



European Maritime Safety Agency

**DECISION OF THE ADMINISTRATIVE BOARD OF**

**28 November 2007**

**AMENDING EMSA IMPLEMENTING RULES OF THE FINANCIAL REGULATION**

THE ADMINISTRATIVE BOARD OF THE EUROPEAN MARITIME SAFETY AGENCY,

Having regard to the European Parliament and Council Regulation 1406/2002, of 27 June 2002, as amended, setting up a European Maritime Safety Agency (hereafter EMSA or the Agency);

Having regard to Regulation 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

Having regard to Commission Regulation No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities

Having regard to the Financial Regulations of the European Maritime Safety Agency adopted by the Administrative Board on 3<sup>rd</sup> July 2003.

Whereas:

- (1) The provisions of the Regulation laying down the detailed rules for the implementation of the Financial Regulation applicable to the budget of the European Maritime Safety Agency (hereinafter referred to as EMSA Implementing Rules) shall be consistent with Regulation 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended (hereinafter referred to as Implementing Rules of the Commission).
- (2) Amendments to the Implementing Rules of the Commission have introduced changes in regard to procurement provisions.

HAS DECIDED AS FOLLOWS:

*Article 1*

The Regulation of the European Maritime Safety Agency of 9 December 2003 laying down detailed rules for the implementation of the Financial Regulation adopted on 3 July 2003 applicable to the budget of the European Maritime Safety Agency (hereafter referred to as "the Implementing Rules") is amended as follows:

1. In 102(6), the fourth sentence of the first subparagraph is replaced by the following:

'Those who have asked to be allowed to take part in a restricted procedure, a competitive dialogue, or a negotiated procedure are referred to as "candidates".'

2. In Article 103, paragraph 1 is replaced by the following:

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

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

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

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

3. In Article 104, paragraphs 3 and 4 are replaced by the following:

'3. The contract notice is the means by which the contracting authorities make known their intention to launch a procedure for the award of a contract or framework contract or to set up a dynamic purchasing system in accordance with Article 111a. Without prejudice to contracts concluded after a negotiated procedure as referred to in Article 112. The contract notice shall be compulsory for the following contracts:

- (a) contracts with an estimated value equal to or above the thresholds laid down in points (a) and (c) of Article 144(1);
- (b) research and development contracts listed in category 8 of Annex II A with an estimated value of equal to or above the threshold laid down in point (b) of Article 144(1) for research and development contracts listed.

It shall not be compulsory for specific contracts based on framework contracts. Contracting authorities which wish to award a specific contract based on a dynamic purchasing system shall make known their intention by means of a simplified contract notice.

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

Contracting authorities shall state whether or not they authorise variants and shall specify the minimum capacity levels they demand if they make use of the possibility provided for in the second subparagraph of Article 121(2). They shall set out the selection criteria referred to in Article 121 that they intend to use, the minimum number of candidates they plan to invite to tender and, where appropriate, the maximum number, and the objective and non-discriminatory criteria they intend to apply in order to limit the number, in accordance with the second subparagraph of Article 109(1).

Where there is unrestricted, direct and full access to the call for tenders by electronic means, in particular in the dynamic purchasing systems referred to in Article 111a, the Internet address at which these documents can be consulted shall appear in the contract notice.

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

Where appropriate, contracting authorities shall specify in the contract notice that the procurement procedure is an interinstitutional procurement procedure. In such cases, the contract notice shall indicate the institutions, executive agencies or bodies referred to in Article 185 of the General Financial Regulation which are involved in the procurement procedure, the institution responsible for the procurement procedure and the global volume of the contracts for all those institutions, executive agencies or bodies.

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

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

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

The award notice shall also be sent to the OPOCE in the case of a contract or a framework contract with a value equal to or above the thresholds laid down in Article 144 and awarded pursuant to a negotiated procedure without prior publication of a contract notice, in sufficient time for the publication to occur before the signature of the contract, in accordance with the terms and conditions set out in Article 144a(1).

Information relating to the value and contractors of specific contracts based on a framework contract during a financial year shall be published on the internet website of the contracting authority no later than 31 March following the end of that financial year if, as a result of the conclusion of a specific contract or of the aggregate volume of the specific contracts, the thresholds referred to in Article 158 are exceeded. `

4. Article 105 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) in point (a), 'equal to or' is deleted.

(ii) in point (b), 'equal to or' is deleted.

