and Geographical return requirements (when applicable)

And recognises and accepts that should the Agency discover either at the time of the acceptance for evaluation or at any time in the course of its evaluation that the content of the tender referred to above contradicts such statement, the subject tender may be rejected for or eliminated from any further evaluation by the Agency.

Name(s) and current position(s):

Signature(s)

Date:

*** Where the tenderer is non-compliant or only partially compliant he will strike out the corresponding point and insert in his cover letter the non-compliances or partial compliances(not doing so will result in his tender not being admitted for evaluation by the TOB)**

Document Requirements List Template

Name		Agency Approval Required	Means		Comments
			H/C Qty	Elec	
MANAGEMENT/ADMINISTRATIVE PROPOSAL DELIVERABLES					
Project Requirements Documents for Lower Tier Contractors					See Part 3 D.1.i)
PRD Compliance statements from subcontractors					See Part 3 D.1.ii)
Management Plan					Separate plans may be required in place of an overall Management Plan See Part 3 D.1
	Project Control Plan				
	Risk Management Plan				
	Schedule Management Plan				
	Financial & Cost Management Plan				
	Change Management Plan				
	Configuration Management Plan				
	Document Management Plan				
	Logistics and Inventory Management Plan				
	Information Management Plan				
	Project Phasing and Review Management Plan				
	Progress & Performance Evaluation/Management				
	Product Assurance Plan				
Project Organisation Breakdown Structure					See Part 3 D.2.i)
Resumes of Key personnel					See Part 3 D.2.iii)
Statement on time allocation/project commitment of key personnel					See Part 3 D.2.ii)
Statement on the involvement of consultants					See Part 3 D.2.ii)
Country/Company Grouping					See Part 3 D.2.i)
Contract Structure					See Part 3 D.2.i)
IMPLEMENTATION PROPOSAL DELIVERABLES					
Risk Assessment					See Part 3 E.1
Product Tree					See Part 3 E.2
Work Breakdown Structure					See Part 3 E.4
Deliverable Items List					See Part 3 E.4.iii)
Work Package Descriptions					See Part 3 E.4.i)
Cost Breakdown Structure					See Part 3 E.5
Model Matrix					See Part 3 E.3
Schedule Tree					See Part 3 E.6.a)
Scheduling Calendars					See Part 3 E.6.a)
Detailed Schedules					Delivery in hardcopy form requires DRD to be specified: Milestone Trend Report Barchart Logic B/C Networks
Schedule Control Level					
Master Schedule					
Schedule planning constraints and assumptions					See Part 3 E.6.c) See Part 3 E.6.d) See Part 3 E.6.e)
Critical Path Analysis					See Part 3 E.6.f)
Design & Development Plan					See Part 3 E.6.g)
Manufacturing Plan					See Part 3 E.6.g)
AIV Plan					See Part 3 E.6.g)
List of Configuration Baselines					See Part 3 E.7.a)
List of Configuration Items					See Part 3 E.7.b)
Document Delivery List					See Part 3 E.8
Transportation Plan					See Part 3 E.9.a)
Logistics Plan					See Part 3 E.9.b)
Review Programme					See Part 3 E.10

Name	Agency Approval Required	Means		Comments
		H/C Qty	Elec	
FINANCIAL PROPOSAL DELIVERABLES				
Tender Cost & Manpower Data				Hardcopy delivery requires the use of Agency Cost Forms. (See DRD’s) See Part 3 F.2
PSS-A forms				
Description of methods of cost estimating used for different elements and the rationale for that choice				See Part 3 F.1.iii)
Parametric Data used in calculation of estimates				See Part 3 F.1.iii)
Price Variation Formulae				See Part 3 F.3.iii)
Profit/fee details				See Part 3 F.4
Cost Calendar				See Part 3 F.3.i)
Payment profiles				See Part 3 F.5
Geographical Distribution Forecast				See Part 3 F.6
MPP				See Part 3 F.5
DCP for price variation				See Part 3 F.3.iii)
Justification for payment of a licence fee or royalty				See Part 3 F.9

Descriptions of the required deliverables called up by these requirements, are given in the Project Management Requirements Document in the Draft Contract. In normal practice the ITT contains a specific DRL. Other items may be included by the Tenderer if deemed necessary.

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**ANNEX V: IMPLEMENTING INSTRUCTION CONCERNING THE
ESTABLISHMENT AND PROCEEDINGS OF THE ESA
PROCUREMENT REVIEW BOARD**

(Article 54.7 of these Procurement Regulations)

Revision 3 of this Annex modifies: Articles 1-2-5-6-7-8 and Rules 1-3-4-5 and 8 to 24

In accordance with Article 9 of these Procurement Regulations, the Director General established this Implementing Instruction. This Implementing Instruction has been approved by the ESA Industrial Policy Committee during its 317th Meeting held on 15 April 2019 (ESA/IPC(2019)14, rev. 2)

ARTICLE 1: PROCUREMENT REVIEW BOARD COMPETENCE

(Article 54, 53, 56 and 57 - Agency's Procurement Regulations)

1. In application of Article 54 of the Agency's Procurement Regulations there shall be set up a Procurement Review Board (hereinafter referred to as "the Board"), independent of the Agency, to hear disputes relating to a decision taken by the Agency in application of Article 53.4 of the Agency's Procurement Regulations and arising between itself and an economic operator demonstrating a direct interest in an Agency's procurement and that claims a potential loss due to an alleged procedural breach of the Agency's Procurement Regulations .
2. Recourse to the Board shall not be admissible until the procedures provided for in Articles 51 and 53 of the Agency's Procurement Regulations have been exhausted.
3. The Board may only award financial compensation to the claimant within the limit of 120 000 Euro set under Article 57 of the Agency's Procurement Regulations.
4. The Board in accordance with Article 56.2 "Interim Measures" of the Agency's Procurement Regulations may propose interim measures to the Director General.

Any decision by the Director General not to follow an interim measure proposed by the Board shall in no case constitute the basis for a further claim by the claimant.

5. The Board shall also be competent to settle disputes concerning its jurisdiction, as defined in the Agency's Procurement Regulations , this Implementing Instruction and in the Rules of Annex I to this document "Rules of Procedure", or any question of procedure.

N.B: Any indication of gender (i.e "he", "his") in this Implementing Instruction and its Annex should be understood to refer to both masculine and feminine.

ARTICLE 2 : COMPOSITION – INCOMPATIBILITIES

(Article 54 - Agency's Procurement Regulations)

1. The Procurement Review Board shall consist of six members external to the Agency with proven legal and practical experience in the field of public procurement.
2. The members of the Procurement Review Board shall be appointed by Council for a period of three years. Their appointments may be renewed once for a further period of three years. Further appointment may be considered after a period of non-eligibility of 18 months starting from the end date of the previous appointment period(s).

