

EUROPEAN CENTRAL BANK

DECISION OF THE EUROPEAN CENTRAL BANK

of 27 January 2009

amending Decision ECB/2007/5 laying down the Rules on Procurement

(ECB/2009/2)

(2009/154/EC)

THE EXECUTIVE BOARD OF THE EUROPEAN CENTRAL BANK,

Having regard to Article 11.6 of the Statute of the European System of Central Banks and of the European Central Bank,

Having regard to Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank ⁽¹⁾, and in particular Article 19 thereof,

Whereas:

(1) The thresholds for public tender procedures laid down in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ⁽²⁾ have been changed by Commission Regulation (EC) No 1422/2007 of 4 December 2007 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts ⁽³⁾. The European Central Bank (ECB), although not subject to Directive 2004/18/EC, intends to apply the same thresholds for its public tender procedures.

(2) To further enhance transparency and competition, in particular for procurements below the thresholds provided for in Decision ECB/2007/5 of 3 July 2007 laying down the Rules on Procurement ⁽⁴⁾, the ECB intends to establish lists of suitable suppliers who may be invited to submit a tender for procurements below the thresholds or to participate in public tenders. The lists will be established following the publication of calls for expressions of interest in the *Official Journal of the European Union*.

(3) To prevent irregularities, combat fraud and corruption and promote sound and efficient management,

candidates or tenderers who are guilty of such acts or have conflicting interests should be excluded from future tender procedures carried out by the ECB. The rules for such exclusion need to be specified in Decision ECB/2007/5.

(4) For the sake of clarity, some of the rules laid down in Decision ECB/2007/5 need to be refined further,

HAS DECIDED AS FOLLOWS:

Article 1

Amendments

Decision ECB/2007/5 is amended as follows:

1. in Article 1 the following definition is added:

‘(p) “call for expressions of interest” is a procedure to establish a list of suitable suppliers who may be invited to participate in procurement procedures.’;

2. Article 2 is amended as follows:

(a) paragraph 3(b) is replaced by the following:

‘(b) procurement procedures in which the ECB participates organised by any of the following: (i) Community institutions and bodies; (ii) international organisations; or (iii) government agencies, provided that the rules governing these procurement procedures are in line with the general principles of Community procurement law’;

(b) paragraph 3(c) is replaced by the following:

‘(c) agreements with other Community institutions and bodies, international organisations or government agencies, which the ECB enters into in the fulfilment of its public tasks’;

⁽¹⁾ OJ L 80, 18.3.2004, p. 33.

⁽²⁾ OJ L 134, 30.4.2004, p. 114.

⁽³⁾ OJ L 317, 5.12.2007, p. 34.

⁽⁴⁾ OJ L 184, 14.7.2007, p. 34.

3. Article 4(3) is replaced by the following:

‘3. The following threshold amounts shall apply:

(a) EUR 206 000 for supply and service contracts;

(b) EUR 5 150 000 for works contracts.’;

4. Article 13 is amended as follows:

(a) paragraph 2 is replaced by the following:

‘2. The ECB may also use the negotiated procedure where no acceptable tenders have been obtained in response to an open or restricted procedure or a competitive dialogue. The ECB may refrain from publishing a new contract notice if it includes in the negotiated procedure exclusively all the tenderers who participated in the previous procedure, met the selection criteria and submitted their tenders in accordance with the formal tender requirements. If no tenders have been obtained or no tenders that meet the formal tender requirements, the ECB may also start a negotiated procedure without notice in accordance with Article 29. In all cases, the original terms of the contract shall not be substantially altered.’;

(b) paragraph 5 is replaced by the following:

‘5. Following the evaluation of the tenders, the ECB may negotiate with tenderers in order to bring their tender in line with the ECB’s requirements. The ECB may start negotiations either:

(a) with the best-ranked tenderer. If the negotiations with the best-ranked tenderer fail, the ECB may take up negotiations with the next ranked tenderer; or

(b) simultaneously with several tenderers who best meet the award criteria. The number of tenderers admitted to the negotiations may be reduced in successive stages by applying the award criteria set out in the contract notice or the invitation to tender.

