

## **BEST PRACTICES**

### **" For the Selection of Subcontractors by Prime Contractors in the frame of ESA 's Major Procurements"**

In accordance with Article 17.1 of the ESA Procurement Regulations, the Director General established the present procurement requirements.

The ESA Industrial Policy Committee approved these requirements (ESA/IPC(2012)65,rev.2) during its 273th meeting held on 27-28 September 2012.

The ESA Council authorised public release of this document by approving Article 4 of the ESA Procurement Regulations.

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(PFL-LT/BPTM-REY.01. dated 4<sup>th</sup> June 2012)

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(IPC – 2009 – 74)

## **INTRODUCTION**

In the framework of its procurements the Agency has persistently been driven by the objective of ensuring fairness of competition at all levels and in particular between Prime Contractors and subcontractors.

The purpose of this document is to ensure that Prime Contractors<sup>1</sup> together with their Subcontractors (both hereinafter referred to as Contractor(s)<sup>2</sup>) when required to perform the selection of subcontractors in the framework of an Agency Programme, conduct their procurement in line with the principles of fairness and equity outlined herein.

The objective is to establish the minimum BEST PRACTICES requirements to be implemented by a Contractor in order to achieve a fair and equitable treatment of all potential tenderers.

Such requirements are approved by the Agency's Industrial Policy Committee (IPC) in accordance with Article 17 of the Agency's Procurement Regulations (ESA/REG/001) at its latest revision.

Any modification of such requirements in order to take account of individual Programme constraints shall be authorised and implemented by the Agency's Procurement Department in co-operation with the responsible Programme Directorate and IPC and the Industrial Ombudsman shall be kept informed.

The present Code of Best Practices and its Appendices forms an integral part of the contractual and management requirements of the Agency's Invitation To Tender (ITT) or Request For Quotation (RFQ) for the selection of the Prime Contractors and shall therefore require from the tenderers submitting a tender in such capacity an explicit statement to the effect that such requirements are read, understood and accepted.

Although specifically targeted at major procurements such as space and/or ground segment above 20 000 000 €, these requirements are not to be construed as being restricted to such procurements and may be applied in their entirety or partially adapted in the framework of any procurement, independent of its nature or magnitude, should the Agency feel it adequate and in such a way that it will not bring unnecessary burden on potential tenderers.

The Agency has also laid down certain general principles of good business conduct expected from companies involved in business activities of the Agency. These principles are contained in a document called "ESA Code of Conduct for Industrial Activities" (hereinafter referred to as "Code of Conduct") which is attached hereto as Appendix 2.

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<sup>1</sup> For the purpose of this document the term Prime Contractor is to be understood as a company who has received a contract from the Agency while subcontractor is a company having received either a contract from the Prime Contractor or from another subcontractor and this independently of its size or role in the procurement in subject.

<sup>2</sup> For the sake of clarity the term Contractor when used on its own in this document shall be understood as meaning the company which is responsible for issuing the ITT/RFQ and of the subsequent evaluation and selection under best practices.

This Code of Conduct may be called upon, in addition to Best Practices, when a company is requesting the support of the Agency's Industrial Ombudsman as foreseen under section VI below.

## **I. GENERAL PRINCIPLES**

1. In order to ensure impartiality in the overall selection process be it in the framework of competitive or non competitive tendering procedures, the Agency shall be given full visibility in the ITT/RFQ preparation, evaluation process and selection of tenders, including the right to perform an audit of the overall procedure.
2. In order to further guarantee the impartiality of economic operators in the implementation of these principles, potential tenderers and the Contractor shall be required to recognise, accept and co-operate with the Agency's Industrial Ombudsman should the latter be asked to intervene.
3. The tendering procedures carried out under Best Practices are being carried out under the responsibility of the Contractor(s) and are thus not subject to the right of review provided for under Part VI of the Agency's Procurement Regulations.
4. The Best Practices Tender Evaluation Manual (Appendix 1) is applicable to the tendering procedures to be carried out under Best Practices, the Contractor shall comply with these procedures.
5. In the event the Contractor(s) wishes to bid for any Element for which he will be carrying out a competitive tendering procedure, the Agency in the interest of impartiality shall;
  - a. in principle exclude the Contractor from the evaluation of tenders submitted<sup>3</sup>. In such cases the Contractor shall be authorised to participate as an Observer in a Tender Evaluation Board (TEB) specifically appointed by the Agency; or,
  - b. may alternatively authorise the Contractor to perform the evaluation provided that at least the Chairperson of the TEB set up by the Contractor is an Agency staff and that no proceedings of the TEB may take place in the absence of the Chairperson.
6. Where in application of paragraph 5.a above the Agency carries out the competitive tendering procedure it shall do so in line with the procedures laid down in Appendix 1.
7. The procedures to be followed in accordance with paragraph 5 above shall in no way absolve the Contractor from his overall responsibility vis-à-vis the sub-contractor selected under this procedure.

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<sup>3</sup> This shall also apply in case of companies belonging to the same industrial and/or legal organisation, or affiliated companies, meaning any form of association giving a company a vested interest in the outcome of the evaluation

8. The Agency at any moment reserves the right to initiate a parallel evaluation to be performed by its own staff.
9. The Prime Contractor shall submit an “Industrial Procurement Plan” (IPP) to establish and describe the procurement approach he intends to follow in order to achieve the requirements set by the Agency. The IPP will be used by the Agency for identifying and assessing activities in order to determine if they should be produced directly through the Prime Contractor (make) or from sources outside (buy) either through open competitive tendering, restricted competitive tendering or direct negotiations.
10. A summary description of the Contractor's Intended Invitations to Tender (IITT) with an indicative budget or target for each element /activity shall be prepared by the Contractor and sent to the Agency for announcement on the ESA's EMITS for External Entities (EMITS.EE) system.
11. Contractors ITT/RFQ's will be prepared in accordance with the special instructions and documentation provided by the Agency in advance of the ITT/RFQ process (if any). As a general rule it is the responsibility of the Contractor to flow down the necessary requirements in a way which is tailored to the specific ITT/RFQ.
12. The ITT packages shall as a minimum comprise the following documents:
  - Cover Letter
  - Statement of Work
  - Specification (technical, management etc..)
  - Draft contract
  - Conditions of Tender
  - Evaluation Criteria and associated weighting factors
  - Closing date for the receipt of tenders.

## **II. THE INDUSTRIAL PROCUREMENT PLAN (IPP) (Make or Buy)**

- a) The IPP will be established by the Prime Contractor as part of his proposal, at the date required by the Agency and will:
  - take into account all pertaining requirements such as, but not limited to, geographical distribution, Industrial policy and special measures introduced by the Agency at the time of its ITT/RFQ; and,
  - develop the strategy proposed to achieve these requirements.
- b) The proposed IPP will be evaluated as part of the tender evaluation process and will be negotiated by the Agency with the Prime Contractor prior to the placing of the contract by the Agency.

Compliance with the requirements related to the size of the Core team shall also be evaluated.

- c) On the basis of the negotiated IPP, an agreed IPP Implementation Table shall be generated indicating as a minimum and for each equipment to be procured:
- The procurement method (direct negotiation, restricted competition).
  - For all procurements the list of potential tenderers and their nationality together with any affiliation to the Prime or to the Contractor issuing the procurement.
  - The indicative budget or target.
  - The planned issue date and closing date.
  - Whether the Agency will carry out the evaluation itself or chair it.

Such agreed IPP Implementation Table shall be annexed to the contract as a reference document.

### **1. Guiding principles of the Industrial Procurement Plan:**

The objective of the IPP is to ensure, taking due account of the overall financial and technical constraints of the project, that the build up of the industrial consortium by the Prime Contractor:

- makes maximum use of established technology harmonisation policies in the framework of the Agency;
- makes use of the technologies developed under ESA programmes;
- makes maximum use of European existing industrial competences;
- identifies technologies/products proposed to be procured outside Europe;
- identifies strategic technologies procured from European suppliers;
- avoids ad hoc developments which would create redundant competences in European Industry detrimental to international competition; and,
- respects the respective technical, financial, schedule and geographical return requirements as well as any industrial policy directives of the given programmes.

