



# European Defence Agency

## A guide to the EDA's new European Defence Equipment Market





## **ACKNOWLEDGEMENTS**

During the process of creating the Intergovernmental Regime to encourage transparency and competition in the defence procurement practices of the EDA's Member States, the Agency has received a great deal of help and expertise from a wide spectrum of institutions and organisations. We are very grateful to the defence ministries of the EDA's participating Member States and, in particular, to their defence procurement experts, as well as to the Aerospace and Defence Industries Association of Europe (ASD), the National Associations of Defence Industries of the EDA's Member States, DG Market of the European Commission and a number of defence academics in Europe. In various seminars and meetings, they all helped us to understand the issues better and to build up the set of agreements which are explained in this guide.

# European Defence Agency

## A Guide to the EDA's new European Defence Equipment Market

"For the first time ever, European countries have committed to procure defence equipment from each other if the offer is the best available, instead of automatically contracting with a national supplier."

Javier Solana, Head of the European Defence Agency.

The screenshot shows the European Defence Agency website. A yellow circle highlights the 'Defence Facts' menu, with an arrow pointing to 'Defence Equipment Market'. Another yellow circle highlights the 'EBB Electronic Bulletin Board' banner, with text stating 'Defence suppliers check here for business opportunities across Europe'. A third yellow circle highlights a quote from Javier Solana.

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"The need to bolster Europe's military capabilities to match our aspirations is more urgent than ever. And so, too, is the need for us to respond better to the challenges facing our defence industries. This Agency can make a huge difference."

Javier Solana, High Representative and Head of European Defence Agency

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# Preface



On 1 July 2006, a new “Electronic Bulletin Board” was launched on the European Defence Agency’s website – providing an historic new opportunity for suppliers across Europe to bid for defence contracts in almost all the other Member States of the European Union. This Bulletin Board is a key element of the new defence procurement regime which these Member States have agreed to follow, based on the principles of the new Code of Conduct on Defence Procurement which governments have pledged to one another to follow. Where once national defence contracts went straight to national suppliers, now the first choice should be to open them up to competition across Europe – creating, for the first time ever, a European defence equipment market. The participating Member States, as well as the Agency, have made a huge effort to bring about this agreement. Now it must be implemented effectively. This guide is intended both to give background information about this new regime and also to provide practical help for government departments, prime contractors and small-and medium-sized enterprises. There are opportunities here for everyone. I hope this publication helps you make the most of them.

**Nick Witney**

*Chief Executive, European Defence Agency*

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## New market rules for European defence: why?

The European Union's (EU) defence sector has long been fragmented into protected national markets despite the existence of European Community (EC) procurement rules. This is now changing for the better with new European Defence Agency (EDA)-sponsored principles to help open up the most sensitive segment of the defence market.

Whether you are a defence buyer or seller, large or small, this handbook explains what the new principles are and how to take advantage of them. As national barriers to defence procurement begin to come down in Europe, all defence players will benefit from new levels of efficiency and economies of scale.

Why the new rules? Because the EU requires a coherent defence sector and market mechanisms to develop military capabilities in order to support its foreign and security objectives. From the taxpayer's point of view, moreover, open and transparent procurement enables Europe's defence ministries to stretch their limited defence resources further.

To achieve this, governments and industry need shared guidelines and goals to underpin the rapid development of a common defence equipment market and a strong European Defence Technological and Industrial Base (EDTIB). This is where the European Defence Agency (EDA) has been especially active.

In recent months the EDA has developed, and will continue to build upon, a set of policy tools and guidelines to help national markets achieve greater integration and transparency.

*The purpose of this guide is to explain how governments and industry can efficiently exploit these new policy tools.*

For the past year the Agency and relevant participating Member States<sup>1</sup> have taken essential steps to reduce national obstacles to the development of a more open defence market for the EU. The centrepiece of this effort is the EDA's new Intergovernmental Regime in Defence Procurement — operating within the parameters of Article 296 of the EC Treaty (see more below) — and designed primarily to open up public procurement to cross-border competition. There are also important supplementary measures for establishing these principles at

<sup>1</sup> The EDA's 24 members include all EU countries except Denmark. Two of the 24 members – Hungary and Spain – have opted out of the Intergovernmental Regime in Defence Procurement

industry level throughout the supply chain. An open defence market will only be a success if there are opportunities for players of all sizes. Indeed, particular attention is being paid to promoting and encouraging the participation of small and medium-sized enterprises (SMEs).

The Intergovernmental Regime in Defence Procurement and its associated Code of Conduct also benefit governments directly by requiring transparency and fair and equal treatment of suppliers in national tendering. By definition, this should increase fair competition in defence procurement. Indeed, it will benefit governments as much as industry by promoting economies of scale and offering all a clear view of who is buying what and also where the best prices — and best practices — are operating. Other measures agreed by EDA members also benefit governments by promoting mutual confidence between capitals on security of information and security of supply in times of crisis (see page 11).

Taken together, these initiatives form an integrated and partnered approach — *a regime for defence change in Europe*. It now falls to national governments and industry to take full advantage of it.

The Intergovernmental Regime in Defence Procurement and related initiatives, including the Code of Conduct as well as the tools for using them, is described briefly over the following pages. For readers desiring detailed information, the full texts of documents are included in the annex to this handbook. On-line users can also consult these — including the user manuals — by visiting the EDA's web page at: <http://www.eda.europa.eu/>

## The Intergovernmental Regime in Defence Procurement and the Code of Conduct

The EDA's Intergovernmental Regime in Defence Procurement and its associated Code of Conduct came into force on 1 July 2006 and applies to all defence contracts where the provisions of Art. 296 of the EC Treaty (see box) are applicable. All EDA Member States have signed up to the Regime except for Hungary and Spain, who may do so later.