(iii) the second subparagraph is deleted.

(b) in the first subparagraph of paragraph 3, first sentence, 'equal to or' is deleted.

5. In Article 109 the first subparagraph is replaced by the following:

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

6. The following Article 111 c is inserted

'Article 111c

Joint procurement procedure with a Member State

(Article 91 of the General Financial Regulation)

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

Where the share pertaining to or managed by the contracting authority of a Member State in the total estimated value of the contract is equal to or above 50 %, or in other duly justified cases, the institution may decide that the procedural rules applicable to the contracting authority from a Member State shall apply, provided that they can be considered as equivalent to those of the institution. The institution and the contracting authority from a Member State concerned by the joint procurement procedure shall agree in particular upon the practical modalities for the evaluation of the requests for participation or the tenders, the award of the contract, the law applicable to the contract and the competent court for hearing disputes.'

7. In Article 115 paragraphs (3) and (4) are replaced by the following:

'3. Contracts with a value less than or equal to EUR 5 000 may be awarded on the basis of a single tender.

4. Payments of amounts less than or equal to EUR 500 in respect of items of expenditure may consist simply in payment against invoices, without prior acceptance of a tender.'

8. Article 116 is amended as follows:

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

'(a) specify the exclusion and selection criteria applying to the contract, save in a competitive dialogue, in the restricted procedure and in the negotiated procedure following publication of a notice as referred to in Article 113; in such cases those criteria shall appear solely in the contract notice or the call for expressions of interest;'

(b) paragraph 4 is amended as follows:

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

'(c) state that, when the institutions are contracting authorities, Community law is the law which applies to the contract, complemented, where necessary, by national law as specified in the contract;'

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

'(d) specify the competent court for hearing disputes.'

(c) in paragraph 5, the following sentence is added:

'In addition to the information referred to in Article 120, the contracting authority may also require the candidate or tenderer to submit information on the financial, economic, technical and professional capacities, as referred to in Articles 121, 122 and 123, of the envisaged subcontractor, in particular when subcontracting represents a significant part of the contract.'

9. Article 119 is replaced by the following:

'Article 119

Illegal activities giving rise to exclusion

(Article 93 and 114 of the General Financial Regulation)

The cases referred to in point (e) of Article 93(1) of the General Financial Regulation shall be the following:

(a) cases of fraud as referred to in Article 1 of the Convention on the protection of the European Communities' financial interests drawn up by the Council Act of 26 July 1995 (\*);

(b) cases of corruption as referred to in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997 (\*\*);

(c) cases of involvement in a criminal organisation, as defined in Article 2(1) of Joint Action 98/733/JHA of the Council (\*\*\*);

(d) cases of money laundering as defined in Article 1 of Council Directive 91/308/EEC (\*\*\*\*).

(\*) OJ C 316, 27.11.1995, p. 48.

(\*\*) OJ C 195, 25.6.1997, p. 1.

(\*\*\*) OJ L 351, 29.12.1998, p. 1.

(\*\*\*\*) OJ L 166, 28.6.1991, p. 77.'

10. The following Article 119a is inserted:

'Article 119a

Application of exclusion criteria and duration of exclusion

(Articles 93, 94, 95 and 96 of the General Financial Regulation)

1. In order to determine duration of exclusion and to ensure compliance with the principle of proportionality, the institution responsible shall take into account in particular the seriousness of the facts, including their impact on the Communities' financial interests and image and the time which has elapsed, the duration and recurrence of the offence, the intention or degree of negligence of the entity concerned and the measures taken by the entity concerned to remedy the situation. When determining the period of exclusion, the institution responsible shall give the candidate or tenderer concerned the opportunity to express their views.

Where the duration of the period of exclusion is determined, in accordance with the applicable law, by the authorities or bodies referred to in Article 95(2) of the General

Financial Regulation, the Commission shall apply this duration up to the maximum duration laid down in Article 93(3) of the General Financial Regulation.

2. The period referred to in Article 93(3) of the General Financial Regulation is set at a maximum of five years, calculated from the following dates:

(a) from the date of the judgment having the force of res judicata in the cases referred to in points (b) and (e) of Article 93(1) of the General Financial Regulation;

(b) from the date on which the infringement is committed or, in the case of continuing or repeated infringements, the date on which the infringement ceases, in the cases referred to in Article 93(1)(c) of the General Financial Regulation.

