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**Notice of
Regulations on Contract Awards
for Public Supplies and Services- Part A
(VOL/A)
Version 2009**

Promulgated on 20 November 2009

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for Public Supplies and Services - Part A
(VOL/A)
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Notice is given below of the new version of VOL Part A (formerly *Verdingungsordnung für Leistungen – Teil A*) adopted by the German Committee on Government Procurement Contracts for Public Supplies and Services (DVAL), which, however, are not yet applicable for contracting authorities.

It replaces VOL Part A (VOL/A) in the version published on 6 April 2006 (Federal Gazette No. 100a of 30 May 2006) as rectified by the corrigendum of 7 June 2006 (Federal Gazette p. 4368)

The provisions of Section 1 of VOL/A apply for contracts awarded by contracting authorities for supplies and services below the thresholds specified in Article 100(1) of the Act against Restraints of Competition (GWB). The obligation to apply Section 1 of VOL/A follows from the Federal Budget Code and federal state or municipal budget regulations.

The application of Section 2 of VOL/A is binding by virtue of a corresponding reference in the Regulation on the Award of Public Contracts (Public Tender Regulation). The amendment of the Public Tender Regulation is currently in preparation by the German Federal Government.

Due to the Regulation amending the Rules on Awarding Contracts in Transport, Drinking Water Supply and Energy Supply of 23 September 2009 (Federal Law Gazette, p. 3110), the previous Sections 3 and 4 no longer apply.

Complementing the Act on Modernising Public Procurement Law of 20 April 2009 (Federal Law Gazette, p. 790) in Part Four of GWB, the new version of VOL/A proceeds with implementing the decision of the German Federal Government on priorities for simplifying public procurement law in the present system of 28 June 2006.

In particular, the previous structure of basic paragraphs and a-paragraphs has been abandoned for awards equal to or exceeding the EU thresholds. The provisions of Sections 1 and 2 are now self-contained and apply respectively for awards below the EU thresholds (Section 1) and to awards equal to or exceeding the EU thresholds (Section 2).

Furthermore, the following additional ex ante and ex post transparency obligations have been included in VOL/A:

- National notices (ex ante) in internet portals must be accessible centrally via a search function of the internet portal www.bund.de.
- In two exceptional cases of restricted invitations to tender, public a call for competitions must always be held.
- Contracting authorities are obliged to provide certain minimum information on every contract awarded equal to or exceeding EUR 25,000 without value added tax after restricted invitations to tender and single tendering procedures without a call for competitions for a period of three months (ex post).

To curtail excessive demands by contracting authorities for requirements of proof, stricter obligations have been introduced on providing grounds for requiring evidence of qualification beyond self-declarations by enterprises. This will make a major contribution to reducing the costs of bureaucracy in enterprises.

Supplementing the definition under Article 101(6), second sentence of GWB, the 'dynamic electronic procedure' has been implemented in VOL/A and is therefore permissible in future. DVAL has refrained from implementing the 'electronic auction' under Article 101(6), first sentence of GWB for reasons of policy on small and medium-sized enterprises.

For the purpose of clarifying the new provisions, the notes on VOL/A have been updated (Annex IV).

To ensure the uniform application of the new version of VOL/A, Section 1 of VOL/A shall also not apply until the date of entry into force of the amended Public Tender Regulation. To ensure legal certainty in this connection, electronic purchasing procedures begun up to three months after entry into force of the Public Tender Regulation can be brought to conclusion under the law applying before entry into force of the Public Tender Regulation.

Berlin, 20 November 2009

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Federal Ministry of Economics and Technology

For the Ministry

Dr Bettina Waldmann

**Regulations on Contract Awards for
Public Supplies and Services (VOL)**

Part A

**General Provisions on
Contract Awards for Public Supplies and Services
(VOL/A)**

Version 2009

Table of Contents

	Page
Section 1: Provisions on Contract Awards for Public Supplies and Services	7
Article 1 Scope of Application	7
Article 2 Principles	7
Article 3 Types of Award	8
Article 4 Framework Agreements	9
Article 5 Dynamic Electronic Procedures	9
Article 6 Competitors	10
Article 7 Contractual Specifications	11
Article 8 Tender Documents	11
Article 9 Contractual Terms and Conditions	12
Article 10 Time Limits	12
Article 11 Principles of Information Transfer	12
Article 12 Notice, Forwarding of Tender Documents	12
Article 13 Form and Contents of Tenders	13
Article 14 Opening of Tenders	14
Article 15 Details of Tenders, Non-negotiability	14
Article 16 Verification and Evaluation of Tenders	14
Article 17 Cancellation of Award Procedures	15
Article 18 Contract Award	16
Article 19 Unsuccessful Candidates and Tenders, Information	16
Article 20 Documentation	16
Section 2: Provisions on Contract Awards for Public Supplies and Services under the Scope of Application of Directive 2004/18/EC	17
Article 1 EC Scope of Application	17
Article 2 EC Principles	17
Article 3 EC Types of Award	17
Article 4 EC Framework Agreements	21
Article 5 EC Dynamic Electronic Procedures	22
Article 6 EC Competitors	23
Article 7 EC Evidence of Qualification	24
Article 8 EC Contractual Specifications, Technical Requirements	27
Article 9 EC Tender Documents	28
Article 10 EC Invitation to Tender and Take Part in Competitive Dialogue	29
Article 11 EC Contractual Terms and Conditions	30