The Code of Conduct is not legally binding since its participating Member States are choosing voluntarily to align their policies and practices on a reciprocal basis. However, regular reports by the EDA will help to show whether the Code is being interpreted and implemented on a uniform basis and, if not, why not. This will allow for "peer pressure" to be applied, thereby steering Member States toward fair practices.

### WHAT IS ARTICLE 296?

#### Treaty establishing the European Community: ARTICLE 296

1. The provisions of this Treaty shall not preclude the application of the following rules:
  - > (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security
  - > (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

#### **"Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement", 7.12.2006**

*Through a specific Interpretative Communication, the European Commission is clarifying the article's application to Europe's defence sector as a whole. It also intends to unveil legislative proposals in 2007 to define new procurement rules for defence contracts that are not subject to Art. 296. (See: [http://ec.europa.eu/internal\\_market/publicprocurement/key-docs\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm))*

The Code of Conduct applies to all Art. 296 related public procurements worth more than €1 million. However, certain contracts are excluded from its scope. These relate to the purchase of: nuclear weapons and related propulsion systems; chemical, bacteriological and radiological goods and services; and, lastly, cryptographic equipment. Research and technology contracts and collaborative programmes are also excluded. Within the scope of the Regime, Member States may exceptionally procure material without competition in cases that involve:

- pressing operational urgency;
- follow-on procurements and supplementary goods and services;
- extraordinary and compelling reasons of national security.

In these exceptional cases, the Code of Conduct requires the Member State to explain the reasons behind its decision once the procurement route is confirmed.

The Code of Conduct lays down four important operating principles for fair and equal treatment of suppliers. These are:

- **Selection criteria.** All companies will be evaluated on the basis of transparent and objective standards, such as possession of security clearance, required know-how and previous experience;
- **Specifications and statements of requirements.** These will be formulated as far as possible in terms of function and performance. International standards will, wherever possible, be included in the technical specifications rather than national ones or detailed and specific company-linked requirements;
- **Award criteria.** These will be made clear from the outset. The fundamental criterion for the selection of the contractor will be the most economically advantageous solution for the particular requirement, taking into account inter alia considerations of costs (both acquisition and life cycle), compliance, quality and security of supply, and offsets;
- **Debriefing.** All unsuccessful bidders who so request will be given feedback after the contract is awarded.

The EDA acts as a neutral arbiter by monitoring how Member States implement the Code of Conduct and by issuing regular reports and statistics on their performance. This ensures mutual transparency and accountability as well as confidence among Member States that the Regime is working as intended.

Finally, for the time being the new Regime does not deal in detail with other market related issues necessary in order to achieve a level playing field for defence industries, i.e. offsets, state aid, mergers and acquisitions, intra-community transfers, etc. However, the Agency expects Member States and also Industry to identify common views and possible future guidelines for all these areas.

## For Governments: new levels of mutual confidence in defence procurement

Promoting a common defence equipment and technological and industrial base in Europe requires, first and foremost, a coherent view among governments since the latter will be the primary beneficiaries. Opening up national defence markets to cross-border competition clearly offers possibilities for boosting efficiency and better spending of limited defence budgets. Without supporting measures, however, it also carries risks for national security regarding the availability of supplies and the security of sensitive information. The Agency and its Member States promulgated two policies in September 2006 that address each of these concerns.

### **Security of Supply**

The historical focus of nations on self-sufficiency in matters of defence is among the direct causes of Europe's fragmented defence sector today. This fragmentation will persist if there is not adequate assurance among governments that, as cross-border market forces in Europe rationalise their defence sectors, they have unfettered access to the defence equipment and supplies needed in times of crisis.

The first agreement — "Framework Arrangement for Security of Supply Between Subscribing Member States in Circumstances of Operational Urgency" — embrac-

es this critical principle of mutual security of supply. It defines the obligations by which one EDA Member State should provide a supply of defence equipment and services to another in times of need or emergency. For example, it requires Member States to respond to each other's emergency needs as quickly as possible by working closely with their respective national defence industries to ensure a rapid flow of supply to the requesting nation. It also calls on signatories to improve "the predictability of their policies" such as supporting efforts to simplify intra-community transfers and transits of defence goods and technologies (see box).

### **SECURITY OF SUPPLY (SoS): CONFIDENCE AMONG EDA MEMBER STATES**

As a borderless defence market unfolds in Europe, national defence ministries will increasingly rely on EU suppliers outside their home territory. To avoid supply problems in times of war or urgent need, in September 2006 EDA members agreed their 'Framework Arrangement for Security of Supply Between Subscribing Member States (SMS) in Circumstances of Operational Urgency.'

Essentially, the SoS agreement requires signatories to assist and expedite each others' contracted defence requirements, especially in times of operational urgency, and to improve the predictability of their policies. Signatories also aim to simplify their intra-community transfers and transits of defence goods and technologies – an important step benefiting industry as well.

More specifically, the SoS obliges signatories to engage in immediate consultation with a requesting country to ensure that the latter's defence supply need is met as expeditiously as possible. This means that the assisting country or countries must:

- consider urgently and sympathetically any request for provision of defence goods, mainly on a reimbursement basis, from their own stocks;
- engage with suppliers within their own territory to help ensure that appropriate priority is given to the needs of the requesting country, with the latter meeting any additional cost that falls to the assisting country or company that supplied the requested goods or services.

Meanwhile, the EDA and Member States are working on supplementary initiatives to strengthen the SoS. For example, these could cover the industry-government relationship when dealing with another EDA Member State's supply request in cases of urgent operational needs and the aspects of SoS in peacetime.

### **Security of Information**

This sets out the conditions for the mutual disclosure and protection of sensitive information. As mutual dependency in defence capability grows, there must be mutual confidence and, inevitably, a wider circulation of classified information among Code of Conduct subscribing Member States (see box).

The "*Security of Information between Subscribing Member States*" defines the rules for protecting and releasing classified governmental or commercially sensitive information between EDA countries. These can be found on the Agency's website. (For the full text in printed form, please refer to the annex.)