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

3. Candidates and tenderers shall be excluded from a procurement and grant procedure as long as they are in one of the situations referred to in points (a) and (d) of Article 93(1) of the General Financial Regulation.'

11. Article 120 is amended as follows:

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

'Depending on its risk assessment, the contracting authority may refrain from requiring the declaration referred to in the first subparagraph for contracts with a value less than or equal to EUR 5 000..'

(b) the following paragraph 7 is added:

'7. When requested by the contracting authority, the candidate or tenderer shall submit a declaration on honour from the intended subcontractor that he is not in one of the situations referred to in Articles 93 and 94 of the General Financial Regulation. In case of doubt on this declaration on the honour, the contracting authority shall request the evidence referred to in paragraphs 3 and 4. Paragraph 5 shall apply, where appropriate.'

12. The following Article 120a is inserted:

'Article 120a  
Central database  
(Article 95 of the General Financial Regulation)

1. The institutions, executive agencies and bodies referred to in Article 95(1) of the General Financial Regulation shall transmit to the Commission, in the format established by the Commission, information identifying the economic operators which are in one of the situations referred to in Articles 93, 94, 96(1)(b) and 96(2)(a) of the General Financial Regulation, the grounds for exclusion and the duration of the period of exclusion.

They shall also transmit information concerning persons with powers of representation, decision making or control over economic operators which are legal entities, when these persons have found themselves in one of the situations referred to in Articles 93, 94, 96(1)(b) and 96(2)(a) of the General Financial Regulation.

The authorities and bodies referred to in Article 95(2) of the General Financial Regulation shall transmit to the Commission, in the format established by the Commission:

(a) information identifying the following persons who are in one of the situations referred to in Article 93(1)(e) of the General Financial Regulation, where their conduct was detrimental to the Communities' financial interests:

- (i) the economic operators;
- (ii) persons with powers of representation, decision-making or control over economic operators which are legal entities;

(b) the type of their conviction;

(c) the duration of the period of exclusion from procurement procedures, where applicable.

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

In the case of the institutions, agencies, authorities and bodies referred to in Article 95(1) of the General Financial Regulation, the designated persons shall address the information as soon as possible to the accounting officer of the Commission, and request, as appropriate, entry, modification or removal of data in the database.

In the case of the authorities and bodies referred to in Article 95(2) of the General Financial Regulation, the designated persons shall address the requisite information to the Commission authorising officer responsible for the programme or action concerned, within three months of the issue of the relevant judgement.

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

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

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

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

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

Appropriate arrangements shall be laid down in the agreements with the authorities of third countries and all bodies referred to in Article 95(2) of the General Financial Regulation, in order to ensure compliance with these provisions and with the principles concerning the protection of personal data.

13. The following Article 120b is inserted:

'Article 120b  
Administrative and financial penalties  
(Articles 96 and 114 of the General Financial Regulation)

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

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

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

Contractors who have been found in serious breach of their contractual obligations may be subject to financial penalties representing 2 % to 10 % of the total value of the contract in question. That rate may be increased to 4 % to 20 % in the event of a repeat infringement within five years of the date referred to in the first subparagraph of paragraph 1.

3. The institution shall determine the administrative or financial penalties taking into account in particular the elements referred to in Article 119a(1).'

14. In Article 126(3), the first subparagraph is replaced by the following:

'In restricted procedures, in cases of use of the competitive dialogue referred to in Article 111b and in negotiated procedures with publication of a contract notice for contracts above the thresholds set in Article 144, the time limit for receipt of requests to participate shall be no less than 37 days from the date on which the contract notice is dispatched.'

15. In Article 131(2), the following subparagraph is added:

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

16. Article 132 is amended as follows:

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

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

(b) in paragraph 2, the following subparagraph is added:



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

17. Article 133 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. A written record of the evaluation and ranking of requests to participate and tenders declared to satisfy the requirements shall be drawn up and dated. The written record shall be signed by all the members of the evaluation committee. If the evaluation committee was not given responsibility for the evaluation and ranking of the tenders on the basis of the exclusion and selection criteria, the written record shall also be signed by the persons who were given that responsibility by the authorising officer responsible.