Should a member's period of appointment end during the examination of a case by the Procurement Review Board, said period of appointment shall be automatically extended by the period of time necessary for the Procurement Review Board to deliver its decision on the case under examination and this without further need for a decision by Council on said extension. Council shall be informed of such occurrences.

3. Two members shall be appointed upon proposal by the Director General, two members shall be appointed upon proposal by industry out of which one shall be proposed by SMEs and two members shall be appointed upon proposal by the Industrial Policy Committee Chair.
4. The members of the Procurement Review Board shall be independent; they shall not be members of the staff of the Agency nor of delegations of Member States, Associate Member States or Cooperating States. They shall not seek or accept instructions from anyone whatsoever nor shall they participate in any capacity whatsoever in activities involving the Agency other than the present ones.

ARTICLE 3: PRIVILEGES AND IMMUNITIES

(Article 54.5 - Agency's Procurement Regulations)

1. The members of the Procurement Review Board shall enjoy the privileges and immunities provided for in Article XVII of Annex I to the Convention for the establishment of the Agency.

ARTICLE 4: NOMINATION

(Article 54.3 - Agency's Procurement Regulations)

1. Before entering upon his duties, each member of the Procurement Review Board shall take an oath in the Council to perform his duties impartially and conscientiously and to preserve the secrecy of the Board's deliberations.
2. The detailed terms of appointment shall be laid down in a letter of appointment to be signed by the Chairman of the Council.

ARTICLE 5: RESIGNATION – NOMINATION OF SUCCESSOR

1. Should a member of the Procurement Review Board resign before the expiry of the period he was appointed for, his letter of resignation shall be addressed to the Chairman of the Council and to the authority which originally designated him for nomination in application of Article 2.3.
2. This notification shall constitute vacation of office; however, the member of the Procurement Review Board concerned may be required to continue in office until his successor has taken up his duties.
3. The successor of the resigning member of the Procurement Review Board shall be nominated by Council upon proposal by the authority which originally designated him for nomination in application of Article 2.3.
4. The member of the Procurement Review Board nominated under paragraph 3 above shall be appointed for the same period (s) established under Article 2.2.

ARTICLE 6: DISMISSAL- NOMINATION OF SUCCESSOR

1. A decision to dismiss a member of the Procurement Review Board from office can only be taken by the Council upon a unanimous recommendation by all the other members of the Procurement Review Board.
2. The successor of the dismissed member of the Procurement Review Board shall be appointed by Council upon proposal by the authority which originally designated him for nomination in application of Article 2.3.
3. The member of the Procurement Review Board appointed under paragraph 2 above shall be appointed for the same period (s) established under Article 2.2. .

ARTICLE 7: CHAIRMANSHIP

1. The members of the Procurement Review Board shall, every two years, designate two from amongst their number as their Chairman and deputy Chairman.
2. The Chairman, shall ensure observance of the rules of procedure and establish the agenda of the Board's meetings. In the absence of the Chairman, his duties shall be exercised by the deputy Chairman; in such case unless otherwise stated, all references to the Chairman shall be construed as references to the deputy Chairman.
3. Should the Chairman resign or be dismissed prior to the expiry of the period he was designated Chairman, the deputy Chairman shall automatically become Chairman for the period of time remaining up to the expiry of the nominal period of Chairmanship of the outgoing Chairman.
4. Where the deputy Chairman resigns or is dismissed prior to the expiry of the period he was designated deputy Chairman or where the deputy Chairman becomes Chairman in accordance with paragraph 3 above, the other members of the Board shall designate one from amongst their remaining number as their deputy Chairman for the period of time remaining up to the expiry of the nominal period of deputy Chairmanship of the outgoing deputy Chairman.

ARTICLE 8: FACILITIES – OFFICIAL SEAT

1. The Agency shall provide for all necessary facilities in order to ensure the functioning of the Procurement Review Board. To that effect the Agency shall establish a Procurement Review Support Entity (PRSE) to support amongst others the Procurement Review Board in its functions.
2. The Procurement Review Board shall have its official seat at the Headquarters of the Agency; it may meet at other places if necessary.

ARTICLE 9: AMENDMENTS

The present Implementing Instruction may be amended as required by the Industrial Policy Committee on the recommendation of the Agency's Director General.

ANNEX I

RULES OF PROCEDURE OF THE PROCUREMENT REVIEW BOARD

Rule 1. SESSIONS

- 1.1 The sessions of the Procurement Review Board (hereinafter referred to as the Board) shall be arranged by the Chairman, bearing in mind the need to take decisions within the time frame established under Article 55.3 of the Agency's Procurement Regulations and the principle set under Article 49.3 of the Agency's Procurement Regulations.
- 1.2 In order to avoid any vacancy of the Board, its members shall under the authority of the Chairman arrange among themselves for the permanent availability of at least three members including the Chairman at any given time.

Rule 2. CONVENING

The Board shall be convened by its Chairman or in his absence by the deputy Chairman, who will determine the agenda for each hearing and the place of meeting, usually its official seat.

Rule 3. TIME LIMITS FOR EXAMINATION OF CASES

- 3.1 The Board shall consider claims submitted with the Chairman pursuant to Article 53.6 of the Agency's Procurement Regulations within the time limits foreseen under Article 55.3 of the Agency's Procurement Regulations.
- 3.2 Where the Board is of the opinion that for the purpose of reaching a proper decision the time limits foreseen under Article 55.3 of the Agency's Procurement Regulations need to be extended, the Chairman may extend these time limits by a further period not exceeding fifteen calendar days.
- 3.3 When granting the extension referred to under paragraph 3.2 above the Chairman shall take due account of the principle set under article 49.3 of the Agency's Procurement Regulations.

Rule 4. NOTICE OF HEARINGS

The date of the hearings shall be communicated by the Chairman to the members of the Board, the Head of the Agency's Department in charge of legal affairs or his designated representative and the claimant, at least seven calendar days beforehand. A copy of the files shall be sent, within the same time limit, to each member of the Board.

Rule 5. CONSTITUTION FOR A GIVEN CASE

- 5.1 For the examination of a given case, the Board shall not be validly constituted unless at least three members are present, including the Chairman.
- 5.2 These same members shall in principle take part in all deliberations and decisions concerning a given case.

Rule 6. CONFLICT OF INTEREST

- 6.1 A member of the Procurement Review Board may not participate in the settlement of any case in which he has previously participated as the representative, counsel or advocate of one of the parties or on which he has been called upon to decide as a member of a tribunal or in any other capacity. In such case, either party may ask for a change in the composition of the Board.
- 6.2 A party may not request a change in the Board's composition on the grounds of a member's nationality, but may request such change on account of presumed partiality: in the event of such a request the Board shall take a decision in the absence of the member concerned.
- 6.3 The Board shall be competent to settle any difficulty arising from the application of this Rule.