### **SECURITY OF INFORMATION (Sol): COMMON CONDITIONS FOR CLASSIFIED INFORMATION.**

Defence buyers and bidders in one EDA country will not be encouraged to engage in business in others unless classified information is properly shared and protected.

The EDA's September 2006 agreement – "*Security of Information Between Subscribing Member States*" – ensures that defence companies will not be discriminated against on Security of Information (Sol) grounds due to nationality or delayed releases of classified information by contracting authorities.

The Sol agreement sets out a number of requirements. For instance, when use of bilateral security agreements is not possible or appropriate for government information, it calls on signatories to use the EU Council of Ministers' well-established security regulations regarding the protection of classified information.

It also requires signatories to use the "*Common Minimum Standards on Industrial Security*" set out in the agreement's Attachment. For details on the Common Minimum Standards on Industrial Security, see the full text in the annex.

Regarding the protection of commercially sensitive information, the Sol agreement forbids signatories from further disclosing information forwarded to them by companies "*which have designated the information as confidential within the framework of the Code of Conduct.*"

## For Industry: increased business opportunities in defence procurement - a Code of Best Practice in the Supply Chain

Europe's evolving internal defence market must be inclusive. It should not – indeed, cannot – only be for the biggest players. Lower-tier suppliers, especially small and medium-sized enterprises (SMEs), play an important role in the defence supply chain and, furthermore, are a source of the innovative defence technologies that Europe will need in the future. The benefits of a single defence market must accrue to the smaller suppliers by encouraging value to flow up the supply chain. This means adopting good practice within the supply chain itself.

For this reason, in May 2006 the EDA and the Council of the Aerospace and Defence Industries Association of Europe (ASD) jointly agreed a *"Code of Best Practice in the Supply Chain"* as an integral element of the Agency's procurement defence regime. It complements the Code of Conduct by promoting opportunities in the supply chain for those who may not have the resources or capacity to bid as a Prime Contractor for contracts directly, but who could still act as subcontractors.

What is the Code of Best Practice in the Supply Chain? Its two key purposes are to identify subcontracting opportunities for prospective suppliers as soon as practicable, and to encourage their evaluation and selection as suppliers on a fair and equitable basis. The Code of Best Practice in the Supply Chain does not, however, govern the performance of contracts, nor does it specify contractual terms and conditions. What it does do, however, is reinforce the principle that buyers remain ultimately responsible for the selection and management of their supply chain.

At present, subcontracting opportunities are notified and disclosed in one of two ways: either by publication in the national *"Public Contracts Bulletin"* of a Member State subscribing to the EDA's voluntary regime; or via the buyer's website in cases where no national Public Contracts Bulletin exists.

The next step for the EDA will be to migrate European buyers' advertising of their subcontracting opportunities to its existing Electronic Bulletin Board (see below). This evolution towards "EBB2" is set to take place in early 2007. Once accomplished, it will provide European defence suppliers with a single portal — a "one-stop shop" — for reviewing all defence procurement opportunities at both prime contractor and subcontractor levels. Consolidating such information centrally will also enable interested suppliers across EDA Member States to identify opportunities for teaming up with other potential suppliers in order to bid within advertised programmes.

For details of the Best Practices Code, please refer to the full text in the annex.

## The end result: the EDA's Electronic Bulletin Board for "One-Stop Procurement"

The Agency's EBB is the e-portal for bringing Code of Conduct buyers and suppliers together. (See: <http://www.eda.europa.eu/ebbweb>). As explained previously, the Intergovernmental Regime promotes fair and equal opportunities for all buyers and suppliers across the subscribing Member States. Its operating principle rests on transparent and objective criteria for selecting bidders and awarding contracts. The EBB is the vehicle for making such a process happen. The site's second development stage (EBB2) will expand its scope by advertising subcontract opportunities. As a result, this will help establish a more open, fair and competitive defence equipment market throughout the supply chain.

The Agency offers two dedicated secure networks within its EBB for each set of users. There is an extranet for government users and an internet-based communications network for industry users. The EBB functions as the portal to each of these networks and offers easy-to-follow guides for each set of users, which are accessible from the relevant web pages. An intranet-based network is used by the Agency's EBB Team for management of the whole system.

## THE ELECTRONIC BULLETIN BOARD: BASICS FOR INDUSTRY

**Q:** Can I expect «fair and equal treatment» as a prospective supplier if I use the EBB?

**A:** If you have your technological and industrial base in one of the Member States subscribing to the EDA's Intergovernmental Regime, you are entitled to fair and equal treatment by the contracting authority which issues the notice. If you do not have your technological and industrial base in one of the Member States subscribing to the EDA's Intergovernmental Regime, the contracting authority would have to decide whether or not to accept your participation in the competition.

**Q:** If I'm interested in a notice published on the EBB, what should I do?

**A:** You can either: a) connect to the web link (if any) of the national contracting authority mentioned in the notice; or b) get in touch with the national contracting authority's point of contact, whose name and contact details are also mentioned in the notice. (Note: please do not use the EBB's "Contact us" button, since it is not the EDA's role to provide detailed tender information. This should come from national contracting authorities.)