Before starting negotiations, the ECB shall inform all tenderers who are eligible for negotiations on how the negotiations will be conducted.’;

5. in Article 15 the following sentence is added at the end of paragraph 4:

‘Article 30(1) and (2) shall apply accordingly.’;

6. the following Article 16a is added:

‘Article 16a

Call for expressions of interest

1. The ECB may apply a call for expressions of interest if it intends to award several contracts which cover the same or similar subject-matter. Unless specified otherwise in this Article, the procedure shall follow the restricted procedure rules.

2. For the purpose of establishing a list of suitable suppliers, the ECB shall publish a contract notice in the *Official Journal of the European Union* specifying as a minimum the subject of the contracts to be awarded, the eligibility and selection criteria and the deadline for receipt of applications to be considered for the first use of a list of suitable suppliers (hereinafter the list).

3. The list shall be valid for no more than four years from the date on which the contract notice is sent to the Office for Official Publications of the European Communities. A supplier may submit an application to be included in the list at any time during the period of validity of the list, with the exception of the last three months of that period. The application shall be accompanied by the documentation specified in the contract notice. To be considered for the first use of the list, suppliers shall submit their application within the deadline specified in the contract notice.

4. Following the receipt of applications, the ECB shall verify the eligibility of candidates and evaluate the applications against the selection criteria set out in the contract notice. The ECB shall include all candidates meeting the eligibility and selection criteria in the list. The ECB shall inform the candidates at the earliest possible opportunity of their inclusion in the list or of their rejection.

5. Suppliers included in the list shall inform the ECB without undue delay of any substantial changes affecting their eligibility or capacity to perform the contract. Moreover, suppliers included in the list may provide the ECB with updated or additional documentation, if they deem it necessary.

6. If the ECB intends to award a contract the estimated value of which is below the thresholds laid down in Article 4(3), it shall invite at least three or five suppliers included in the list, if available, to submit a tender in accordance with the procedure set out in Article 29. The ECB shall invite the suppliers who best meet the selection criteria set out in the contract notice in view of the contract to be awarded.

7. If the ECB intends to award a contract the estimated value of which exceeds the thresholds laid down in Article 4(3), it shall publish a simplified contract notice in the Official Journal describing the scope of this specific contract. Interested suppliers who are not yet included in the list may submit an application to be included in the list within the deadline specified in the simplified contract notice, which shall not be less than 15 days from the date on which the simplified contract notice is sent. Following evaluation of the applications received, the ECB shall invite at least five suitable suppliers included in the list to submit a tender provided that a sufficient number of suppliers is available. The ECB shall select the suppliers who best meet the selection criteria set out in the contract notice in view of the contract to be awarded. Article 12(4) and (5) shall apply accordingly.

8. In the cases described in paragraphs 6 and 7, the ECB may request the suppliers included in the list to provide updated information and documentation relevant for the fulfillment of the eligibility and selection criteria.;

7. Article 21(2) is replaced by the following:

'2. If candidates or tenderers consider that the ECB's requirements laid down in the contract notice, the invitation to tender or supporting documents are incomplete, inconsistent or illegal or that the ECB or another candidate/tenderer has infringed the applicable procurement rules, they shall notify their concerns to the ECB in writing without undue delay. The time limit shall start to run from the moment they become aware of the irregularity or could reasonably have become aware of it. The ECB may then either correct or supplement the requirements or remedy the irregularity as requested, or reject the request indicating the reasons therefor. Objections which were not communicated to the ECB without undue delay may not be raised at a later stage.;

8. Article 24 is amended as follows:

(a) paragraphs 3 to 5 are replaced by the following:

'3. Candidates and tenderers shall submit only one application or tender. The ECB may exclude from participation any candidates/tenderers who submit a separate application or tender and who:

- (a) are members of the same group of affiliated undertakings as another candidate/tenderer;
- (b) are members of a temporary grouping together with other candidates/tenderers;
- or
- (c) offer a substantial part of the contract to be awarded to another candidate/tenderer as subcontractor,

if there are indications that they have received information regarding the application or tender prepared by another candidate/tenderer or if the submission of separate applications/tenders distorts otherwise free competition among candidates/tenderers.