In the interest of transparency and once the IPP Implementation Table is agreed with the Agency, parts of it will be made public by the Agency.

### **2. Definitions to be used for the establishment of the Plan:**

When establishing its IPP the Prime Contractor in order to categorise activities as Make or Buy shall use the following definitions:

- i. **Buy:** A work activity, supply, or service to be produced or performed by a Subcontractor through a procurement or purchase initiated by the Prime Contractor. Such subcontractor can be an affiliate company or in-house consultant of the Prime Contractor.
- ii. **Make:** A work activity, supply, or service to be produced or performed by the Prime Contractor or one of its affiliated entities.
- iii. **Core Capabilities:** Capabilities which cannot be «buy» since considered either as critical to business operations capabilities or critical project capabilities which have to be executed by the contractor's staff and which if they were to be «buy», would have a considerable cost and/or schedule impact on the programme or the future of the company.

### **3. Content of the Industrial Procurement Plan**

The Prime Contractor's IPP shall contain the following data to be connected to the product tree :

- i. The categorisation of each " make“ or " buy" proposal with the justification for such categorisation in consideration of the programme specific criteria (including geographical requirements);
- ii. A list of the items proposed to be procured for which the Prime Contractor or its Core Team member intend to submit a tender accompanied with justifications against criteria announced in this respect by the Agency in the ITT/RFQ;
- iii. A list of proposed potential suppliers shall be provided with their reference heritage (and to the extent known, the applicability to the specific project) addressing also the level of maturity (category of the equipment, modulated per each potential supplier based on its heritage);
- iv. Identification of proposed potential subcontractors for restricted competition or direct negotiation if justified due to reasons of sole source or by special measures applicable to the programme and identified as such in the ITT/FQ, their nationality and affiliation to the Contractor in charge of the procurement;
- v. For each procurement, identification of the procurement schedule including the necessary tendering and evaluation periods. (section III below) ;
- vi. A recommendation to defer a make or buy decision where categorisation of an identifiable item is not feasible at the time of the initial submission of the plan and a schedule for future re-evaluation;
- vii. For activities/products categorized as “buy” outside Europe, a detailed justification of the reasons why it cannot be “ buy” in Europe.

- viii. The proposed procurement strategy for achieving the established geographical return requirements or special measures.
- ix. For each procurement, the proposed budgetary allocation, along with a detailed justification, that will include at least the basis for the estimate (RFI, Database), the way the budgetary allocation was further derived, the financial margins allocated to the item in question.

#### **4. Update of the agreed Industrial Procurement Plan Implementation Table**

Following each selection of subcontractor or batch of subcontractors if applicable, the agreed IPP Implementation Table shall be reviewed taking into account past and future procurements and a revised strategy for achieving the industrial policy requirements (including the geographical distribution) shall be reflected in an updated IPP Implementation Table that shall be submitted to ESA for agreement. The agreed IPP Implementation Table shall remain a document under configuration control, but its update(s) shall not give rise to Class A changes.

### **III . ISSUING OF ITT/RFQs BY CONTRACTOR AND TENDERING PERIOD**

1. When issuing competitive tenders (ITTs) the Contractor shall use the Agency's EMITS for External Entity (EMITS.EE) and when applicable any other media required by the Agency.
2. The Agency will review the ITT/RFQ's documentation prepared by the Contractor, in particular the technical, contractual and management requirements, to ensure its "impartiality" in term of guaranteeing in the cases of competitive tendering a fair competition. Such review by the Agency should not exceed a period of 10 working days.

The Agency shall further assess the validity of the budgetary estimate or target given by the Contractor for each activity in question.

Only upon written authorisation by ESA shall the ITT/RFQ packages be released by the Contractor.

When agreed by the ESA Project Manager the above review and authorisation may be given by the Agency's representative sitting in the Contractor's TEB.

3. All relations with potential tenderers during the tendering period will be governed by the rules laid down in Appendix 1.  
Any correspondence from or to potential tenderers will be copied to the Agency's Responsible Contracts Officer.



Answers to questions raised by potential tenderers shall be published and disseminated through the Agency's EMITS.EE (and when applicable any other media required by the Agency) together with the original questions following their check by ESA.

4. In parallel to sending their tenders to the Contractor, tenderers will be required to send at least two (2) sets of their tenders to the Agency's Responsible Contracts Officer.
5. Any prescribed time limit for the tendering period shall be adequate to allow for a fair treatment with respect to the preparation and submission of tenders before the closing date of the ITT. To that effect the response time for submission of tenders shall not be less than:
  - a) 30 working days from the date on which the ITT is published or dispatched for procurement actions superior or equal to 300 000 Euro.
  - b) 20 working days for all other procurement actions provided such period would not create an unfair advantage to the benefit of one or more economic operators.

However in exceptional cases and following a properly documented written request addressed to the Agency's Responsible Contracts Officer, this response time may be shortened following written approval by the Agency's Responsible Contracts Officer.

6. Once issued evaluation criteria shall not be altered or sub-divided.
7. The weighting factors associated to each individual criteria **shall** be published at the time of the issuing of the ITT. Once issued weighting factors shall not be altered.

#### **IV. RECEIPT, OPENING AND DISTRIBUTION OF TENDERS BY THE CONTRACTOR**

1. The receipt, opening and distribution of tenders shall be done by the Tender Opening Board (TOB) in conformity with the procedure laid down in Appendix 1
2. In case the TOB finds that one or more tenders cannot be accepted for evaluation, the distribution to the TEB of the tenders received in answer to the ITT, shall not take place until the Agency's Responsible Contracts Officer has given a decision in writing within five working days.
3. No additional information received from tenderers is to be admitted for evaluation after the formal opening of the tenders unless expressly foreseen in Appendix 1.

**V. EVALUATION OF TENDERS BY THE CONTRACTOR.****1. Nomination and Appointment of Tender Evaluation Boards (TEB)**

For each ITT/RFQ the Contractor, within the following boundaries, shall appoint a Tender Evaluation Board the composition of which is described in Appendix 1:

- i. All persons nominated shall be allowed to exercise their independent professional judgement independently from their hierarchy.
- ii. A TEB should never comprise more than seven (7) members recalling that each contractual tier has a right to be represented in a TEB as a member, expert or observer. The absence of a participant in a TEB who is not a member will not prevent a TEB from taking place.
- iii. (A) representative(s) of ESA will be designated by the ESA Project Manager to participate as member(s) of the TEB.
- iv. Further to the above designated Agency's representative(s), the Agency's Responsible Contracts Officer shall have the discretionary right at his own request to participate in any such TEB as a Member.
- v. For the cases foreseen under paragraph 5.b of Section I "General Principles" above, the ESA Project Manager shall designate the Chairperson of the TEB.
- vi. The appointment and nomination of the TEB participants shall be recorded by using the form indicated in Appendix 1 and shall be submitted to the Agency's Responsible Contracts Officer.

**2. Declaration of Secrecy and Disclosure of Interest**

The Contractor shall demonstrate the measures he has taken in order to ensure that all tenders submitted and all documents arising from the evaluation are treated as "commercially confidential" and that access to such documents is limited to those persons directly involved in the evaluation. To that effect the following shall apply:

- i. Section 6 of Appendix 1 shall not be altered
- ii. No evaluation participant may discuss topics related to the work of the board with any person who is not a nominated participant in the evaluation.
- iii. No person who is not a nominated participant may be present when the TEB discusses the tender.
- iv. Contacts with tenderers concerning the tender under evaluation shall be regulated by sections 8 and 9 of Appendix 1.