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# ① **Steering Board Decision on an Intergovernmental Regime to Encourage Competition in the European Defence Equipment Market**

Brussels, November 21, 2005

## **The EDA Steering Board,**

- recalling the Conclusions of its second meeting on 22 November 2004, and its direction to the Agency to bring forward proposals on the European Defence Equipment Market (EDEM);
- recalling subsequent direction given by the Steering Board, meeting in National Armaments Directors (NADs) formation on 2 March 2005, on a work programme to provide the basis for a decision on whether or not to proceed with a voluntary, nonbinding intergovernmental regime to encourage competition in defence procurement in the Article 296 area on a fair and transparent basis;
- recalling the European Commission's efforts to facilitate the development of a more integrated EDEM, pursuant to its September 2004 Green Paper on Defence Procurement;
- reaffirming the importance they attach to the development of an internationally competitive European Defence Equipment Market, as a key means to strengthen the European defence technological and industrial base;
- noting that subscription to such a voluntary, non-binding regime would be without prejudice to the subscribing Member States' rights and obligations under the Treaties and their national legislation and international obligations;
- noting the desirability of the widest possible participation in the regime, but that not all pMS might be ready to join at the outset, or indeed later;
- noting that a number of closely associated issues, whilst not constituting a bar to early implementation of the regime, would require further work to enable the improvement of the regime over time;

## **Has decided, at its meeting of 21 November 2005:**

- to implement, from 1 July 2006, a voluntary, non-binding intergovernmental regime to encourage competition in defence procurement in the Art. 296 area - the regime to be operated on the basis of the principles and practices set out in the attached Code of Conduct;
- to direct the Agency, in close cooperation with participating Member States (pMS), to:
  - develop a single portal for announcement of all new contracting opportunities, and to set up a reporting and monitoring system, both to become operational at the time of implementation of the regime;
  - develop a Code of Best Practice in the Supply Chain, to ensure fair opportunities especially for small- and medium-sized enterprises (SMEs), for adoption at the same time as implementation of the regime, as an integral part of it;
  - work further with pMS on security of supply (in all circumstances) and harmonisation of offset requirements at a European level, and on common minimum standards for security of information, perhaps adapted from new Council Security rules; and to present roadmaps for this work for adoption at the next meeting of the Steering Board in NADs formation; and
- to examine the prospects for introducing greater intra-European competition into the R&T area and to develop proposals for systematic data collection on R&T; and
- to invite any pMS deciding not to subscribe to the regime on 1 July 2006 to so notify the Agency by 30 April 2006.

## ② **The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency**

Brussels, November 21, 2005

The European Defence Agency's participating Member States (pMS) have agreed on the need for decisive progress towards creation of an internationally competitive European Defence Equipment Market, as a key means to strengthen the European Defence Technological and Industrial Base.

A significant proportion of their defence procurement takes place outside EU internal market rules, on the basis of Article 296 of the Treaty establishing the European Community. The pMS have therefore decided, without prejudice to their rights and obligations under the Treaties, to establish a voluntary, non-binding intergovernmental regime aimed at encouraging application of competition in this segment of Defence procurement, on a reciprocal basis between those subscribing to the regime.

Member States who choose to subscribe to the Regime ("subscribing Member States", or sMS) will undertake to open up to suppliers having a technological and/or industrial base in each others' territories, all defence procurement opportunities of € 1 m or more where the conditions for application of Art. 296 are met, except for procurement of research and technology; collaborative procurements; and procurements of nuclear weapons and nuclear propulsion systems, chemical, bacteriological and radiological goods and services, and cryptographic equipment.

Within the scope of the regime thus defined, it is recognised that sMS may exceptionally need to proceed with specific procurements without competition, in cases of pressing operational urgency; for follow-on work or supplementary goods and services; or for extraordinary and compelling reasons of national security. In such exceptional cases sMS will, once the procurement route has been confirmed, provide an explanation to the EDA, in its capacity as monitor of the regime on behalf of sMS. Data will also be provided to the Agency on collaborative procurements.

## The key principles of this regime will be as follows:

- a. A voluntary, non-binding approach.** No legal commitment is involved or implied. The regime will operate on the basis of sovereign Member States voluntarily choosing to align their policies and practices, on a reciprocal basis, in this area. Those who elect to join the regime, and follow this Code, will be free to cancel their participation in the regime at any time. No sanction is envisaged for any non-observance of this Code by any SMS, beyond the requirement to account to the other members of the regime. In all cases, the final authority for contract award remains with SMS national authorities.
- b. Fair and equal treatment of suppliers.** We wish to maximise opportunities for all suppliers based on each others' territories to compete in our competitions. This will require transparency and equality of information; arrangements will be made for all relevant new defence procurement opportunities offered by SMS to be notified on one single portal, which will provide advance notification of Invitations To Tender to be issued under the regime, and links to national websites or other directions to where full documentation can be obtained. A brief "vade mecum" will also familiarise suppliers with national defence procurement authorities and procedures. The notification will briefly describe the requirement, the procedures and timescales for the competition and the award criteria. A standard-format announcement will also be posted on contract award. In the conduct of the competition itself, fair and equal treatment will be assured in:
  - **selection criteria.** All companies will be evaluated on the basis of transparent and objective standards, such as possession of security clearance, required know-how and previous experience;
  - **specifications and statements of requirements.** These will be formulated as far as possible in terms of function and performance. International standards will, wherever possible, be included in the technical specifications rather than national ones or detailed and specific companylinked requirements;
  - **award criteria.** These will be made clear from the outset. The fundamental criterion for the selection of the contractor will be

the most economically advantageous solution for the particular requirement, taking into account inter alia considerations of costs (both acquisition and life cycle), compliance, quality and security of supply and offsets;