Rule 7. PRE-JUDICIAL DECISIONS

- 7.1 Where necessary, the Board shall, before examining a claim submitted to it, rule on any objections concerning its own composition.
- 7.2 The Board shall rule, at any time it deems appropriate, on any challenge to its jurisdiction, and on any difficulties occasioned by the application of these rules of procedure.

Rule 8. REFERAL OF MATTERS

- 8.1 A claim shall be submitted to the Board within the time limits set under Article 53.6 of the Agency's Procurement Regulations.
- 8.2 In the absence of a decision by the Agency's Head of the Procurement Department within the time limits set under Article 53.4 of the Agency's Procurement Regulations, the time limit set under Article 53.6 of the Agency's Procurement Regulations shall be brought to 15 calendar days following the last calendar day by which the written decision foreseen under Article 53.4 of the Agency's Procurement Regulations should have been notified to the claimant.
- 8.3 In the absence of a recommendation by the Agency's Industrial Ombudsman within the time limits set under Article 53.3 of the Agency's Procurement Regulations, the time limit set under Article 53.6 of the Agency's Procurement Regulations shall be brought to 15 calendar days following the last calendar day by which the written recommendation foreseen under Article 53.3 of the Agency's Procurement Regulations should have been notified to the claimant and the Head of the Agency's Procurement Department.
- 8.4 In circumstances beyond the claimant's control, however, the Board may admit claims submitted after the time limits laid down in Article 53.6 of the Agency's Procurement Regulations.

Rule 9. FORM OF THE REFERAL

- 9.1 In application of Article 53.6 of the Agency's Procurement Regulations or Rules 8.2 or 8.3 above a matter shall be referred to the Board in the form of a written claim either in English or French, using the standard form established to that effect, addressed by registered mail or courier services to the Chairman of the Board giving the subject matter of the dispute and a summary of the grounds on which the claim is based.
- 9.2 The claim shall be accompanied by the decision in writing which is challenged, unless the claim is based on the grounds of Rule 8.2 above, together with the decision taken by the Head of the Agency's Procurement Department in application of Articles 51.4 if any and/or the recommendation foreseen under Article 53.3 of the Agency's Procurement Regulations unless in the case of the latter the claim is based on the grounds of Rule 8.3 above.
- 9.3 In order to ease the review process, copies of the documents requested under Rules 9.1 and 9.2 may be send in parallel by electronic mail to the Chairman of the Board at a specific address set up for the purpose.

In case of conflict, the written claim and accompanying documents required under the provisions of Rule 9.1 above shall be considered as the original form of the referral.

Rule 10. SUPPORTING DOCUMENTS

- 10.1 When presenting his claim the claimant shall produce any documentary evidence he may have together with the documents referred to in Rule 9.2 above..
- 10.2 In the absence of a decision he must produce a copy of the petition which he had sent to the competent authority pursuant to Article 51 and/or Article 53 of the Agency's Procurement Regulations.
- 10.3 Should the claimant's petition be insufficiently precise, the Chairman of the Board shall summon him and take down his statements in writing in order to define the subject-matter of the claim. These statements shall then be signed by the claimant.
- 10.4 The petitions and documentary evidence in support, as well as all other documents submitted to the Board, shall be in English or French.

Rule 11. WITHDRAWAL OF CLAIM

- 11.1 Once a claim is submitted to the Board in the prescribed form, the claimant is free to withdraw his claim in writing at any time before the hearing foreseen under Rule 19 hereunder such written withdrawal to be addressed by registered mail or courier services to the Chairman of the Board or orally during the said hearing. Withdrawal of a claim is not receivable once the hearing has been closed.
- 11.2 The Chairman of the Board shall accept the withdrawal provided that the withdrawal is unconditional and that the Agency, having been duly informed by the Chairman of the Board of the withdrawal request, has not raised any written objection prior to the hearing or orally during the hearing.

Rule 12. COMMUNICATIONS FROM THE BOARD TO THE PARTIES

- 12.1 All communications to the parties shall be made in writing without delay and within the time limits fixed by the Board.
- 12.2 The Chairman of the Board shall be responsible for the communication of documents to the parties.

- 12.3 In order to ease the review process, copies of the communications may be sent in parallel by electronic mail to the parties.

In case of conflict, the written claim received pursuant to Article 55.1 of the Agency's Procurement Regulations and accompanying documents shall be considered as the original form of the referral.

- 12.4 Communications to the parties shall be in the language used by the claimant under the provisions of Rule 9.1 above.

Rule 13. EVIDENCE SUBMITTED TO THE BOARD AND ACCESS

- 13.1 The Chairman of the Board may request the parties to produce all documents and to supply all information which it considers desirable for the proceedings.
- 13.2 The Chairman of the Board may furthermore at any time charge a person or body of its own choice to make an expert study.

Such expert shall, prior to accepting, be required to make a written declaration stating the absence of any known or potential conflict of interest. Such expert may not be a staff member of the Agency unless the parties agree to this in writing upon proposal by the Chairman of the Board.

- 13.3 The parties shall have access to all evidence submitted to the Board.

Rule 14. COMMUNICATION BETWEEN THE PARTIES

- 14.1 All communications between the parties are to be managed through the Board with the support of the Procurement Review Support Entity and copied to the other party.
- 14.2 The claim submitted in application of Rules 8.2 or 8.3 above shall be transmitted immediately to the Head of the Agency's Department in charge of legal affairs or his designated representative, who shall make his comments thereon in writing to the Chairman of the Board within five working days from the submission of the claim. These comments shall be conveyed by the Board to the claimant.
- 14.3 Communication between the parties shall be made in the language originally used by the claimant under the provisions of Rule 9.1 above.

Rule 15. COMMUNICATION WITHIN THE BOARD

The claim, together with the documentary evidence produced and the comments of Head of the Agency's Department in charge of legal affairs or his designated representative shall be communicated by the Chairman of the Board to the members of the Board .

Rule 16. EVIDENCE OF DELIVERY.

All submissions, communications and notifications provided for in these Rules of Procedure shall be either handed to the addressee against his signature or sent by registered mail or courier services and a receipt obtained. Electronic copies may be sent in parallel to ease the review process.

Rule 17. REPRESENTATION OF THE PARTIES BEFORE THE BOARD.

17.1 The Agency shall be represented by its department in charge of legal affairs and any other staff it deems necessary to assist before the Board. The list of the Agency's designated representative(s) shall be communicated in writing to the Board not later than five calendar days prior to the date of the hearing.