The written record shall be kept for future reference.'

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

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

18. Article 135 is amended as follows:

(a) the title is replaced by the following:

'Article 135  
Information for candidates and tenderers  
(Articles 100(2), 101 and 105 of the General Financial Regulation) '

(b) paragraph 3 is amended as follows:

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

'In the case of contracts awarded by the Community institutions on their own account, with a value equal to or more than the thresholds set in Article 144 and which are not excluded from the scope of Directive 2004/18/EC, the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and individually, by mail, fax or e-mail, that their application or tender has not been accepted, at either of the following stages:

(a) shortly after decisions have been taken on the basis of exclusion and selection criteria and before the award decision, in procurement procedures organised in two separate stages,

(b) as regards the award decisions and decisions to reject offers, as soon as possible after the award decision and within the following week at the latest.

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

(ii) the fourth subparagraph is deleted.

19. The following Article 135a is inserted:

'Article 135a  
Signature of the contract  
(Articles 100 and 105 of the General Financial Regulation)

Implementation of a contract may not start before the contract is signed.'

20. Article 141 is amended as follows:

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

'Whenever appropriate, technically feasible, and costefficient, contracts with a value equal to or greater than the thresholds laid down in Article 144 shall be awarded at the same time in the form of separate lots.'

(b) the following paragraph 4 is added:

'4. Where a contract is to be awarded in the form of separate lots, tenders shall be evaluated separately for each lot. If several lots are awarded to the same tenderer, a single contract covering those lots may be signed.'

21. The following Article 144a is inserted:

'Article 144a  
Standstill period before signature of the contract  
(Article 105 of the Financial Regulation)

1. The contracting authority shall not sign the contract or framework contract, covered by Directive 2004/18/EC, with the successful tenderer until 14 calendar days have elapsed.

That period shall run from either of the following dates:

(a) the day after the simultaneous dispatch of the award decisions and decisions to reject;

(b) where the contract or framework contract is awarded pursuant to a negotiated procedure without prior publication of a contract notice, the day after the contract award notice referred to in Article 104 has been published in the Official Journal of the European Union.

If necessary, the contracting authority may suspend the signing of the contract for additional examination if this is justified by the requests or comments made by unsuccessful or aggrieved tenderers or candidates or by any other relevant information received. The requests, comments or information must be received during the period set in the first subparagraph. In the case of suspension all the candidates or tenderers shall be informed within three working days following the suspension decision.

Except in the cases provided for in paragraph 2, any contract signed before the expiry of the period set in the first subparagraph shall be null and void.

Where the contract or framework contract cannot be awarded to the successful envisaged tenderer, the contracting authority may award it to the following best tenderer.

2. The period set in the first subparagraph of paragraph 1 shall not apply in the following cases:

(a) open procedures where only one tender has been submitted;

(b) restricted or negotiated procedures after prior publication of a contract notice where the tenderer to whom the contract is to be awarded was the only one who satisfies the exclusion and selection criteria, provided that, in accordance with point (a) of the first subparagraph of Article 135(3), the other candidates or tenderers have been informed of the grounds of their exclusion or rejection shortly after the relevant decisions have been taken on the basis of the exclusion and selection criteria;

(c) specific contracts based on a framework contract and by applying the terms set out in such a framework contract, without reopening the competition;

(d) extreme urgency referred to in Article 112(1)(c).'

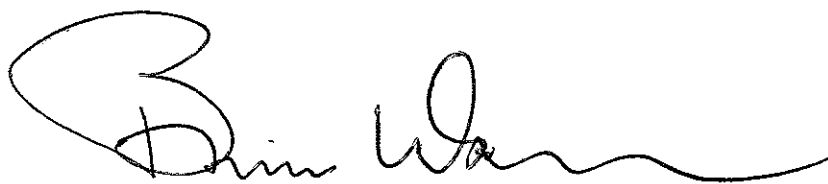
#### *Article 2*

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

#### *Article 3*

This Decision shall enter into force on the day of adoption by the Administrative Board.

Done at Lisbon on 28 November 2007,

A handwritten signature in black ink, appearing to read 'Brian Wadsworth', with a long, wavy horizontal line extending to the right.

Brian Wadsworth

Chairman of the Administrative Board