- **debriefing.** All unsuccessful bidders who so request will be given feed-back after the contract is awarded.
- c. Mutual transparency and accountability.** Each SMS will wish regularly to review comprehensive data which demonstrates how the regime is in practice impacting on defence procurement practices and outcomes. The regime will embody certain classes of exception; when exceptions are invoked or when other irregular events occur, SMS will wish to have an explanation - and the opportunity, if need be, to debate the circumstances in the Agency Steering Board. The EDA will be the instrument to achieve this mutual transparency and accountability. Whilst no SMS will wish the EDA to assume the role of independent investigator of its affairs, we recognise that mutual visibility and reassurance about how each SMS is operating the Code will require an effective EDA monitoring and reporting system with regular reports to the Steering Board. We will therefore ensure that the Agency receives the necessary cooperation from national staffs to provide the insight into the operation of the regime that we will require. SMS will also inform the Agency of any use of Art. 296 in relation to the award of state aid or in mergers and acquisitions issues.
- d. Mutual support.** The privilege of improved opportunity to sell into each other's defence markets implies a reciprocal obligation to do everything possible to ensure supply. In defence procurement, this is not merely a commercial matter – it involves the role of governments as well as industries. We recognise that fully-effective operation of the regime will depend on strong mutual confidence and interdependence. SMS intending to place contracts on suppliers elsewhere in Europe are entitled to expect that the latter are and remain dependable and competitive sources of supply. Uncertainty on this point may count against them in competition. Each SMS government will therefore do everything possible, consistent with national legislation and international obligations, to assist and expe-

dite each others' contracted defence requirements, particularly in urgent operational circumstances, and will work to increase the level of mutual confidence amongst the SMS, in particular by improving the predictability and dependability of its regulations and policies. All SMS will support efforts to simplify amongst them intracommunity transfers and transits of defence goods and technologies.

- e. **Mutual benefit.** We wish to maximise opportunities for all suppliers based on each others' territories to compete in our competitions. This will require transparency and equality of information; arrangements will be made for all relevant new defence procurement opportunities offered by SMS to be notified on one single portal, which will provide advance notification of Invitations To Tender to be issued under the regime, and links to national websites or other directions to where full documentation can be obtained. A brief "vade mecum" will also familiarise suppliers with national defence procurement authorities and procedures. The notification will briefly describe the requirement, the procedures and timescales for be agreed with industry, as an integral part of the regime. Its principal tenets will be to promote transparency and fair competition at the sub-contract level. Prime contractors will be expected to evaluate and select suppliers on a fair and equitable basis. Implementation will be supported by arrangements for bench-marking, reporting and monitoring.

We are confident that mutual transparency and accountability will support over time the growth of confidence and ever-more effective operation of the regime. Experience will also enable us to identify improvements to these initial arrangements, and to consider adaptation and possible expansion of the regime. We will therefore keep its operations under continuous review, based on the EDA-led monitoring and reporting arrangements, and pursue progressively closer alignment of our policies and practices over time.

## ③ Approving the Code of Best Practice in the Supply Chain

Brussels, May 15, 2006

### The EDA Steering Board,

- Recalling its decision of 21 November 2005 to implement, from 1 July 2006, a voluntary, non-binding intergovernmental regime to encourage competition in defence procurement in the Art. 296 area;
- Recalling that in the context of this decision the Steering Board directed the Agency to develop a Code of Best Practice in the Supply Chain, to ensure fair opportunities especially for small- and medium-sized enterprises (SMEs), for adoption at the same time as implementation of the regime, as an integral part of it;
- Recalling that the Steering Board in National Armaments Directors formation on 7 April agreed the Code of Best Practice in the Supply Chain as a proposal which, subject to Industry agreement, could be endorsed by the Ministerial Steering Board on 15 May;
- Noting that the AeroSpace and Defence Industries Association (ASD) has informed the Agency that its Council has endorsed the proposal of the Code of Best Practice in the Supply Chain at its meeting on 27 April

### Has decided, at its meeting of 15 May 2006:

- To approve the **Code of Best Practice in The Supply Chain**

## ④ The Code of Best Practice in the Supply Chain

Brussels, May 15, 2006

**Approved by ASD on 27 April and agreed by the EU Member States participating in the European Defence Agency.**

### Introduction

1. This is a voluntary Code of Best Practice in the Supply Chain (hereinafter referred to as the "CoBPSC") for use where Article 296 of the TEC is invoked and the voluntary regime applies (other than for excepted goods and services); it is to be read and implemented coherently with the Code of Conduct, of which the CoBPSC is an integral part. The CoBPSC is to be complementary to national procedures with such procedures taking precedence where they exist. No legal commitment is involved or implied nor is there a transfer of risk involved or implied by the CoBPSC.
2. The CoBPSC is established to promote the principles of the Code of Conduct on Defence Procurement in the supply chain thereby encouraging increased competition and fair opportunities for all suppliers, including for small and medium-sized enterprises (SMEs). The CoBPSC should encourage value to flow up the supply chain to the benefit of the SMS by adopting good practice down the supply chain.
3. Over time the scope of the CoBPSC may be broadened to encompass all public defence procurements undertaken by SMS.

### Definitions

4. In the CoBPSC, the phrase "relevant administrations of the SMS" in the field of defence embraces the acquisition community throughout these administrations. The word "Suppliers" means suppliers and buyers having a technological and/or industrial basis in a SMS constituting the supply base of these administrations, which includes all existing or potential suppliers and contracting parties at all levels of the supply chain. The word "Buyers" includes the contracting authorities of the relevant administrations of the SMS and commercial purchasers, including prime contractors.

## Objectives

5. The CoBPSC is about influencing behaviour in the supply chain to encourage fair competition at the national level and across the SMS. The CoBPSC does not seek to deal directly with the performance of goods and services nor to specify contractual terms for their supply; rather, the CoBPSC will promote transparency and fair competition at the contract and sub-contract level. Relevant administrations of the SMS, and Prime Contractors and other Buyers in the supply chain are expected to adopt practices that will, wherever efficient and practical, encourage an increase in the level of competition.
6. The CoBPSC will also encourage the evaluation and selection of suppliers on a fair and equitable basis. The objectives are to deliver improvements in quality, efficiency, timeliness and consistency in supply chain relationships in defence acquisition business.
7. The CoBPSC should also encourage a positive and co-operative approach by all stakeholders involved in setting the terms for the supply of goods and services to the relevant administrations; advocating a team approach in all cases, to use best practice to achieve shared goals, while recognising and respecting each other's interests, by the avoidance of confrontation and the adoption of reciprocal behaviours.