17.2 The list of the claimant's designated representative(s) shall be communicated in writing to the Board not later than five calendar days prior to the date of the hearing.

Rule 18. PERSONAL APPEARANCE – ASSISTANCE.

18.1 Both parties may arrange to be represented or assisted by an advocate or counsel, however, the Board may invite both parties to appear before it in person.

18.2 Appearance before the Board of the parties, their representative(s), counsel or advocate shall only be in person as no other form (e.g. teleconferencing, video conferencing...) is authorised unless such absence is due to events outside the control of the parties and evidence of these compelling circumstances is produced. In such case the Board shall, on the basis of such evidence, decide either to accept other forms of appearances or to postpone the hearing to another date.

Rule 19. HEARING

The parties shall be entitled to a hearing. On request of one party and with the agreement of the other party, the Board may decide whether a case may be put forward only in writing.

19.1 Conduct of hearings

19.1.1 The Board's examination of each case shall comprise a full hearing.

19.1.2 The Chairman shall be responsible for conducting the hearings.

19.1.3 Hearings shall be public, unless the Board ex officio or at the request of one of the

parties shall, for valid reasons, decide to hold the hearing in camera either fully or partially .

19.1.4 Any person having attended a hearing of the Board held in camera shall observe the strictest secrecy concerning any facts that may have come to his knowledge in the course of the proceedings and any opinions expressed thereat.

19.2 Language of hearings

19.2.1 Hearings shall be conducted either in English or French.

19.2.2 The Board and the parties to the hearing may be assisted, if necessary, by an interpreter.

19.3 Oral statements and final oral submissions

19.3.1 Either party or its representative, and its counsel or advocate, shall have the right to adduce verbally any argument in support of the pleas advanced in the claim.

19.3.2 Prior to closing the hearing, the Board shall allow each of the two parties the opportunity to make a final oral submission.

19.4 Hearings in absentia

Should a party and its representative (s), counsel or advocate fail to appear before the Board without producing the evidence foreseen under Rule 18.2, the Board shall hold the hearing in absentia, provided that the absent party has been duly notified of the date of the hearing.

Should both parties and their representatives, counsels or advocates be absent under the aforementioned conditions, the Board shall close the hearing and proceed with the delivery of the decision.

19.5 Hearing of witnesses

19.5.1 Either party may propose to the Board to call witnesses and may submit other appropriate forms of evidence.

19.5.2 Staff members of the Agency or in the cases foreseen under Article 47.2 of the Agency's Procurement Regulations staff of the concerned bodies, if so requested by the Board, shall appear before it and give evidence.

19.5.3 A witness shall not be bound to disclose information to the Board if he has professional or moral objections which are acceptable to the Board in accordance with the general principles of law.

- 19.5.4 Before each witness is heard, the Chairman shall require of him an undertaking to answer fully and accurately any questions put to him. Where appropriate, he shall draw attention to the fact that all those attending hearings in camera are bound to secrecy, or to the obligation placed on staff members of the Agency to give any information required of them.
- 19.5.5 Minutes shall be kept of each hearing of witnesses of the parties and shall be signed by the witnesses and by the members of the Board who took part in the audition of the witness (es).

19.6 Production of documents and supply of information

With the exception of any information related to the quality or contents of the other tenders submitted to the Agency in response to the procurement action under which the claim is submitted, the Board may request the parties to produce all documents and to supply all information which it considers desirable for the hearing.

19.7 Powers of the Chairman between sessions

Between sessions of the Board, the Chairman, or a member of the Board whom he shall designate to this end, shall give interim decisions concerning any measures which have been requested for the sole purpose of establishing any facts that may assist the Board's decision. As far as possible, both parties to the claim should be heard, and a report made to the Board in writing.

19.8 Establishment of facts - Report

If necessary, and should the Board so decide, any investigation or hearing of witnesses may be conducted by one of its members or by any other person not a member of the Agency whom it may designate for the purpose or by a member of the Procurement Review Support Entity provided the claimant agrees to the latter case. Proceedings for the establishment of facts under this paragraph shall, so far as possible, give a full hearing to both parties; a written report shall be made to the Board.

Rule 20. DELIBERATIONS OF THE BOARD

- 20.1 Once the Chairman has closed the hearing, the Board shall deliberate on its decision.
- 20.2 The Board's deliberation shall be held out of the presence of either party or of any other person. Nonetheless, the Board may enlist the aid of interpreters; in this case, the Chairman will draw their attention to the fact that they are bound to secrecy.

20.3 The Procurement Review Board's deliberations shall be and remain secret.

Rule 21. DECISIONS BY THE BOARD

21.1 A decision of the Procurement Review Board, to be delivered within the time limits foreseen under Article 55.3 of the Agency's Procurement Regulations, shall be made by a simple majority. Should the Board consist of an even number of members, the Chairman shall have the casting vote in the event of a tie.

The grounds on which the Board's decision is based shall be stated together with the signature and names of the members of the Board who took part in the deliberations and the date of the decision.

21.2 A detailed decision of the Board certified by the Chairman, shall give the full text of the grounds considered by the Board. The findings stated in the detailed decision shall cover all the facts and legal arguments put forward by the two parties together with the name of the members of the Board who took part in the deliberations of the decision, and the date of the decision.

The Board may, where appropriate, reserve the right to only issue the detailed decision, provided such detailed decision is communicated within the time limits foreseen under Article 55.3 of the Agency's Procurement Regulations .

21.3 Where the decision of the Board grants financial compensation to the claimant such compensation shall in all cases be limited to the cost for tender preparation and the cost incurred for protest within the limit of 120 000 Euro laid down in Article 57 of the Agency's Procurement Regulations.

Rule 22. COMMUNICATION OF THE DECISIONS OF THE BOARD.

22.1 The Chairman shall communicate the Board's decision foreseen under Rule 21.2 to the Director General, to the Head of the Agency's Department in charge of legal affairs, to the Agency's Industrial Ombudsman and to the claimant within the time period laid down in Article 55.3 of the Agency's Procurement Regulations.

It shall also be communicated to the Procurement Review Support Entity for further distribution to the Chairman of the Industrial Policy Committee, to the Head of the Agency's Procurement Department and to other services concerned within the Agency and in the case of application of Article 47.2 of the Agency's Procurement Regulations to the concerned bodies.

22.2 Certified true copies of the Board's detailed decision foreseen under 21.2 shall be sent to the Head of the Agency's Department in charge of legal affairs and the claimant within fifteen calendar days following the day the decision foreseen under Rule 21.2 was communicated as per Rule 22.1.