### **3. Proceedings of the TEB**

- i. The Contractor's authorised Representative in consultation with ESA shall, for each evaluation, decide on a schedule commensurate with the dates by which a final decision is needed.
- ii. The TEB shall conduct its independent evaluation against the criteria established in the ITT, marks shall be awarded and weighting factors applied as provided for in Appendix 1.
- iii. Each and every meeting of the TEB shall be recorded in minutes in such form as the Chairperson directs, but shall, in any event always be in conformity with the minimum requirements contained in Appendix 1.
- iv. Each TEB shall produce a report of the evaluation in conformity with the minimum requirements contained in Appendix 1, containing inter-alia a matrix of the tenders received and the marks awarded and prices.
- v. The Chairperson and all TEB Members shall sign the Evaluation Report.
- vi. The Evaluation Report shall be sent by secured means to the Agency's Responsible Contract Officer within two working days following the end of the evaluation.

## **VI. RECOMMENDATION BY THE CONTRACTOR AND DECISION**

### **1. Recommendation**

- i. The Contractor's recommendation for selection will be made on the basis of the evaluation results of the TEB -also when it was an ESA lead TEB- and any other constraints and considerations of the programme, including if any the geographical distribution objectives or special measures defined by the Agency at the time of the issuing of the ITT/RFQ.
- ii. Unless directed otherwise by the Agency in the frame of special measures which will set the minimum acceptable overall weighted mark for the tender in question , no tender having obtained an overall weighted mark below 60 shall be put forward by the Contractor to the Agency unless such recommendation specifically identifies the necessary measures which have to be taken in order to bring the recommended tender to such a level and to further optimise the best combination of technical quality and price.
- iii. This recommendation shall be send to the Agency's Project Manager and Agency's Responsible Contracts Officer by secured means and addressed to the Agency's Responsible Contracts Officer.

## **2. Decision**

- i. Upon receipt of the recommendation, the Agency shall decide within a period of five working days, (unless justified circumstances prevent such response) either to endorse the recommendation or to request that it be submitted for decision to a Joint ESA/Industry Senior Procurement Board with a possibility of appeal at higher management level in case of persisting disagreement.
- ii. The Agency shall always have the right to request, if so desired, a new evaluation, in such case the Agency shall notify both the Prime Contractor and the interested Contractor of the reasons for its decision.
- iii. The above decision procedure is described in ANNEX A.
- iv. The decision shall in no way absolve the Contractor from his overall responsibility vis-à-vis the sub contractor selected under this procedure.
- v. Tenderers which have not been retained shall be informed within five working days from the final endorsement of the decision by the Agency, unless otherwise requested by the Agency or the issuing Company.

## **VII. THE ESA INDUSTRIAL OMBUDSMAN**

Pursuant to Article 17 of the ESA Procurement Regulations, procurements carried out under Best Practices are not subject to the right of review provided for under Part VI of the Agency's Procurement Regulations. Nonetheless in order to guarantee the principle of fair competition and fair access to Contractor's procurements at all levels, the Agency has established an Industrial Ombudsman. In the frame of Best Practices companies are required to recognise, accept and co-operate with this Industrial Ombudsman should the latter be asked to intervene.

### **1. Competence**

The OMBUDSMAN is competent in :

- i. Facilitating the solving of disputes among industry in the framework of European Space Agency's (ESA) project procurements and technology development procurements, in order to ensure that all contractors are given a fair opportunity of participation in ESA Programmes.
- ii. Listening to concerns from industry about specific issues of competitiveness / competence and consult the appropriate persons within ESA to resolve such concerns before they become a major problem
- iii. Facilitating communications between tenderers, potential tenderers, Contractors and industry representatives in the resolution of matters arising in the frame of an Agency's project/programme.

## **2. Scope**

- i. The request for the intervention of the Ombudsman shall only be receivable for companies which have provided evidence that they have tried to resolve their concerns amongst themselves and have therefore exhausted the normal channels allowing such resolution within the industrial structure concerned.
- ii. The Ombudsman shall not be competent for receiving complaints concerning disputes between the Agency and Industry in the frame of Best Practices.
- iii. The Ombudsman shall not be competent to receive and investigate complaints based on questions of Industrial Return and Geographical Distribution.
- iv. The Ombudsman shall not participate in the evaluation of proposals, the source selection process, or the adjudication of formal contracts disputes.

## **3. Investigation**

- i. Any company requesting the intervention of the Ombudsman shall in parallel notify the Head of the Agency's Procurement Department.
- ii. The Ombudsman can only investigate a procurement process where a complaint has been made to him and, having carried out a preliminary examination of the matter, it appears to him that the procurement process was or may have been:
  - carried out contrary to the procurement instructions and/or rules established by the Agency either in general or for the specific purposes of the procurement under investigation,
  - improperly discriminatory,
  - based on an undesirable procurement practice, or otherwise contrary to faire and sound procurement practices.

## **4. Conduct of Investigation**

- i. The procedure for conducting an investigation is such that the Ombudsman himself considers appropriate.
- ii. All investigations shall be carried out in strict confidentiality.
- iii. When conducting an investigation the Ombudsman may call for and collect all relevant facts to resolve such issues raised by the parties.

- iv. To that effect the Ombudsman,
- will maintain strict confidentiality as to the source of the concern,
  - will be granted access to source selection and proprietary information, the collection of which will be co-ordinated through the designated ESA support staff, and
  - will be granted access to all technical specifications and requirements either established by the Agency or by the Company carrying out the procurement in the frame of an Agency's programme.

In order to avoid as far as possible “fait accompli” situations, the Ombudsman when referred to by a complainant company, has the right to recommend to the Head of the Agency’s Procurement Department any conservatory measures he deems necessary to be taken.

## **5. Findings and reports**

- i. When the Ombudsman carries out an investigation he must inform the complainant company and the company complained against of the result of the investigation and of his proposed recommendations.
- ii. When it appears to the Ombudsman that the response to a recommendation which he has made to a company is not satisfactory he shall make a special report on the matter to the Head of the Agency’s Procurement Department. This report shall contain the representations of this company in relation to the matter.
- iii. Should the findings of the Ombudsman conclude that the situation was caused by actions or omissions of the Agency he shall first report the matter to the Head of the Agency’s Procurement Department.

## **ANNEX A**

### **DECISION.**

Upon receipt of the recommendation made by the Contractor, the Agency may decide that it be submitted for decision to a Joint ESA/Industry Senior Procurement Board

#### **1.1 Composition of the SPB \***

Chairperson: - ESA Head of Programme Department or equivalent

Members : - ESA Project Manager  
- ESA Head of Procurement Division/Department\*  
- ESA Industrial Matters officer  
- Prime Contractor Head of .....

- Prime Contractor Project Manager

- Prime Contractor Head of Contracts[ or equivalent role in company]

Members & Secretaries:

- Agency's Responsible Contracts Officer  
- Prime Contractor Contracts Officer

Plus any advisors (experts) considered necessary by each project manager.

#### **1.2 Proceedings of the SPB\*\***

The Board shall convene as required.

Based on the TEB report, the recommendation made by the Contractor and any other documents (including risk assessment and mitigation) the essence of which do not constitute an amelioration or update of the tenders under discussion, the Board shall render a decision as to the award of the contract.

#### **1.3 Decision**

The decision of the SPB as to the award of a contract shall be recorded in writing and forwarded to the respective Project Managers for implementation.

After completion of the evaluation process by the SPB one copy of each tender concerned shall be archived. Unwanted copies of the tenders shall be disposed of in a secured manner. The records of the proceedings and the accompanying documentation submitted to SPB will be kept by the ESA Contracts Officer in the contracts file)

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\* The Head of the Agency's Procurement Department reserves the right to participate should he feel it appropriate.

\*\* Rules applicable to the TEB on secrecy and confidentiality apply in extenso to the proceedings of the SPB.





## **APPENDIX 1**

# **ESA BEST PRACTICES TENDER EVALUATION MANUAL**

**(PFL-LT/BPTEM-REY.01 dated 04 June 2012)**

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## **1. SCOPE**

The purpose of the present Tender Evaluation Manual (TEM) is to define procedures for tender actions taking place at the level of sub-contractors, and carried out by the Contractor<sup>4</sup> in the frame of its Best Practices.

The purpose of such a procedure is to ensure that open competition plays its part in achieving a realistic and suitable overall procurement and to allow European industry to participate in Agency programmes on a fair and equal footing. And in the case of non competitive tender actions that tenderers are treated fairly.