## Principles

8. The relevant administrations of the SMS and their Suppliers share the core values of fairness, honesty and openness, efficiency and effectiveness, and professionalism; maintaining the highest levels of integrity, impartiality and objectivity. They will strive to perform their obligations efficiently and to the highest professional standards, treating each other fairly, and with courtesy. The Prime Contractor remains responsible ultimately for the selection and management of its supply chain.
9. The commercial "freedom to contract" in the supply chain is to be maintained except where mandated by law or customer requirement. It is recognised that Buyers must be free to specify terms and performance require-

ments that meet their acquisition needs; however, those terms are to be clearly stated at the outset, drafted unambiguously and implemented in a balanced manner. Eventual direction from the contracting authorities of the relevant administrations of SMS for a specific source of supply may result in a reassessment of risk sharing.

- 10.** The CoBPSC is to take account of the following within the supply chain:
  - a. the relationship between Buyers and their Suppliers;
  - b. the behaviours expected from all Buyers and Suppliers, large and small;
  - c. transparent and fair conduct of competition and Suppliers selection by Buyers.
- 11.** The CoBPSC is to promote opportunities, where competition is efficient, practical and economically or technologically appropriate on a level playing-field basis for qualified and competent suppliers (both in-house and external), including SMEs, to participate in competitions. In the interests of both buyers and Suppliers numbers invited to tender could be limited to ensure optimum economy, whilst honouring (and testing, where appropriate) preferred supplier status and strategic alliances where these exist. This will include the identification of contract and subcontract opportunities as soon as practicable by publication in the Contracts Bulletin of the relevant administrations of the SMS, the Agency's Electronic Bulletin Board or the Suppliers websites as applicable.
- 12.** Buyers will make available the criteria for the evaluation of bids; to evaluate the bids objectively and to notify the outcome promptly to all bidders on the same day, and within the bounds of commercial confidentiality, to debrief winners and losers, upon request, on the outcome of the bidding process and the reasons for not being so selected so as to facilitate better performance on future occasions.
- 13.** In assessing what is economically advantageous in the selection of Suppliers, it shall be taken into consideration that both Buyers and Suppliers need to take strategic sourcing decisions that are wider than individual contract or programme requirements.

- 14.** In evaluating tenders of Suppliers, buyers will consider, amongst other things, the approach undertaken or proposed for the selection of sources of supply (including, where appropriate, make or buy plans), having regard to the principles of the CoBPSC.
- 15.** It is incumbent on Buyers at each tier to resolve any difficulties or concerns of their supply chain in relation to the CoBPSC; where these matters remain they may be notified for transparency purposes to a Point of Contact of the relevant administration of the sMS.
- 16.** All methods of acquisition implementation should be carried out in the same spirit of good practice. Whatever procurement method is chosen there is a need for transparency, clarity and certainty.

## **Monitoring**

- 17.** Monitoring arrangements will be introduced to assess the extent to which the CoBPSC is being applied. It will be based on Prime Contractors providing information on sub-contract opportunities advertised.

## ⑤ Framework Arrangement for Supply Between Subscribing sMS) in Circumstance of Urgency

Brussels, September 20, 2006

### The EDA Steering Board,

- Recalling that the implementation by the subscribing Member States (sMS) of the Intergovernmental Regime to inject transparency and to encourage competition in the European Defence Equipment Market (EDEM) on the basis of the principles of the Code of Conduct on Defence Procurement is associated with the important aspects of the Security of Supply;
- Noting that full effective operation of the Code of Conduct requires that sMS should have full assurance that when placing contracts with suppliers on the territory of other sMS they are entitled to expect that these suppliers are and remain dependable and competitive sources of supply

### Has decided:

1. subscribing Member States (sMS) to the voluntary Intergovernmental Regime to encourage competition in the European Defence Equipment Market (EDEM) being operated on the basis of the principles and practices of the Code of Conduct on Defence Procurement, have agreed that they will do everything possible, consistent with national law and international obligations – and having particularly regard to Title V of the Treaty on the European Union (TEU) – to assist and expedite each others' contracted defence requirements, particularly in circumstances of pressing operational urgency.
2. The sMS will work to increase the level of mutual confidence amongst themselves, in particular by improving the predictability of their policies. All sMS will support efforts to simplify amongst them intra-community transfers and transits of defence goods and technologies.

**In furtherance of these mutual commitments SMS have agreed as follows:**

3. If in times of emergency, crisis or armed conflict one or more SMS request(s) defence goods or services from one or several other SMS, this or these Member States will engage in immediate consultation with the requesting SMS based on the principles of cooperation and solidarity, with the aim of ensuring that the need is met as expeditiously as possible.
4. In addition to taking all possible steps to expedite its administrative processes, each Member State will also, if so requested by another SMS:
  - engage with suppliers on its territory to help ensure that an appropriate priority is given to the needs of the requesting SMS in matters of ordering, re-allocating supplies of defence goods or services or modifying existing defence goods. The requesting SMS will meet any additional cost falling to the assisting SMS or to the company supplying the goods or services;
  - acknowledge and consider urgently and sympathetically any request for provision of defence goods, mainly on a re-imbursement basis, from its own stocks.