- 22.3 The detailed decisions of the Board shall be made public by the Procurement Review Support Entity on the pertaining Agency's media once their certified true copies foreseen under Rule 22.2 have been sent to the parties.

Nevertheless, the Board may decide that a decision shall only be made public with the name of the claimant or any other person mentioned therein, including that of members of the Board who took part in the deliberations, deleted.

Rule 23. COST OF PROCEEDINGS

23.1 Agency's cost

The Agency, except in cases foreseen under Article 47.2 of the Agency's Procurement Regulations, shall in all cases bear its own costs as well as the cost of interpretation as provided under Rule 19.2 above and any expert study commissioned pursuant to Rule 13.2 above unless it is demonstrated by the Board that the claimant was not acting in good faith.

In such case the cost incurred by the Agency or the concerned bodies in application of Article 47.2 of the Agency's Procurement Regulations shall be borne in full by the claimant.

23.2 Claimants cost

23.2.1 Where the decision of the Board does not uphold his claim, the claimant shall bear its own incurred cost including travel and subsistence expenses.

23.2.2 Where the decision of the Board upholds his claim in all or in part if it has been established that there were good grounds for the claim or that the claimant thought that he had good reason to submit a claim, the costs incurred by the claimant for protest shall be deemed incurred by the Agency or the concerned bodies in application of Article 47.2 of the Agency's Procurement Regulations in all or in part within the limit of 120 000 Euro for compensation set under Article 57 of the Agency's Procurement Regulations.

23.2.3 In all cases the claimant must present a detailed claim for compensation to the PRB not later than five calendar days prior to the date set for the hearing.

Rule 24. APPEAL AGAINST THE DECISION OF THE BOARD

24.1 No appeal shall be possible against the decision of the Procurement Review Board, which shall be final and binding on all parties.

- 24.2 However, the Board may be asked by the parties to interpret a decision, should difficulties arise as to the meaning or scope of that decision.
- 24.3 The Board may be asked by any of the parties to review a decision if a fact of decisive importance comes to the knowledge of the Board and of that party within a period of twelve months following the delivery of such a decision.
- 24.4 No request for review may be made by a party after the expiry of a period of thirty calendar days following the discovery of the fact mentioned under Rule 24.3 above.
- 24.5 Any request for interpretation or review shall be submitted to the Chairman if he considers that this request clearly amounts to a claim against a decision of the Board and is not a request for interpretation or review, the Chairman may, after consulting the members of the Board who would be called upon to deal with the matter and provided none of them objects in writing, deliver a reasoned decision stating the request to be inadmissible. There shall be no claim against this decision.
- 24.6 Subject to the above provision, the procedure for review shall commence with a decision of the Board formally declaring that a new fact exists, that it is of a character which justifies the review, and that the request for review is admissible for that reason.
- 24.7 Clerical and arithmetical mistakes in the decision, or any accidental error or omission, may be corrected by the Board, either on its own initiative or on the application of either party.

Rule 25. AMENDMENTS TO THE RULES OF PROCEDURE

These Rules of Procedure may be amended by the Industrial Policy Committee either :

- i. on the unanimous recommendation of the Procurement Review Board after consultation with the Head of the Agency's Department in charge of legal affairs; or,
- ii. on the recommendation of the Agency's Director General when such amendments concerns the implementation of changes stemming directly from modifications of the Agency's Procurement Regulations and its Annexes or from the organisational structure of the Agency.

ANNEX VI:

**IMPLEMENTING INSTRUCTION CONCERNING THE European SPACE
AGENCY's PROCUREMENT REVIEW PROCEDURE**

(Article 58 of these Procurement Regulations)

Revision 3 of this Annex modifies Articles 5-12-13-26 and 29:

In accordance with Article 9 of these Procurement Regulations, the Director General established this Implementing Instruction. This Implementing Instruction has been approved by the ESA Industrial Policy Committee during its 317th Meeting held on 15 April 2019 (ESA/IPC(2019)14, rev. 2)

PART I: REVIEW BY THE AGENCY'S PROCUREMENT DEPARTMENT

ARTICLE 1: PROCUREMENT DEPARTMENT'S COMPETENCE

Pursuant to Article 51 of the Agency's Procurement Regulations a claim referred to in Article 50 of Agency's Procurement Regulations, shall, in the first instance be submitted to the Head of the Procurement Department or a person designated by him.

ARTICLE 2: CONFLICT OF INTEREST

Notwithstanding Article 1 of the present Implementing Instruction, if a claim referred to in Article 50 of the Agency's Procurement Regulations is based on an act or decision taken directly by the Head of the Procurement Department, the claim shall be submitted directly to the Agency's Industrial Ombudsman pursuant to Article 53 of the Agency's Procurement Regulations.

ARTICLE 3 :TIME LIMITS AND SUPENSION OF TIMES LIMITS FOR EXAMINATION OF CASES

1. Pursuant to Article 51.4 of the Agency's Procurement Regulations, the Head of the Procurement Department shall, within 10 calendar days after receiving the claim, issue a written decision to the claimant.

2. Should the Head of the Procurement Department not issue his decision within the time limit specified in Section 1 above , the claimant pursuant to Article 51.5 of the Agency's Procurement Regulations is entitled within 5 calendar days thereafter to submit his claim to the Agency's Industrial Ombudsman.

3. Where pursuant to Article 12.2 of the present Implementing Instruction or for any other reason, the Director General or the Head of the Procurement Department in order to reach a decision suspend the procurement process under review for a given period, the 10-day calendar period foreseen under Section 1 above shall be automatically suspended by the same period of time.

When the suspension period ends the 10-day calendar period foreseen under Section 1 above shall resume and the Head of the Procurement Department shall issue his written decision to the claimant within the time period remaining.

ARTICLE 4: ESTABLISHMENT OF AN AGENCY'S PROCUREMENT REVIEW SUPPORT ENTITY (PRSE)

1. One or more Agency's staff member (s) (herein after referred to as Procurement Support Review Entity (PRSE)) shall be designated for supporting the review process established under Part VI of the Agency's Procurement Regulations. They shall not be staff of the Procurement Department nor of the Department in charge of legal affairs.

2. In the execution of its tasks the PRSE shall be independent.
3. The PRSE staff name(s) and coordinate shall be made public.
4. The PRSE shall maintain a database containing the records of each case.
5. The designation of the PRSE together with its terms of Reference and its functioning shall be established by means of an Administrative Instruction of the Director General of the Agency which shall be communicated to the Agency's Industrial Ombudsman and to the Agency's Procurement Review Board.