### **1.1 Principles**

The following principles shall be followed:

1.1.1 Fair and equal treatment of all economic operators is maintained and seen to be maintained at all times.

1.1.2 It shall be borne in mind that in some circumstances the Contractor<sup>5</sup> may also be a sub-contract tenderer. In such cases the Agency's Head of Procurement Department or his authorised representative in the interest of impartiality shall either:

- a. exclude the Contractor from the evaluation of tenders submitted. In such cases the Contractor shall be authorised to participate as an Observer in a Tender Evaluation Board (TEB) specifically appointed by the Agency; or,
- b. authorise the Contractor to perform the evaluation provided that at least the Chairperson of the TEB set up by the Contractor is an Agency staff and that no proceedings of the TEB may take place in the absence of the Chairperson.

The above shall also apply in case of companies belonging to the same industrial and/or legal organisation, or affiliated companies, meaning any form of association giving a company a vested interest in the outcome of the evaluation.

1.1.3 Invitations To Tender (ITT) by the Contractor shall be published on EMITS-EE. Restricted tender actions shall only be allowed in agreement with the Agency based on the Industrial Procurement Plan (IPP) (Make or Buy) submitted by the Contractor.

1.1.4 The ITT package shall be established by the Contractor, but approved by the Agency, so as to ensure that they correspond to the requirements and procedures.

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<sup>4</sup> For the sake of clarity the term Contractor when used on its own in this document shall be understood as meaning the company which is responsible for issuing the ITT/RFQ and of the subsequent evaluation and selection under best practices.

<sup>5</sup> This shall also apply in case of companies belonging to the same industrial and/or legal organisation, or affiliated companies, meaning any form of association giving a company a vested interest in the outcome of the evaluation

Approval shall not be taken as lessening the Contractor's overall responsibility. ITTs shall describe the procedure being followed.

1.1.5 Tenders shall be sent to the Contractor and at least two copies to the Agency simultaneously. The Agency reserves the right to make a public opening of the tenders received. Such opening shall take place on the Agency's premises

1.1.6 If so required by the Agency, a representative of the Agency will witness the Contractor's Tender Opening Board (TOB). In some specific cases the Agency's representative may be accompanied by a representative of another public body as foreseen under section 3.2.3 herein.

1.1.7 Any negotiation with Tenderers shall be conducted by the Contractor, the Agency reserves the right to participate in such negotiations. The rules governing negotiation established under section 9 herein shall be followed

1.1.8 The result of the evaluation and any discussions arising therefrom between the Agency and the Contractor, shall be deemed to constitute a formal tender from the Contractor to include selected sub-contractors in the industrial team under his responsibility.

1.1.9 Independently of the procedure laid down in this manual the Agency shall have the right to conduct a parallel evaluation of the tenders.

1.1.10 Any deviation from these procedures to suit the needs of a particular procurement should be considered as exceptional, and must receive the prior written agreement of the Agency's Responsible Contracts Officer .

## **1.2 Interpretation**

1.2.1 Should any interpretation of any particular provision be required, it shall be made in accordance with the principle of fair and equal treatment set under section 1.1.1 above and after consultation with the Agency's Responsible Contracts Officer.

1.2.2 Any agreed interpretation, shall be recorded in the records of the evaluation and communicated to the Chairperson of the Tender Evaluation Board (TEB).

## **1.3 Applicability**

1.3.1 The procedure laid down in sections 2 - 9 of this manual shall apply, in full, to all competitive tender actions

1.3.2 For non-competitive tender actions a procedure is laid down in section 10.

1.3.3 If necessary this procedure may be adapted ad hoc by agreement between the Agency and the Contractor to lower level of procurements if any, provided it respects the principle of fair and equal treatment set under section 1.1.1 above.

## **2. ISSUING OF ITTS and USE OF THE AGENCY'S EMITS SYSTEM.**

2.1 ITT packages will be published and disseminated by the Contractor.

2.2 They shall be announced through the Agency's EMITS. EE system at least two weeks prior to the Contractor's planned issue date. To that effect a summary description of the Contractor's Intended Invitations to Tender (IITT) for each competitive tender action shall be prepared by the Contractor and sent to the Agency for authorisation to publish on EMITS.EE.

2.3 In the case of restricted competitive tender actions the Contractor shall submit to the Agency for approval his intended potential Tenderers' list. The Agency shall have the right to modify this list. Once returned and agreed by the Agency this list will be considered as the final list.

The final list will be copied to the Agency for the ITT release.

2.4 The issued ITT package together with copy of the cover letter(s) shall be sent to the Agency's Responsible Contracts Officer.

2.5 All relations with potential Tenderers during the tendering period will be governed by the rules laid down herein under section 8.

2.6 Any correspondence from or to potential Tenderers will be copied to the Agency's Responsible Contracts Officer and to the Agency's Project Manager (APM ) when so required.

2.7 Answers to questions raised by potential Tenderers shall, following their endorsement by the Agency, be published and disseminated through the Agency's EMITS.EE system together with the original questions.

## **3. RECEIPT AND OPENING OF TENDERS**

### **3.1 Principles**

3.1.1 All tenders received shall be opened by a Tender Opening Board (TOB) after the closing date and time established for the ITT/RFQ.

3.1.2 The procedures regulating the receipt and opening of tenders are primarily to ensure that no distortion of competition or unfair advantage to a particular tenderer occurs in the case of ITTs, and that tenderers have complied with the conditions of tender.

3.1.3 In parallel to sending the tenders to the Contractor, the tenderers will be required to send at least 2 technical sets and 2 commercial sets of their tenders to the Agency's Responsible Contracts Officer. (This number may be modified if so required)

### **3.2 Appointment of the Tender Opening Board (TOB)**

3.2.1 A TOB shall be appointed by the Contractor prior to the closing date stated in the ITT/RFQ.

3.2.2 The TOB shall consist of at least the Contractor Contracts Officer (CCO) and the Contractor Programme Manager (CPM), or a person to whom he had delegated his authority. The CCO shall be Chairperson of the TOB. Members of the TOB shall be indicated as such on the form for nomination and appointment of the Tender Evaluation Board (TEB) Annex I .

3.2.3 In the framework of international agreements entered into by the Agency with public bodies (including International Organisations) - or in the case of collaborative programmes 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

### **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. The TOB shall, first, verify that the dispatch conditions have been met. The TOB shall then open the tenders.

#### **3.3.2 Admissibility of tenders**

The TOB shall assess the admissibility of tenders. Tenders shall be admitted if they were received on/or before the closing date and time and do not show prima facie evidence of a major non-compliance with the formal tender conditions, which would impair the fairness or secrecy of the competition.

Tenders shall be admitted if they were received after the closing date and time, provided that the tenderer has dispatched the tender in time to meet the closing date and informed the Contractor of the dispatch.

The Contractor and the Agency shall cross-check as to which tenders have been received by each party by the closing date and time. If any tender has been received by one of the parties by the due date and time, the tender shall be deemed to have been received in time.

If a tender, having been dispatched in time, with proper notification, appears to be lost or delayed in transmission, the Contractor in consultation with the Agency may grant the tenderer an extension in order to forward duplicates within defined time limits. The tenderer shall, in such case, be requested immediately to send simultaneously to the Contractor and the Agency the summary technical description, price and schedule of delivery by telecopy and when technically feasible the full proposal by e-mail in Pdf format.

Tenders arriving after the expiry of this extension will not be taken into consideration and will be returned unopened. The decision of the TOB shall be taken unanimously. In the case of a restricted tender action, a tender received from a tenderer not invited shall not be admitted for evaluation, unless it is decided, by the Agency's Responsible Contracts Officer following consultation with the Contractor, that the tenderer falls within the terms of the restriction (e.g. geographical) and that the fairness of the tender action is not jeopardised by admitting the tender.