## ⑥ Security Of Information Between Subscribing Member States (SMS)

Brussels, September 20, 2006

### The EDA Steering Board,

- Recalling that the implementation by the subscribing Member States (SMS) of the Regime to encourage competition on the basis of the principles of the Code of Conduct on Defence Procurement may be associated with the release of classified information to industry located in other SMS
- Noting that full effective operation of the Code of Conduct requires that SMS should have full assurance that:
  - When opening competition to EU defence companies located in other SMS, their nationally classified information will be protected during the different phases of the procurement procedure;
  - When competing for other MS contracts, their defence companies will not be discriminated on a Security of Information (Sol) grounds because of their nationality or because of the duration of the process of release of classified information;
- Acknowledging the reasonable interest of defence companies participating in the procurement under the Code of Conduct that the commercial sensitivity and confidentiality of their information provided to SMS government establishments is respected;

### Has decided:

#### Regarding protection of classified information:

- subscribing Member States (SMS) will use the EU Council security regulations<sup>1</sup> for their national procurement under the Code of Conduct requiring protection of classified information and when use of bilateral security

<sup>1</sup> Council Decision 2001/264/EC of 19/03/01 adopting the Council's security regulations (amended by Council Decisions 2004/194/EC of 10/02/04, 2005/571/EC of 12/07/05 and 2005/952/EC of 20/12/05).

agreements is not possible or not considered as appropriate by the procuring SMS. In that case, classified information generated or exchanged under the Code of Conduct shall be marked with an appropriate EU classification marking with a caveat limiting the release of such information to the EDA and SMS and without caveat discriminating between SMS;

- subscribing Member States (SMS) will use the "Common Minimum Standards on Industrial Security" as set out in the Attachment to this Steering Board Decision, for their national procurement under the Code of Conduct requiring protection of classified information and when use of bilateral security agreements is not possible or not considered as appropriate by the procuring SMS. These standards are adapted from the industrial security section of the EU Council security regulations.

**Regarding protection of commercially sensitive information:**

- subscribing Member States (SMS) commit themselves, without prejudice to the provisions of the Code of Conduct, in particular those concerning transparency and in accordance with their national laws, not to further disclose information forwarded to them by companies which have designated the information as confidential within the framework of the Code of Conduct.

## Common Minimum Standards on Industrial Security under the EDA's Code of Conduct on Defence Procurement

1. This Attachment deals with security aspects of industrial activities that are unique to negotiating and awarding contracts entrusting tasks involving, entailing and/or containing EU classified information and to their performance by industrial or other entities, including the release of, or access to, EU classified information during the public procurement procedure (bidding period and pre-contract negotiations) done under the Code of Conduct on Defence Procurement.

### DEFINITIONS

2. For the purposes of these common minimum standards, the following definitions shall apply:

- (a) «Classified contract»: any contract to supply products, execute works or provide services, the performance of which requires or involves access to or generation of EU classified information;
- (b) «Classified sub-contract»: a contract entered into by a contractor with another contractor (i.e. the sub-contractor) for the supply of goods, execution of works or provision of services, the performance of which requires or involves access to or generation of EU classified information;
- (c) «Contractor»: an individual or legal entity possessing the legal capability to undertake contracts;
- (d) «Designated Security Authority (DSA)»: an authority responsible to the National Security Authority (NSA) of an EU Member State which is responsible for communicating to industrial or other entities the national policy in all matters of industrial security and for providing direction and assistance in its implementation. The function of DSA may be carried out by the NSA;
- (e) «Facility Security Clearance (FSC)»: an administrative determination by a NSA/DSA that, from the security viewpoint, a facility can afford adequate security protection to EU classified information of a specified security classification level and its personnel who require access to EU classified information have been appropriately security cleared and briefed on the relevant security requirements necessary to access and protect EU classified information;
- (f) «Industrial or other entity»: an entity involved in supplying goods, executing works or providing services; this may involve industrial, commercial, service, scientific, research, educational or development entities;
- (g) «Industrial security»: the application of protective measures and procedures to prevent, detect and recover from the loss or compromise of EU classified information handled by a contractor or sub-contractor in pre-contract negotiations and contracts;
- (h) «National Security Authority (NSA)»: the Government Authority of an EU Member State with ultimate responsibility for the protection of EU classified information;
- (i) «Overall level of the security classification of a contract»: determination of the security classification of the whole contract, based on the classification of information and/or material that is to be, or may be, generated, released or accessed under any element of the overall contract. The overall level of security classification of a contract may not be lower than the highest classification of any of its elements, but may be higher because of the aggregation effect;
- (j) «Security Aspects Letter (SAL)»: a set of special contractual conditions, typically issued by the contracting authority, which forms an integral part of a classified contract involving access to or generation of EU classified information, that identifies the security requirements or those elements of the contract requiring security protection;
- (k) «Security Classification Guide (SCG)»: a document which describes the elements of a programme or contract which are classified, specifying the applicable security classifica-

tion levels. The SCG may be expanded throughout the life of the programme or contract and the elements of information may be re-classified or downgraded. The SCG must be part of the SAL.

- (l) "sMS": a subscribing Member State to the Code of Conduct on Defence Procurement of the EU Member States participating in the European Defence Agency.
- (m) "Contracting sMS": a sMS contracting authority which is negotiating and awarding a contract under the Code of Conduct on Defence Procurement.
- (n) "Host sMS": a sMS where a contractor or sub-contractor participating in a classified contract of a contracting sMS is located or registered in accordance with the national rules and regulations.
- (o) "EU classified information": any information and material, an unauthorised disclosure of which could cause varying degrees of prejudice to the EU interests, or to one or more of its Member States, whether such information originates within the EU or is received from Member States, third states or international organisations<sup>1</sup>.

## ORGANISATION

- 3. A Contracting sMS may entrust by contract tasks involving, entailing and/or containing EU classified information to industrial or other entities located or registered in a sMS.
- 4. The Contracting sMS shall ensure that all requirements deriving from these minimum standards are complied with when awarding classified contracts.
- 5. Each sMS shall ensure that its NSA has appropriate structures to apply these minimum standards on industrial security. These may include one or more DSA.
- 6. The ultimate responsibility for protecting EU classified information within industrial or other entities rests with their management.
- 7. Whenever a contract or a sub-contract falling within the scope of these minimum standards is awarded, the Contracting sMS' NSA/DSA will promptly notify the NSA/DSA of the Host sMS in which the contractor or sub-contractor is located or registered.

