

# 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 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 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 expedite 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 intra-community transfers and transits of defence goods and technologies.

- e. **Mutual benefit.** We recognise, too, that this regime will not prosper unless all SMS find benefit in subscribing to it. An important part of this is the expansion of opportunities for

small- and medium-sized companies from across Europe to sell into a continental-scale market. In defence procurement, the customers for such companies may be a prime contractor rather than the end-user. We will therefore seek to ensure that fair competition and the benefits of the regime are driven down the supply-chain. We accordingly see a Code of Best Practice in the Supply Chain, to 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.