### **3.3.3 Non Admissible tenders**

If a decision cannot be taken unanimously or if a tender is considered non-admissible, the Chairperson of the TOB shall inform the Chairperson of the TEB and submit the matter to the Agency's Responsible Contracts Officer for decision. If the tender following consultation with the Agency's Responsible Contracts Officer is ruled non-admissible, the Contractor shall within 3 working days from the decision notify the tenderer stating the reason for which the tender was considered non admissible, such notification shall be kept in the contract file and copied to the Agency's Responsible Contracts Officer.

### **3.3.4 TOB Report**

The TOB shall draw up a report (see Annex II) 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. where appropriate, the different volumes of a tender should be identified; and,
- vi. any decision in the case where a single tender has been received.

The report shall be signed by the members of the TOB and shall be submitted by the Chairperson of the TOB to the Chairperson and members of the TEB, to the CPM and to the Agency's Responsible Contracts Officer. A copy shall be kept in the contract file.

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



### **3.3.5 Briefing to tenderers ruled non admissible**

Upon receipt of the notification of non-admissibility, tenderers ruled non admissible may formally request in writing an oral debriefing from the Contractor as to the reasons for which their tender was not accepted for evaluation.

## **4. RE-ISSUE OF THE INVITATION TO TENDER**

ITT's may have to be re-issued in the following circumstances.

4.1 Where no tender has been admitted, the Contractor shall submit the matter to the Agency's Responsible Contracts Officer for joint decision on whether to re-issue the ITT, either unchanged or amended. If it is considered that re-issue of the ITT, even with amended specification, would be unlikely to result in the submission of an acceptable tender, the tender action shall be cancelled. The Contractor shall implement the decision accordingly and record it in the contract file with copy to the Agency's Responsible Contracts Officer.

4.2 Where only one tender has been admitted, the Contractor shall submit the matter to the Agency's Responsible Contracts Officer after consultation with the Chairperson of the TEB on either re-issuing the ITT or evaluating the admitted tender. While the normal rule would be to re-issue the ITT, a decision to evaluate the admitted tender may only be taken if a re-issue of the ITT would be unlikely to result in more than one acceptable tender being received or would not be feasible due to extreme urgency. The Contractor shall implement the decision accordingly and record it in the contract file with copy to the Agency's Responsible Contracts Officer.

## **5. DISTRIBUTION OF ADMITTED TENDERS**

5.1 The joint secretaries of the TEB shall distribute a complete copy of each admitted tender to each member of the TEB

5.2 Tenders shall not be distributed to any other persons until completion of the evaluation.

5.3 The distribution of cost information shall be restricted to other participants on a need to know basis.

## **6. THE TENDER EVALUATION BOARD (TEB)**

### **6.1 Appointment of the Tender Evaluation Board**

Except for the cases foreseen under section 1.1.2.a above, the Contractor shall appoint a TEB for each tender action. The composition of the board shall be left to the Contractor's discretion within the following boundaries.

### **6.2 Membership of the TEB**

6.2.1 The TEB shall be composed of Contractor's personnel with an overall appropriate experience and qualified in the appropriate technical and administrative disciplines.

6.2.2 A technical representative(s) of the Agency will be designated by the ESA Project Manager to participate as member(s) of the TEB.

6.2.3 In the framework of international agreements entered into by the Agency with public bodies (including International Organisations) - or in the case of other types of collaborative programmes, representatives of the Agency's partner may be designated by the Agency as members of the TEB.

6.2.4 In the event the Head of the Agency's Procurement Department or his authorised representative authorises by application of section 1.1.2.b above the Contractor to carry out the evaluation itself, the Tender Evaluation Board shall be composed of Contractor's personnel but as a minimum the Chairperson of the TEB shall be an Agency staff designated by the Agency's Project Manager.

6.2.5 The Agency's Responsible Contracts Officer shall have the discretionary right to participate and vote in any TEB as a member.

6.2.6 Any given TEB should never be made up of more than seven (7) members including the Chairperson, the joint secretaries and the designated representative(s) of the Agency.

Where the Agency's Responsible Contracts Officer exercise his discretionary right to participate this number may be brought up to eight (8) members .

6.2.7 Appointment to, and membership of, a TEB is personal, and cannot be delegated.

6.2.8 All persons nominated shall be allowed to exercise their independent professional judgement independently from their hierarchy.

6.2.9 The CPM or his designated technical initiator for the subject tender action and the CCO shall always be members and ex-officio joint secretaries of the TEB and they shall ensure that the rules laid down in the present Tender Evaluation Manual and /or in any specific instructions issued by the Agency are followed.

6.2.10 The appointment and nomination of the TEB Members shall be recorded by using the form indicated in Annex I and shall be submitted to the Agency's Responsible Contracts Officer.

### **6.3 Secrecy and non-interest**

It is paramount that all tenders submitted and all documents arising from the evaluation be treated as "commercially confidential" and that access to such documents must be limited to those persons directly involved in the evaluation. The following shall therefore apply:

6.3.1 Before the distribution of tenders is performed, each person participating in the evaluation shall complete and sign the " Declaration of secrecy and non interest form" attached as Annex III of the present Tender Evaluation Manual.

These forms shall be attached to the TEB nomination form and kept in the evaluation files of the Contractor and copied to the Agency's Responsible Contracts Officer.

6.3.2 At the time of their nomination TEB Members shall be informed of their duty to preserve secrecy concerning the contents of any tender and the proceedings of meetings of the TEB. Emphasis shall be placed on the fact that hierarchical superiority alone does not entitle any person to have knowledge of tenders or to be informed of the proceedings of TEBs.

## **7. RESPONSIBILITIES OF THE TENDER EVALUATION BOARD**

### **7.1 Duties of the Chairperson of the Tender Evaluation Board**

7.1.1 The Chairperson of the TEB shall be responsible for the correct proceedings of the evaluation. He shall convene its meetings. In the case of his absence, the meeting shall be chaired by a deputy, appointed under the provisions of section 6.1 above.

7.1.2 No meeting of the TEB may take place without the presence of at least one ESA nominated TEB Member or in the cases foreseen under section 6.2.4 in the absence of the nominated Agency Chairperson unless the Deputy Chairperson is himself a staff of the Agency.

### **7.2 Proceedings of the tender evaluation board**

#### **7.2.1 Quorum**

- i. The quorum of the TEB for taking decisions shall be two thirds of its members entitled to vote including the Joint secretaries and the Agency's Responsible Contracts Officer who has decided to exercise his discretionary right to participate in the TEB.

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

### **7.2.2 Voting and Marking Rules**

- i. The decisions of the TEB shall normally be taken by a simple majority vote of members present.
- ii. 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.
- iii. In case of a tie, the Chairperson shall have a casting vote.
- iv. Marks shall normally be given individually by the TEB members present.
- v. 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.
- vi. Members who have communicated their marks or vote in writing but are not present in the way described under section 7.2.1 ii above are not to be considered as present and their marks or vote shall not be taken into account.
- vii. No voting or marking can take place in the absence of an Agency representative .

### **7.2.3 Minutes of meeting**

Proceedings of the TEB shall be recorded in minutes in such form as the TEB Chairperson directs, but shall, in any event always contain:

- 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;
- 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 the establishing of evaluation criteria and weighting factors, the establishing of the time schedule , the elimination of tenders, minority statements, negotiation with tenderers, recommendation to place a contract; and,

- vi. any other matters which any member may ask to have recorded in the minutes.

### **7.3 Duties of the joint secretaries of the Tender Evaluation Board**

The joint secretaries shall be responsible for keeping the minutes of the meetings of the TEB in accordance with section 7.2.3 above and making the necessary arrangements for distributing copies of admitted tenders in accordance with section 5 above.

### **7.4 Duties of the Tender Evaluation Board**

#### **7.4.1 Duties of the TEB prior to issue of the ITT**

A first meeting of the TEB shall be held prior to the issue of the ITT. At the beginning of this meeting, the Chairperson of the TEB shall remind participants that they must declare any personal interest in the subject of the ITT, and of their duty not to disclose any information concerning the evaluation to persons not involved in the evaluation including their hierarchy and to keep all evaluation documents secret.

The TEB shall then approve the ITT documents, establish the evaluation criteria and their associated weighting factors and a time schedule the later taking due account of the need dates for consultations with the Agency.