4. The ECB shall exclude candidates or tenderers from participation if they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, money laundering, involvement in a criminal organisation or any other illegal activity detrimental to the financial interests of the Communities, of the ECB or of the NCBS.

5. The ECB may exclude candidates or tenderers from participation at any time if:

- (a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*;
- (c) they have been guilty of grave professional misconduct;
- (d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed;
- (e) they have been declared by a court or an arbitration tribunal to be in serious breach of contract for failure to comply with their contractual obligations following another tender procedure;
- (f) they or their management, staff or agents are subject to a conflict of interest;
- (g) they are guilty of serious misrepresentation in supplying the information required by the ECB;
- (h) they contact other candidates or tenderers with the purpose of restraining competition.;

(b) the following paragraphs 6 and 7 are added:

'6. Candidates or tenderers shall certify that they are not in one of the situations listed in paragraphs 4 and 5 and/or provide the evidence specified in the contract notice or invitation to tender. If such circumstances arise in the course of the procedure the candidate/tenderer concerned shall inform the ECB without undue delay thereof.

7. The ECB may exclude a supplier that is in one of the situations described in paragraphs 4 and 5 from participation in any future tender procedure for a reasonable period of time. The ECB shall decide on the exclusion and determine the period of its duration applying the principle of proportionality, taking into account in particular the seriousness of the offence, the time which has elapsed since the offence was committed, the duration and recurrence of the offence, the intention or degree of negligence of the supplier concerned and the measures taken by the supplier to avoid similar offences in the future. The period of exclusion shall not exceed 10 years. Prior to taking a decision to exclude a supplier, the ECB shall give the supplier an opportunity to express its views unless the facts justifying the exclusion are laid down in a judgment which has the force of *res judicata*. The ECB shall notify the supplier in writing of its decision and the main reasons therefor.'

9. Article 28(2) is replaced by the following:

'2. The notification shall be sent at least 10 days prior to the signature of the contract by the ECB if the notification is sent by fax or electronic means, or at least 15 days prior to the signature of the contract if other means of communication are used.'

10. Article 29 is amended as follows:

(a) paragraph 3 is replaced by the following:

'3. The ECB shall select the suppliers invited to participate in the tender procedure either among the tenderers admitted to a dynamic purchasing system or, where no such system is in place, from a list of suitable suppliers drawn up following a call for expressions of interest or, where no such list is established, on the basis of a proper market analysis. In the latter case, the pre-selection of suitable suppliers shall be at the ECB's sole discretion.'

(b) paragraph 5 is replaced by the following:

'5. The tenders received shall be evaluated against the criteria set out in the request for a proposal. Following the evaluation of the written tenders, the ECB may enter negotiations with the tenderers if that possibility was announced in the request for a proposal. The negotiations may be carried out as consecutive negotiations in the order of the tenderers' ranking or as parallel negotiations with several tenderers who best meet the award criteria.'

Article 2

Entry into force

1. This Decision shall enter into force on 1 March 2009.

2. Tender procedures started before the entry into force of this Decision shall be completed in accordance with the original provisions of Decision ECB/2007/5. For the purpose of this provision a tender procedure is deemed to be started on the day on which the contract notice was sent to the *Official Journal of the European Union* or, in cases where no such notice is required, on the day when the ECB invited one or several suppliers to submit a tender.

Done at Frankfurt am Main, 27 January 2009.

The President of the ECB
Jean-Claude TRICHET