ARTICLE 5: EVIDENCE GATHERED BY OR SUBMITTED TO THE PRSE AND ACCESS

1. In order to gather any necessary evidence for the establishment of facts necessary for the reaching of a decision or a recommendation by the Head of the Procurement Department, the Agency's Industrial Ombudsman or the Agency's Procurement Review Board, the PRSE staff shall:
 - a) be given unrestricted access to all the Agency's proceedings and records of the procurements which are subject to review;
 - b) have the right to interview individuals participating on behalf of the Agency or in accordance with the provisions of an international agreement entered into by the Agency in the procurements under review. In such cases the statements of the individual being interviewed shall be taken down by the PRSE staff and shall be signed by the individual interviewed; and,
 - c) have the right to request the claimant to produce all documents and to supply all information which is considered desirable for the conduct of the proceedings.
2. The parties to a claim, the Agency's Industrial Ombudsman and the Procurement Review Board shall have access to all evidence gathered by or submitted to the PRSE.

ARTICLE 7: FORM AND LANGUAGE OF THE REFERRAL

1. A matter shall be referred to the Head of the Procurement Department or the person designated by him in the form of a written claim either in English or French, using the standard form established to that effect with copy to the PRSE, giving the subject matter of the dispute and a summary of the grounds on which the claim is based.
2. The claim shall be accompanied by the decision in writing, if any, which is challenged.
3. In order to ease the review process by the Head of the Procurement Department, copies of the documents requested may be sent in parallel by electronic mail to the Head of the Procurement Department or the person designated by him and the PRSE at a specific address set up for the purpose.
4. In case of conflict, the written claim and accompanying documents required under the provisions of Section 1 above shall be considered as the original form of the referral.

ARTICLE 8: SUPPORTING DOCUMENTS

1. When presenting his claim the claimant shall produce any documentary evidence he may have, and, if possible, the text of the contested decision, as well as any of the decisions or recommendations whether made before or after the contested decision.
2. In the absence of a decision the claimant must produce a copy of the original petition which he had sent to the Agency's Procurement Department.
3. Should the claimant's petition be insufficiently precise, the PRSE shall summon him and take down his statements in writing in order to define the subject-matter of the claim. These statements shall then be signed by the claimant.
4. The petitions and documentary evidence in support, as well as all other documents submitted to the Procurement Department, shall be in English or French.

ARTICLE 9: WITHDRAWAL OF CLAIM

1. Once a matter is referred to the Head of the Procurement Department in the form prescribed under Article 6 of the present Implementing Instruction, the claimant is free to withdraw his claim in writing at any time.
2. The Head of the Procurement Department or the person designated by him shall accept the withdrawal.

ARTICLE 10: COMMUNICATIONS BETWEEN THE PARTIES

1. All communications between the parties shall be made in writing without delay.
2. The PRSE shall be responsible for the communication of documents to the claimant.
3. In order to ease the review process, copies of the communications may be sent in parallel by electronic mail to the parties.
4. In case of conflict, the written claim and accompanying documents shall be considered as the original form of the referral.
5. Communications between the parties shall be made in the language originally used by the claimant under the provisions of Article 7 of the present Implementing Instruction.

ARTICLE 11: EVIDENCE OF DELIVERY

All communications and notifications provided for under the present Implementing Instruction shall be either handed to the addressee against his signature or sent by registered mail or courier services and a receipt obtained.

ARTICLE 12: POWERS OF THE HEAD OF THE PROCUREMENT DEPARTMENT

1. Within the 10 calendar days period for reaching his decision the Head of the Procurement Department shall have the right to:
 - a) Call for a meeting with the claimant in order to resolve the claim by mutual agreement. In such cases the minutes of the meeting shall be taken down by the PRSE staff and shall be signed by the participants at the end of the meeting.
 - b) Call for a meeting with the claimant for the sole purpose of establishing any facts that may assist him in his decision. In such cases the minutes of the meeting shall be taken down by the PRSE staff and shall be signed by the participants at the end of the meeting.
 - c) Request the PRSE in writing to hold a meeting with the claimant for the sole purpose of establishing any facts that may assist him in his decision. In such cases the minutes of the meeting shall be taken down by the PRSE staff and shall be signed by the participants at the end of the meeting.
 - d) Request the PRSE in writing to conduct within the Agency any investigation, information gathering or hearing of witnesses for the establishment of facts that may assist him in his decision.

- e) Request the claimant through the PRSE to produce any documents and to supply any information which he considers may assist him in his decision. Where the claimant refuses to produce or supply such information he shall provide the reasons for such refusal in writing to the PRSE who will record the refusal in the review file and communicate it to the Head of the Procurement Department.
2. Further to Section1 above the Head of the Procurement Department, based on the fact in his possession, may:
- a) by delegation from the Director General take all interim measures including the suspension of the procurement process under review in accordance with Article 56 of the of the Agency's Procurement Regulations for procurement actions below 20 000 000 Euro;
 - b) propose to the Director General interim measures including the suspension of the procurement process under review in accordance with Article 56 of the Agency's Procurement Regulations for procurement actions above 20 000 000 Euro.

Any decision by the Director General not to follow an interim measure recommended by the Head of the Procurement Department shall in no case constitute the basis for a further claim by the claimant.

ARTICLE 13: FINAL DECISIONS BY THE HEAD OF THE PROCUREMENT DEPARTMENT

1. Prior to taking a decision, the Head of the Procurement Department shall consult the Agency's Department in charge of legal affairs responsible for the establishment and interpretation of the Agency's Procurement Regulations and associated annexes. The decision shall be issued in writing to the claimant and shall state the reasons, facts and Agency's applicable rules on which it is based.
2. The decision shall be signed by the Head of the Procurement Department or the person designated by him.
3. A copy of the decision shall be kept in the files of the PRSE.

ARTICLE 14: COMMUNICATION OF THE DECISIONS OF THE HEAD OF THE PROCUREMENT DEPARTMENT

The final decision of the Head of the Procurement Department shall be communicated for information to the Chairman of the Industrial Policy Committee for procurement actions which have been or should be the subject of a submission to the Industrial Policy Committee in accordance with the Agency's Procurement Regulations.

ARTICLE 15: COST OF PROCEEDINGS

The Parties shall in all cases bear their own costs.

ARTICLE 16: APPEAL AGAINST THE FINAL DECISION OF THE HEAD OF THE PROCUREMENT DEPARTMENT.

1. Pursuant to Article 51.7 of the Agency's Procurement Regulations, within five calendar days from receiving the decision of the Head of the Procurement Department, the claimant may challenge the decision and submit the ensuing claim to the Agency's Industrial Ombudsman.

In such case the claimant shall notify the Head of the Procurement Department in writing with copy to the PRSE of his intention to challenge the decision.

2. Upon receipt of the above notification, the PRSE will immediately constitute a case file containing all supporting documents in its possession pertaining to the case under review and communicate it to the Agency's Industrial Ombudsman.