The ITT package shall comprise, as a minimum, the following documents:

- Cover Letter (s)
- Statement of Work
- Specification
- Draft Sub-contract
- Conditions of Tender
- Evaluation Criteria and associated weighting factors
- Closing date for the receipt of Tenders

#### **7.4.1.1 Approval of ITT package**

The TEB when reviewing the ITT package shall ensure that:

- i. the documents constitute a proper basis for a competitive tender;
- ii. the requirements are neutral unambiguous and exhaustive so that all potential tenderers can understand them and commit to them ;
- iii. terminology and units of measurement used are those normal to the subject matter of the ITT;

- iv. 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;
- v. the technical parts of the ITT do not contain contractual aspects;
- vi. the proposed budget is commensurate with the subject procurement;
- vii. all applicable industrial policy and geographical return requirements set by the Agency are correctly reflected and unambiguous;
- viii. all special instructions and documentation provided by the Agency in advance of the ITT process are complied with; and,
- ix. the proposed schedule to complete the work is realistic.

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

**Endorsement and approval of the ITT package by the Agency for release**

The ITT packages prepared by the Contractor, (including evaluation criteria and weighting factors), together with the potential tenderers list in case of restricted tender actions, shall be made available to the Agency's Responsible Contracts Officer ten working days prior to the intended issue date.

The Agency within ten working days, unless justified circumstances prevent such response within that time period, will review the ITT's package prepared by the Contractor SOLELY to ensure its "impartiality" in term of guaranteeing a fair competition.

Once the documents are approved by the Agency, they shall be binding for the evaluation.

No amendment of the binding ITT documents shall be made by the Contractor without the prior approval in writing of the Agency's Responsible Contracts Officer.

Should amendments, exceptionally, be necessary during the tender period, the TEB shall, subject to the agreement of the Agency, approve such amendments, which will be communicated simultaneously to all potential tenderers via EMITS.EE. The members of the TEB shall be notified of any change to the closing date and clarifications during the tendering period.

#### **7.4.1.2 Establishing of evaluation criteria and weighting factors.**

The joint secretaries of the TEB shall submit a proposal for evaluation criteria and weighting factors for the approval of the TEB.

Except in justified cases agreed by the Agency's Responsible Contracts Officer the definition of criteria and weighting factors shall be established in accordance with the following guidelines

*i. Evaluation Criteria*

Evaluation criteria are the norms to be 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. Evaluation criteria shall be well defined and logically distinct. They shall cover all aspects of a tender and shall avoid duplication.

The criteria shall be divided into technical criteria, such as understanding of and compliance with requirements, quality and suitability of proposed design, and suitability of facilities and of support programme, and management criteria, such as overall organisation and management methods, costing and planning, manpower deployment, experience and capacity of the tenderer, and compliance with substantive tender and contract conditions.

The TEB shall be free to establish such criteria as it sees fit, provided that all significant parts of the ITT are covered, and no unfair advantage to one specific potential tenderer over another is thereby created.

Price shall not be a criteria. (See, however, section 7.4.2.7 on the overall assessment of tenders, including the price).

Geographical distribution shall not be a criteria unless otherwise specifically agreed by the Agency and the Prime Contractor.

Once approved, the evaluation criteria shall be binding for the evaluation and they shall not be further altered or sub divided. They shall be included as such in the ITT.

*ii. Weighting Factors:*

Weighting factors are to be applied to the marks obtained for the evaluation criteria, in order to establish the relative importance of each of these elements within the total evaluation. The weighting factors shall apply to all evaluation criteria. The global total of the weighting factors shall add up to 100%.

Should one of the nominated ESA TEB Member(s) disagree with the proposed weighting factors the matter shall be referred to the Agency via the Agency's Responsible Contracts Officer and a further meeting may be called in order to reconsider the matter.

Once approved, the weighting factors shall be binding for the evaluation and they shall be included in the ITT.

#### **7.4.1.3 Establishment of time schedule**

The joint secretaries of the TEB shall propose to the TEB a time schedule for its further actions. The time schedule shall take into account the validity period of the tender, any required periods for consultation with the Agency and shall allow sufficient time for the evaluators to read, understand and discuss the proposals.

This schedule shall be communicated to the Agency at least two weeks before the date of receipt of the Tenders.

#### **7.4.2 Duties of the TEB subsequent to receipt of tenders**

The TEB shall assess tenders, mark them, prepare a report on the results and make a recommendation as to any action to be taken as a result of the evaluation, in accordance with the following procedures:

##### **7.4.2.1 Preliminary assessment**

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 ESA Procurement Regulations; and,
- vi. a signature validating the tender.

If any of the above elements or if any other element specifically required in the conditions of tender are missing, and the omission is such as to render the tender substantively incomplete, so that its further evaluation would impair fair competition, the TEB shall eliminate such tender from further evaluation.

If, however, the TEB is of the opinion that the omission is unintentional and may easily be corrected and following consultation with the Agency's Responsible Contracts Officer, the Contractor may consult in writing with the tenderer concerned with the aim of rectification. If the result of such consultation is negative, the TEB shall eliminate the tender concerned from further evaluation. Otherwise the tender



shall be evaluated. In all cases a written record of such decision shall be placed in the contracts file and copied to the Agency's Responsible Contracts Officer.

#### **7.4.2.2 Clarity of costing and pricing**

The TEB shall verify whether the costing and pricing of the tenders is clear. This refers specifically to the correctness and adequacy of the detailed information as required by the Price Breakdown Form and any supporting costing documents required by the conditions of tender.

#### **7.4.2.3 Compliance with specifications (including work statement and management requirements)**

The TEB, without awaiting the outcome of any consultation mentioned above, shall continue the initial evaluation by verifying whether the specification (including work statement and management requirements) is complied with. It shall identify the strengths and weaknesses of each tender in respect to the criteria.

This shall be done by comparing the tender with the specification, not by comparing tenders amongst each other.

The TEB shall, also, if possible, identify whether weaknesses are readily capable of being corrected in order, if necessary, to improve the tender concerned. If technical statement contained in a tender need clarification, the CCO, 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. Such correspondence shall be copied to the Agency's Responsible Contracts Officer prior to being send to the tenderer. The TEB shall take the outcome of such consultation into its overall assessment of the tender.

#### **7.4.2.4 Discussion of findings**

Prior to the marking of tenders by each individual member, the TEB shall discuss their findings on each aspect of a tender. The Chairperson shall guide the discussion in such a way that any significant differences of opinion may be reduced, or if this is not possible, that they are clearly identified and recorded.

#### **7.4.2.5 Marking of tenders**

The TEB shall award marks to the criteria. The price shall not be marked ( see 7.4.2.7). TEB members shall mark all criteria of which they have a good understanding and can make an assessment.

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

If a member marks one tender under a particular criteria, he shall mark all tenders hereunder.

The marks shall be a number between zero and one hundred for each evaluation criterion and sub-criterion in accordance with the following scale of marking:

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

For figures above 40, members shall restrict themselves to the indicated figures. For marks below 40, intermediate marks by increments of five (5) only, may be given if in the judgement of the members, the tender could be readily rendered acceptable for that criterion. If this is not the case, a mark of 0 shall be given.

Any member of a TEB, whose mark differ significantly from the marks given by the other members in such a way that no agreement can be reached with respect to acceptability, or who gives a mark below 40 for any criterion, shall state specifically why he disagrees or considers the tender unacceptable on that criterion, and the reason shall be recorded.

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.

#### **7.4.2.6 Assessment of results of marking and application of weighting factors**

If, as a result of the marking, one or more tenders is marked acceptable in all evaluation criteria (i.e.  $\geq 40$ ), then 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; The result of such application will be weighted marks. Those weighted marks shall also be filled into the marking sheets and, finally, reflect one weighted mark for each tender
- iii. make its overall assessment and recommendation pursuant to section 7.4.2.7 below; and,
- iv. finalise its final report and have it signed by all members.

If all of the tenders received have one or more criteria judged to be unacceptable (below 40), the TEB shall write an interim report and the provisions of section 9.1 below shall be applied.