## CLASSIFIED CONTRACTS

- 8. The security classification of classified contracts must take account of the following principles:
  - (a) the Contracting sMS determines, as appropriate, the aspects of the contract which require protection and the consequent security classification; in doing so, it must take into account the original security classification assigned by the originator to information generated before awarding the contract;
  - (b) the overall level of classification of the contract may not be lower than the highest classification of any of its elements;
  - (c) EU classified information generated under contractual activities is classified in accordance with the SCG;
  - (d) when appropriate, the Contracting sMS is responsible for changing the overall level of classification of the contract, or security classification of any of its elements, in consultation with the originator, and for informing all interested parties;
  - (e) classified information released to the contractor or sub-contractor or generated under contractual activity must not be used for purposes other than those defined by the classified contract and must not be disclosed to third parties without the prior written consent of the originator.
- 9. The NSAs/DSAs of the Host sMS are responsible for ensuring that contractors and subcontractors awarded classified contracts which involve information classified CONFIDENTIEL UE or SECRET UE take all appropriate measures for safeguarding such EU classified information released to or generated by them in the performance of the classified contract in accordance with national laws and regulations. Non-compliance with the security requirements may result in termination of the contract.
- 10. All industrial or other entities participating in classified contracts which involve access to information classified CONFIDENTIEL UE or SECRET UE must hold a national FSC. The FSC is granted by the NSA/DSA of a Host sMS to confirm that a facility can afford and guarantee adequate security protection to EU classified information to the

<sup>1</sup> As defined in Article 2 of Part 1 of the Annex to Decision 2001/264/EC of 19/03/01 «Security regulations of the Council of the EU».

appropriate classification level.

11. The NSA/DSA of a Host sMS is responsible for granting, in accordance with its national regulations, a Personnel Security Clearance (PSC) to all persons employed in industrial or other entities located or registered in that sMS whose duties require access to EU information classified CONFIDENTIEL UE or SECRET UE subject to a classified contract.
12. Classified contracts must include the SAL as defined in point 2(j). The SAL must contain the SCG.
13. Before initiating the negotiation of a classified contract the Contracting sMS will contact the NSA/DSA of the Host sMS in which the industrial or other entities concerned are located or registered in order to obtain confirmation that they hold a valid FSC appropriate to the level of security classification of the contract.
14. The contracting authority must not place a classified contract with a preferred bidder before having received the valid FSC certificate.
15. Unless required by national laws and regulations of the sMS where the contractor is located, an FSC is not required for contracts involving information classified RESTREINT UE.
16. In the case of bids in respect of classified contracts, invitations must contain a provision requiring that a bidder which fails to submit a bid or which is not selected be required to return all documents within a specified period of time.
17. It may be necessary for a contractor to negotiate classified sub-contracts with sub-contractors at various levels. The SAL must state that the contractor is responsible for ensuring that all subcontracting activities are undertaken in accordance with the common minimum standards contained in this Attachment. However, the contractor must not transmit EU classified information or material to a subcontractor without the prior written consent of the Contracting sMS.
18. The conditions under which the contractor may sub-contract must be defined in the tender and in the contract. No classified sub-contract may be awarded to entities located or registered in a non-sMS without the express written authorisation of the Contracting sMS.
19. Throughout the life of the contract, compliance with all its security provisions will be monitored by the relevant NSA/DSA of the Host sMS in coordination with the Contracting sMS. Notification of security incidents shall be reported, in accordance with the provisions laid down in Part II, Section X of the Council Security Regulations. Change or withdrawal of an FSC shall immediately be communicated to the Contracting sMS and to any other NSA/DSA to which it has been notified.
20. When a classified contract or a classified sub-contract is terminated, the Contracting sMS' NSA/DSA will promptly notify the NSA/DSA of the Host sMS in which the contractor or sub-contractor is located or registered.
21. The SAL must state that the common minimum standards contained in this Attachment shall continue to be complied with, and the confidentiality of classified information shall be maintained by the contractors and sub-contractors, after termination or conclusion of the classified contract or sub-contract.
22. Specific provisions for the disposal of classified information at the end of the contract will be laid down in the SAL or in other relevant provisions identifying security requirements.
23. Visits by personnel of the Contracting sMS to industrial or other entities in the Host sMS performing EU classified contracts must be arranged with the relevant NSA/DSA of the Host sMS. Visits by employees of industrial or other entities within the framework of EU classified contract must be arranged between the NSAs/DSAs concerned. However, the NSAs/DSAs involved in a EU classified contract may agree on a procedure whereby the visits by employees of industrial or other entities can be arranged directly.

## VISITS

## TRANSMISSION AND TRANSPORTATION OF EU CLASSIFIED INFORMATION

24. With regard to the transmission of EU classified information, the provisions of Part II, Section VII, Chapter II, and where relevant of Section XI, of the Council Security Regulations shall apply. In order to supplement such provisions, any existing procedures in force among sMS will apply.
25. The international transportation of EU classified material relating to classified contracts are to be carried out in accordance with sMS' national procedures. The following principles will be applied when examining security arrangements for international transportation:
- (a) security is assured at all stages during the transportation and under all circumstances, from the point of origin to the ultimate destination;
  - (b) the degree of protection accorded to a consignment is determined by the highest classification level of material contained within it;
  - (c) an FSC is obtained, where appropriate, for companies providing transportation. In such cases, personnel handling (including, where appropriate, escorting) the classified consignment, shall be appropriately cleared in compliance with the common minimum standards contained in this Attachment;
  - (d) journeys are point to point to the extent possible, and are completed as quickly as circumstances permit;
  - (e) whenever possible, routes should be only through EU Member States. Routes through non-EU Member States should only be undertaken when authorised by the NSA/DSA of the States of both the consignor and the consignee;
  - (f) prior to any movement of EU classified material, a Transportation Plan is made up by the consignor and approved by the NSAs/DSAs concerned.



Further information about the Intergovernmental Regime to encourage competition in the Defence Equipment Market and the activities of the European Defence Agency is available on our website:  
<http://www.eda.europa.eu>

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