3. The Head of the Procurement Department shall communicate for information the claimant's decision to appeal to the Director General and to the Chairman of the Industrial Policy Committee for procurement actions which have been or should be the subject of a submission to the Industrial Policy Committee in accordance with the Agency's Procurement Regulations.

PART II: REVIEW BY THE AGENCY'S INDUSTRIAL OMBUDSMAN (IOE).

ARTICLE 17: AGENCY'S INDUSTRIAL OMBUDSMAN'S COMPETENCE

Pursuant to Article 53.1 of the Agency's Procurement Regulations the Agency's Industrial Ombudsman (IOE) is competent to entertain claims submitted in application of Articles 51.2, 51.5 and 51.7 of Agency's Procurement Regulations.

ARTICLE 18: TIME LIMITS AND SUPENSION OF TIMES LIMITS FOR EXAMINATION OF CASES BY THE IOE

1. Pursuant to Article 53.3 of the Agency's Procurement Regulations the IOE shall, within 10 calendar days after receiving the claim foreseen under Article 16 of the present Implementing Instruction or 25 calendar days when the claim is made after contract award, issue a written recommendation to the Head of the Procurement Department of the Agency.

2. Where pursuant to Article 25.2 of the present Implementing Instruction or for any other reason, the Director General or the Head of the Procurement Department suspend the procurement process under review for a given period, the calendar days periods foreseen under Section 1 above shall be automatically suspended by the same period of time.

When the suspension period ends, the calendar days periods foreseen under Section 1 above shall resume and the IOE shall issue his written recommendation to the Head of the Procurement Department within the remaining time period.

ARTICLE 19: REFERRAL OF MATTERS

1. A claim shall be referred to the IOE within the time limits set under Articles 50 and 51 of the Agency's Procurement Regulations.

2. In circumstances beyond the claimant's control, however, the IOE after consultation with the Head of the Procurement Department or the person designated by him may admit claims brought after the time limits laid down in Articles 50 and 51 of the Agency's Procurement Regulations.

ARTICLE 20: FORM AND LANGUAGE OF THE REFERRAL

1. A matter shall be referred to the IOE in the form of a written claim either in English or French, using the standard form established to that effect, addressed to the IOE with copy to the Head of the Procurement Department or the person designated by him and to the PRSE, giving the subject matter of the dispute, and a summary of the grounds on which the claim is based.
2. The claim shall be accompanied by the decision in writing of the Head of the Procurement Department or the person designated by him, if any, which is challenged.
3. In order to ease the review process by the IOE, copies of the documents requested may be sent in parallel by electronic mail to the IOE, the Head of the Procurement Department or the person designated by him and the PRSE at a specific address set up for the purpose.
4. In case of conflict, the written claim and accompanying documents required under the provisions of Section 1 above shall be considered as the original form of the referral.

ARTICLE 21: SUPPORTING DOCUMENTS

1. When presenting his claim to the IOE, the claimant shall produce any documentary evidence he may have, and, if possible, the text of the contested decision, as well as any of the decisions or recommendations whether made before or after the contested decision.
2. In the absence of a decision the claimant must produce a copy of the original petition which he had sent to the Agency's Procurement Department.
3. Should the claimant's petition be insufficiently precise, the IOE shall summon him and take down his statements in writing in order to define the subject-matter of the claim. These statements shall then be signed by the claimant.
4. The petitions and documentary evidence in support, as well as all other documents submitted to the IOE, shall be in English or French.

ARTICLE 22: WITHDRAWAL OF CLAIM

1. Once a matter is referred to the IOE in the form prescribed under Article 20 of the present Implementing Instruction, the claimant is free to withdraw his claim in writing at any time even after the IOE's recommendation to the Head of the Procurement Department made pursuant to Article 26 of the present Implementing Instruction.

2. The IOE shall communicate the withdrawal of the claim to the Head of the Procurement Department or the person designated by him and to the PRSE.
3. The Head of the Procurement Department or the person designated by him shall accept the withdrawal provided that the withdrawal is unconditional.

ARTICLE 23: COMMUNICATIONS BETWEEN THE PARTIES

1. All communications between the parties shall be made in writing without delay.
2. In order to ease the review process, copies of the communications may be sent in parallel by electronic mail to the parties.
3. In case of conflict, the written claim and accompanying documents shall be considered as the original form of the referral.
4. Communications between the parties shall be made in the language originally used by the claimant under the provisions of Article 20 of the present Implementing Instruction.

ARTICLE 24: EVIDENCE OF DELIVERY

All communications and notifications provided for under the present Implementing Instruction shall be either handed to the addressee against his signature or sent by registered mail or courier services and a receipt obtained.

ARTICLE 25: POWERS OF THE AGENCY'S INDUSTRIAL OMBUDSMAN

1. Within the foreseen calendar days periods for reaching his recommendation the IOE shall have the right to:
 - a) Call for a meeting with the claimant and the Head of the Procurement Department or a person designated by him, in order to resolve the claim by mutual agreement. In such cases the minutes of the meeting shall be taken down by the IOE and shall be signed by the participants at the end of the meeting.
 - b) Call for a meeting with the claimant and/or the Head of the Procurement Department or a person designated by him for the sole purpose of establishing any facts that may assist him in his recommendation. In such cases the minutes of the meeting shall be taken down by the IOE and shall be signed by the participants at the end of the meeting.
 - c) Request the PRSE in writing to hold a meeting with the claimant for the sole purpose of establishing any facts that may assist him in his recommendation. In such cases the minutes of the meeting shall be taken down by the PRSE staff and shall be signed by the participants at the end of the meeting and

communicated to the IOE.

d) Request the PRSE in writing to conduct within the Agency any investigation, information gathering or hearing of witnesses for the establishment of facts that may assist him in his recommendation.

e) Request the claimant and/or the Head of the Procurement Department or a person designated by him, either directly or through the PRSE, to produce any documents and to supply any information which he considers may assist him in his recommendation.

Where the claimant and/or the Head of the Procurement Department or a person designated by him refuses to produce or supply such information he shall provide the reasons for such refusal in writing to the IOE and the PRSE who will record the refusal in the review file.

2. Further to Section1 above the IOE, based on the facts in his possession, may pursuant to Article 56.2 of the Agency's Procurement Regulations :

a) Propose in writing to the Head of the Procurement Department acting by delegation from the Director General, to take all interim measures including the suspension of the procurement process under review in accordance with Article 56 of the Agency's Procurement Regulations for procurement actions below 20 000 000 Euro.

b) Propose in writing to the Director General interim measures including the suspension of the procurement process under review in accordance with Article 56 of the Agency's Procurement Regulations for procurement actions above 20 000 000 Euro.