#### **7.4.2.7 Overall assessment of tenders**

The TEB shall finalise the evaluation of each tender by taking into an overall assessment the marked and weighted criteria and any not marked and not weighted criteria, if such be the case. A numerical relation between the marked and weighted and any unmarked and un-weighted evaluation criteria shall not be established.

At this stage, the prices offered shall be taken into account. For the purchase of standard equipment, this shall usually be the lowest price meeting the specified requirements. For others the assessment shall be based on the best combination of technical quality and price.

The TEB shall also identify areas of non-compliance and any items that would require negotiation prior to the placing of a contract.

The members of the TEB shall discuss their findings for each assessed tender. The Chairperson of the TEB 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.

Unless specified otherwise in the conditions of tender, the overall assessment shall , not be based on considerations of industrial policy and in particular geographical distribution such considerations to be taken by the Contractor's management following receipt of the TEB's recommendation.

#### **7.4.2.8 Drawing-up of final evaluation report**

Each TEB shall produce a report of the evaluation. The final evaluation report shall contain:

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

- 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.

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.

In case of restricted competition the report shall further contain inter-alia a matrix of the list of the companies contacted, the tenders received ( with the name of the tenderer and sub-tenderers) and the marks awarded and prices.

The recommendations of the TEB shall in all cases -and thus also when it is an ESA lead TEB- be strictly based on the conditions of tender as previously stated under section 7.4.2.7 above. The TEB may, however, point out, where appropriate, the implications which result from the choice of a given tenderer and any other remarks it considers relevant to the evaluation.

The evaluation report shall be signed by the Chairperson and all TEB members. A copy of the report shall be kept in the contract file.

#### **7.4.2.9 Submission of the TEB's final evaluation report for decision on recommendation**

The Chairperson of the TEB shall submit the evaluation report to the CPM, CCO and Agency's Responsible Contracts Officer. Exceptionally, in case of doubt as to the correctness or completeness of the evaluation, they may refer the matter back to the TEB for further evaluation; they shall, however, not direct changes to evaluation criteria, weighting factors or marks.

Based on the TEB evaluation report the Contractor's management may take into consideration other elements such as industrial policy and in particular geographical distribution to reach its recommendation.

The TEB Evaluation Report together with the recommendation of the Contractor's management shall be made available to the Agency's Responsible Contract Officer, within two working days following the end of the evaluation.

#### **7.4.2.10 Closing of evaluation by TEB**

On finalisation of the evaluation the Chairperson of the TEB shall remind its members again not to disclose any information concerning the evaluation to anybody until a final endorsement is made by the Agency. The joint secretaries of the TEB shall ensure that documents no longer needed are collected and disposed of. If an ITT is reissued in accordance with the provisions of section 4 above, or negotiations take place in accordance with section 8.4 below, the TEB is maintained until the final recommendation is made.

## **8. COMMUNICATIONS WITH TENDERERS**

Communications with potential tenderers shall be formal, in writing, and restricted to what is necessary to ensure clarity of the requirements and to preserve fair competition. Any communications shall be issued through the CCO with copy to the Agency's Responsible Contracts Officer.

### **8.1 Briefing meetings to potential tenderers**

8.1.1 A briefing may be held, as appropriate, before or shortly after issue of the ITT.

8.1.2 Upon agreement between ESA and the Contractor, potential tenderers may, if the complexity of the ITT justifies it, be invited to a briefing meeting where the requirements are described and explained.

8.1.3 All identified potential tenderers shall be invited.

8.1.4 All questions submitted and answers given shall subsequently be distributed in writing to all potential tenderers.

### **8.2 Communications during tender preparation period**

8.2.1 In accordance with the tender conditions, any questions from potential tenderers shall be submitted in writing to the CCO. Following approval by the Agency, the Contractor may issue clarifications or amendments to the ITT.

8.2.2 Only questions concerning the understanding of the requirements will be answered.

8.2.3 Amendments and questions and the answers thereto of possible interest to other potential tenderers, shall be distributed via the EMITS.EE.

### **8.3 Debriefing after evaluation**

8.3.1 Tenderers who have not been selected for the placing of a contract will be notified thereof by the Contractor within five (5) working days from the final endorsement of the decision by the Agency, unless otherwise requested by the Agency or the issuing Company.

8.3.2 Upon request of a tenderer, the Contractor may explain to such tenderer the reasons why this tender has not been accepted. Such debriefing shall be made by the concerned TEB Chairperson.

8.3.3 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. Debriefings may be oral or in writing. In the former case, a record of the explanation given shall be placed in the contract file.

## **9 NEGOTIATIONS WITH TENDERERS**

### **9.1 Exceptional negotiation with tenderers during the evaluation period**

Negotiations with tenderers may only be undertaken exceptionally following written approval by the Agency and following a detailed negotiation procedure to be established in agreement with the Agency.

### **9.2 Negotiation foreseen in the ITT**

9.2.1 In duly justified circumstances and subject to the same procedure laid down under section 9.1 above, the Contractor in order to meet the requirements of a particular programme, and to obtain the greatest advantage from a competitive tendering procedure may introduce negotiation as a predetermined element of the evaluation procedure. Under such a procedure, tenderers will submit a preliminary binding tender, in response to a full and detailed invitation to tender.

9.2.2 A preliminary evaluation will be made by the TEB, giving both a qualitative assessment of the tenders, and establishing a list of all points which could be improved. Tenders will not be marked at this stage. Negotiations will be conducted, under the authorised specific conditions, with all tenderers, with an aim of achieving the best possible revised tender from each. Upon receipt of revised tenders the TEB will proceed to make a final assessment, mark, apply weighting factors, and draw up a final report and recommendation.

9.2.3 The procedure to be followed, including an undertaking from the Contractor and the Agency not to transmit unlawfully information from one tenderer to another, shall be included in the conditions of tender, and by submission of a preliminary tender, tenderers shall undertake to participate in such negotiations. In order to maintain the fairness of the competition, the procedures described in sections 7.4.1 and 7.4.2 above shall be strictly adhered to.

9.2.4 In appropriate cases, the procedure may foresee, or the TEB may decide, that cost and price information not be examined prior to final evaluation. In any case, distribution of cost and price information shall be restricted to the TEB and those persons involved in the evaluation and negotiation who need to have access to such information.

## **10. EVALUATION PROCEDURE FOR NON-COMPETITIVE TENDER**

In the case of non-competitive tender actions, a formal TOB shall be appointed. Tenders shall be opened and a record shall be made in the contract file.

The procedures described in sections 3– 7 above shall be followed with the exception of the application of weighting factors. Deviations from conditions solely related to the maintenance of fair competition may be made, upon the approval of the Agency's Responsible Contracts Officer, provided that confidential information, including cost details from the tenderer, are not wrongfully distributed. A report and recommendation, as described in section 7.4.2.8 above shall be drawn up.





**ANNEX I**

**NOMINATION AND APPOINTMENT OF TENDER EVALUATION BOARD FOR  
INVITATION TO TENDER**

Subject: .....

Reference: ESA-Contract ../.. / (Contract No ESA and Prime Contractor )

Budget: .....EURO

Planned issue date: .....

Chairperson:  
Deputy Chairperson:

Members:

ESA Member:

Ex Officio Joint secretaries:

Tender Evaluation Board



**ANNEX II**

**TENDER OPENING REPORT**

Subject: Contractors ITT Ref Number .....  
 Reference: ESA-Contract ...../.. / ( Contract number ESA and Prime Contractor )  
 Budget: .....EURO  
 Published on EMITS.EE on:

The tender opening for the above tender action took place on .....

The geographical distribution of the firms contacted was as follows ( for restricted competition only):

Name of countries		Name of countries
	Name of countries	
Name of countries		Name of countries
	Name of countries	
Name of countries		Name of countries
	Name of countries	

the following tenders were received and accepted for evaluation:

Contractor	Subcontractor's	Amount EURO	Price type

- The following tender(s) was/were regarded as unacceptable for evaluation for the following reason(s):  
 .....

and in accordance the Tender Evaluation Manual the Chairperson of the TEB has been notified and the matter submitted to the Agency's Responsible Contracts Officer.