Such proposal shall be communicated to the Head of the Procurement Department with copy to the PRSE.

Any decision by the Head of the Procurement Department or the Director General not to follow an interim measure recommended by the IOE shall in no case constitute the basis for a further claim by the claimant.

ARTICLE 26: FINAL RECOMMENDATION BY THE IOE

1. The recommendation of the IOE shall contain the information required under Article 53.3 a) and b) of the Agency's Procurement Regulations and shall state the reasons, facts and Agency's applicable rules on which it is based.
2. The recommendation shall be issued in writing to the claimant, and to the Head of the Procurement Department who shall communicate it to the Head of the Agency's Department in charge of legal affairs or his designated representatives .
3. The recommendation shall be signed by the IOE.

4. A copy of the recommendation shall be kept in the files of the PRSE.
5. In order to ease the review process, copies of the recommendation may be send in parallel by electronic mail.
6. In case of conflict, the written recommendation shall be considered as the original.

**ARTICLE 27 : TIME LIMITS AND SUSPENSION OF TIMES LIMITS
FOR THE DECISION BY THE HEAD OF THE
PROCUREMENT DEPARTMENT**

1. Pursuant to Article 53.4 of the Agency's Procurement Regulations, the Head of the Procurement Department shall, within 10 calendar days after receiving the recommendation of the IOE, issue a written decision to the claimant and the IOE.
2. All communications and notifications established during this period shall be copied to the IOE and the PRSE.
3. Where pursuant to Article 28 of the present Implementing Instruction or for any other reason, the Director General or the Head of the Procurement Department in order to reach a decision suspend the procurement process under review for a given period, the 10-day calendar period foreseen under Section 1 above shall be automatically suspended by the same period of time.

When the suspension period ends the 10-day calendar period foreseen under Section 1 above shall resume and the Head of the Procurement Department shall issue his written decision to the claimant and the IOE within the remaining time period.

**ARTICLE 28 : POWERS OF THE HEAD OF THE PROCUREMENT
DEPARTMENT.**

1. Further to the powers established under Article 12 of the present Implementing Instruction the Head of the Procurement Department in order to reach his decision shall have the right to:
 - a) Call for a meeting with the claimant and the IOE, in order to resolve the claim by mutual agreement. In such cases the minutes of the meeting shall be taken down by the IOE and shall be signed by the participants at the end of the meeting and copied to the PRSE.
 - b) Call for a meeting with the IOE for the sole purpose of establishing any facts that may assist him in his decision. In such cases the minutes of the meeting shall be taken down by the PRSE and shall be signed by the participants at the end of the meeting and copied to the PRSE.
2. Any decision by the Director General not to follow an interim measure recommended by the Head of the Procurement Department pursuant to Section 1 above shall in no case constitute the basis for a further claim by the claimant.

ARTICLE 29: FINAL DECISIONS BY THE HEAD OF THE PROCUREMENT DEPARTMENT

1. Prior to taking a decision, the Head of the Procurement Department shall consult the Agency's Department in charge of legal affairs responsible for the interpretation of the Agency's Procurement Regulations and associated annexes. The decision shall be issued in writing to the claimant and to the IOE and shall state the reasons, facts and Agency's applicable rules on which it is based.
2. The decision shall be signed by the Head of the Procurement Department or the person designated by him.
3. A copy of the decision shall be kept in the files of the PRSE.
4. In order to ease the review process copies of the decision may be send in parallel by electronic mail.
5. In case of conflict, the written decision shall be considered as the original

ARTICLE 30: COMMUNICATION OF THE DECISIONS OF THE HEAD OF THE PROCUREMENT DEPARTMENT

The final decision of the Head of the Procurement Department together with the recommendation of the IOE shall be communicated for information to the Chairman of the Industrial Policy Committee for procurement actions which have been or should be the subject of a submission to the Industrial Policy Committee in accordance with the Agency's Procurement Regulations.

ARTICLE 31: COST OF PROCEEDINGS BEFORE THE IOE

The Parties shall in all cases bear their own costs.

ARTICLE 32: APPEAL AGAINST THE FINAL DECISION OF THE HEAD OF THE PROCUREMENT DEPARTMENT.

1. Pursuant to Article 53.6 of the Agency's Procurement Regulations, within five calendar days from receiving the decision of the Head of the Procurement Department, the claimant may challenge the decision and submit the ensuing claim to the Procurement Review Board.

In such case the claimant shall notify the Head of the Procurement Department in writing with copy to the IOE and the PRSE of his intention to challenge the decision.

2. Upon receipt of the above notification, the PRSE will immediately constitute a case file containing all supporting documents in its possession pertaining to the case under review and communicate it to the Chairman of the Procurement Review Board.
3. The Head of the Procurement Department shall communicate for information, the claimant's decision to appeal to the Director General and to the Chairman of the Industrial Policy Committee for procurement actions which have been or should be the subject of a submission to the Industrial Policy Committee in accordance with the Agency's Procurement Regulations.

PART III: REVIEW BY THE AGENCY'S PROCUREMENT REVIEW BOARD.

ARTICLE 33: PROCUREMENT REVIEW BOARD'S COMPETENCE

1. In application of Article 54.7 of the Agency's Procurement Regulations a Procurement Review Board (hereinafter referred to as "the Board"), independent of the Agency, to hear disputes relating to a decision taken by the Agency in application of Article 53.4 of the Agency's Procurement Regulations has been set up under Annex V to the ESA Procurement Regulations.
2. Recourse to the Board shall not be admissible until the procedures provided for in Articles 51 and 53 of the Agency's Procurement Regulations have been exhausted.

ARTICLE 34: PROCEEDINGS OF THE PROCUREMENT REVIEW BOARD'S COMPETENCE

The proceedings of the Board are established under the "Implementing Instruction Concerning the Establishment and Proceedings of the European Space Agency's Procurement Review Board "Annex V to the ESA Procurement Regulations".

ARTICLE 35: ACCESS BY THE PROCUREMENT REVIEW BOARD TO THE PRSE

1. Pursuant to Article 5 of the present Implementing Instruction the Board through his Chairman or his deputy Chairman shall have the right to require the support of the PRSE at any time provided such support is not incompatible with the rules established under the "Implementing Instruction Concerning the Establishment and Proceedings of the European Space Agency's Procurement Review Board" Annex V to the ESA Procurement Regulations".
2. The Board through its Chairman or deputy Chairman shall be given unrestricted access to all evidence gathered by or submitted to the PRSE either prior or subsequent to the submission of the claim to the Board.

ARTICLE 36: AMENDMENTS

The present Implementing Instruction may be amended as required by the Industrial Policy Committee on the recommendation of the Agency's Director General.