- [Only one] [No] acceptable tender(s) having been accepted for evaluation, in accordance with the Tender Evaluation Manual the matter has been referred to the Agency's Responsible Contracts Officer  
 .....  
 .....

Were present:

Distribution of invitation to tender:  
 TEB members



**ANNEX III**

**DECLARATION OF SECRECY AND OF NON-INTEREST**

Evaluation of tender for:

Reference number:

I, ..... hereby declare that I shall not disclose to any unauthorized person, whether an employee of .....( Contractors Company) or a staff member of ESA or not, knowledge which I acquire through my participation in the above tender evaluation.

I further declare that neither I nor any immediate member of my family have any personal interest in the outcome of the above tender action, except \*)

Signed:

Date:

\*) please insert here any exceptions, or delete if there are none.



## **ANNEX IV**

### **MINUTES OF FIRST TEB MEETING**

Subject:

In accordance with the provisions of Article 7.4.1 of the Tender Evaluation Manual, revision 1, the TEB members have:

- reviewed the following documents and agreed that they are a proper basis for a complete ITT package:
  - Tenderer list for each ITT ( in case of restricted competition)
  - Cover Letter
  - Statement of Work
  - Specification
  - Draft Sub-contract
  - Conditions of Tender
  - Evaluation Criteria and weighting factors
  - Target Price
  - Proposed Schedule
  - Closing date for the receipt of Tenders

#### **DECLARATION OF SECRECY AND OF NON-INTEREST**

The following TEB members declare that they shall not disclose to any unauthorized person, whether an employee of .....( Contractors Company) or a staff member of ESA or not, knowledge which they acquire through their participation in the above tender evaluation.

They further declare that neither they nor any immediate member of their family have any personal interest in the outcome of the above tender action, except

#### **SIGNATURE OF THE TEB MEMBERS**

Chairperson:  
Deputy Chairperson  
Members  
Joint secretaries

#### **TARGET CLOSING DATE**

TARGET	DATE	NEXT	TEB	MEETING	(EVALUATION)
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**APPENDIX 2**  
**“ESA CODE OF CONDUCT FOR INDUSTRIAL  
ACTIVITIES”**  
**IPC – 2009 – 74**

A sustainable and balanced relationship between industrial partners within a team is one of the major key factors of success for the implementation of complex projects such as space programs.

The European Space Agency has thus developed a Code of Conduct for industrial activities, based on the best business practices acquired through its experience. Its purpose is to recall certain general principles of good business conduct expected of companies involved in business activities with the Agency.

The present Code shall be the Industry's reference guidelines as soon as an industrial team is set up in view of doing business with the European Space Agency. The Agency is confident that the general principles of its Code will promote fair practices and will also stimulate constant improvement in industrial subcontracting and this with a beneficial result to the overall success of its space activities.

This Code of Conduct may be called upon when a company is requesting the support of the Agency's Industrial Ombudsman to facilitate communications between industries or to mediate between them to find a resolution to a conflict.

## **I – MUTUAL OBLIGATIONS**

In order to develop a relationship of true partnership between the Prime Contractor and the Subcontractor, based on shared objectives and interests, in a framework of fairness, mutual trust and common benefit, recognizing and observing each other's rights and obligations, the parties shall implement the following principles:

### **1- Obligation of confidentiality**

Both parties are committed to mutually respect a strict confidentiality (respecting the communication and information conditions of the Contract and towards the Agency) at the time of preparation of the proposal, at the time of negotiation of the Contract and during the performance of the Contract and as an obligation surviving the Contract, also after conclusion of the Contract. This covers Intellectual Property Rights and know-how used by both Prime Contractor and Subcontractor but also a general obligation to adhere to the principle of confidentiality such that their respective commercial interests are not jeopardised. Observance of this obligation should be ensured by a mutual agreement of confidentiality, either in the form of a separate agreement, or a special clause inserted in the Contract between them. Such agreement shall not constitute and shall not be considered as an exclusivity agreement, restricting the parties from bidding as a part of another industrial team or for similar or related activities.

#### **1.1 – At the time of negotiation of the contract**

- The circulation of information between the business partners should be open and transparent, and as complete and precise as possible in order to reach an identical understanding of the requirements of the project
- The general framework in terms of rules and scope of the agreement should be clearly defined
- The rights and obligations of both parties should be evident in the agreement between them.
- The agreement should be based on a fair price resulting from the bidding conditions, existing market parameters but also reflecting the need to achieve best possible quality.
- The agreement should provide for risk sharing commensurate to the exposure of sub-contractors in case of design modification/redesign and solidarity in case of accident.

### **1.2 – During the performance of the contract**

The Parties should develop a relationship of trust based on:

- Mutual information. The Prime Contractor should provide all necessary information enabling subcontractors to suggest technical solutions that could improve the value of the quality/price ratio.
- Intense cooperation: The Prime Contractor should create conditions to optimize collaboration with the Subcontractor and any supplier/consultant involved in the subcontracting relationship to achieve the best quality/price ratio.

Better communication and/or dialogue on the technical specifications to maintain mutual comprehension of the scope of responsibility but also to allow a full transparency and understanding in situations where modifications are necessary.

## **II - OBLIGATIONS OF THE PRIME CONTRACTOR TOWARD THE SUB CONTRACTOR**

### **1. Obligation of careful selection**

Subcontractors shall be selected on a fair and transparent basis and against conditions which allow them to fully assess their future involvement.

In procurements where the Prime Contractor has been entrusted by the Agency with the selection of subcontractors after the Contract has been placed, the applicable procedure for selection of subcontractors is the “Best Practices for the selection of Subcontractors by Prime Contractors in the frame of ESA’s major procurements”.

### **2. Obligation of proportionate flow-down of the provision of the Prime Contract to the Subcontractors**

The subcontracts shall constitute a fair reflection of the scope of involvement and responsibility of the respective subcontractor. The conditions of the Contract between the Agency and the Prime Contractor shall be tailored and flow-down in a fair manner through the industrial team.

### **3. Obligation to inform subcontractors adequately**

- As the implementation evolves and the need for modifications of the work arises, the Prime Contractor should timely communicate any change or new development or generic issues that have/or may have an impact on the subcontract. The procedure for implementing Contract Change Notices shall be identical to the procedure laid down in the Contract between the Agency and the Prime-Contractor for the project.
- The Prime Contractor should provide, as appropriate, financial information to the Subcontractor (as applicable, e.g. financial envelope and/or target price, financial limit of liability where needed).

### **4. Obligation of control (product quality)**

The control relates to the quality of the product:

- Definition of the subcontractors production control criteria: joint definition of control criteria or involvement of third parties;
- Adequate tailoring of applicable standards to reflect the scope of the subcontracted activity;
- Compliance of sub-contractor internal design, development and production means to industrial engineering practice recognised by the Agency.

### **5. Obligation to pay in reasonable time**

Conditions and frequency of payments to subcontractors should be jointly agreed and scheduled in a payment plan. Payments to Subcontractors should reflect their contribution to the project. The Prime Contractor should pay utmost attention to timely approval and processing of subcontractor invoices to remain within the agreed timeframe.

### **III - OBLIGATIONS OF THE SUBCONTRACTOR TOWARDS THE PRIME CONTRACTOR**

#### **1. Obligation to decide carefully**

Like the Prime Contractor, the subcontractor must exercise prudence and, in this respect, consider his ability to respond to the offer (in relation, among others, to his financial capacity to cope with any economic risks, should they arise). If appropriate, subcontractors should refuse orders for which they estimate that they are ill equipped technically, financially or in terms of the quantities or delivery terms requested.

#### **2. Obligation to provide advice and technical assistance**

In so far as subcontractors have developed specific know-how, they should undertake to make this available, allowing a maximum benefit to the project, especially when they are responsible for the design or for the development of prototypes. The subcontractor should also use his know-how or awareness by drawing the Prime Contractor's attention to possible difficulties or generic issues in implementing the project.