Article 12 EC	Time Limits	30
Article 13 EC	Principles of Information Transfer	31
Article 14 EC	Requirements for Requests to Participate	32
Article 15 EC	Notice, Despatch of Tender Documents	32
Article 16 EC	Form and Contents of Tenders	33
Article 17 EC	Opening of Tenders	34
Article 18 EC	Details of Tender Contents, Non-negotiability	34
Article 19 EC	Qualification and Evaluation of Tenders	34
Article 20 EC	Cancellation of Award Procedures	35
Article 21 EC	Contract Award	36
Article 22 EC	Unsuccessful Candidates and Tenders	36
Article 23 EC	Notice of Contract Award	36
Article 24 EC	Documentation	37
Annex I:	Part A	38
	Part B	41
Annex II:	Requirements relating to devices for the electronic receipt of tenders, requests for participation and tenders	42
Annex III:	Council Regulation (EEC, Euratom) No. 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits	43
Annex IV:	Notes on VOL/A	46
TS Annex:	Technical Specifications	52

VOL Part A General Provisions on Contract Awards for Public Supplies and Services (VOL/A)

Section 1: Provisions on Contract Awards for Public Supplies and Services

Article 1

Scope of Application

The following rules shall apply for awarding public contracts (for supplies and services). They do not apply

- for construction works that fall under the scope of the Regulations on Contract Awards for Public Works - VOB - and
- for services performed as part of an independent professional activity¹ or offered in competition with independent professionals. This is without prejudice to budgetary regulations.²

Article 2

Principles

(1) As a rule, contracts shall be awarded in competition through transparent award procedures to skilled, efficient and reliable (qualified) enterprises at reasonable prices. No enterprise may be discriminated against.

(2) Contracts shall be subdivided into partial lots and by type or trade (technical lots). On award, such divisions or separations need not be made, if this is warranted on economic or technical grounds.

(3) Award procedures may not be conducted merely for the purpose of market research and estimating returns.

(4) When awarding contracts, account must be taken of the provisions on prices for public contracts.²

Article 3

Types of Award

(1) Public invitations to tender are procedures in which an unrestricted number of enterprises are publicly requested to submit tenders. In restricted invitations to tender, enterprises are generally publicly invited to take part (a call for competition) and a limited number from the group of candidates is then requested to submit tenders. Single tendering is a procedure in which the contracting authorities, with or without a call for competition, generally approach

¹ Cf. Article 18(1.1) of the Income Tax Act (EStG):

(1) Income from a professional activity is:

1. Income from independent professional activity. Independent professional activity includes the independent professional exercise of scientific, artistic, literary, teaching or educational activity, the independent professional occupations of physicians, dentists, veterinary practitioners, lawyers, notaries, patent agents, land surveyors, engineers, architects, trade chemists, accountants, tax consultants, consultant economists and business economists, chartered accountants (attested auditors of books), tax agents, non-medical practitioners, dentists, physiotherapists, journalists, photo-journalists, interpreters, translators, pilots and similar professions. A member of a liberal profession as defined in the first and second sentences is also engaged in an independent professional activity when he avails himself of the help of professionally trained personnel; this is on condition that by virtue of his own expertise he acts in a managerial capacity on his own responsibility. Representation in the case of temporary incapacity is without prejudice to a managerial activity with sole responsibility;...

² Pricing Regulation No. 30/53 for Government Contracts of 21 November 1953 (Federal Gazette No. 244 of 18 December 1953), last amended by Pricing Regulation 1/86 of 15 April 1986 (Federal Law Gazette. I p. 435 and Federal Gazette p. 5046) and Pricing Regulation No. 1/89 of 13 June 1989 (Federal Law Gazette. I p. 1094 and Federal Gazette p. 3042)

several selected enterprises to negotiate with one or more on the contractual terms and conditions.

In restricted invitations to tender and single tendering procedures, several – never less than three - candidates must be requested to submit a tender.

(2) Contracts are awarded in a public invitation to tender. A restricted invitation to tender or a single tendering procedure is permissible in duly justified exceptional cases.

(3) A restricted invitation to tender with a call for competition is permissible, if

a) due to its special nature, the performance can only be rendered by a limited number of enterprises, particularly where exceptional qualification is required (Article 2(1), first sentence),

b) a public invitation to tender is inexpedient for other reasons (e.g. urgency, secrecy).

(4) A restricted invitation to tender without a call for competition is permissible, if

a) a public invitation to tender has not led to an economically advantageous outcome,

b) the public invitation to tender would incur costs for the contracting authority or the candidates which would not stand in reasonable relation to the benefit gained or the value of the performance.

(5) Single tendering procedure is permissible, if

a) after cancellation of a public or restricted invitation to tender a repetition holds no prospect of an economically advantageous outcome,

b) subsequent to development services, contracts of adequate scope and for adequate periods must be awarded to enterprises involved in the development,

c) if the supplies of goods or the provision of services are needed for the performance of specialist scientific-technical tasks in research, development and studies that are not intended for the purpose of maintaining the general operations and infrastructure of an agency of the contracting authority,

d) with repeat contracts of minor value following on an existing contract no higher price is expected than for the initial performance and the repeat contracts altogether do not exceed 20 per cent of the value of the initial contract,

e) replacement or accessory parts for machinery and equipment are to be obtained from the initial supplier and these parts cannot be procured at adequate quality or on economically advantageous terms and conditions from other enterprises,

f) this is necessary for reasons of secrecy,

g) due to circumstances which could not have been foreseen by the contracting authorities, the performance is of special urgency and the reasons for such urgency cannot be ascribed to the conduct of the contracting authorities,

h) the type and scope of performance cannot be described clearly and exhaustively enough prior to award to be able to expect adequately comparable tenders,

i) it is permissible up to a certain maximum value under executive regulations of a federal minister - possibly a federal state minister,

j) contracts are to be awarded solely to workshops for disabled persons,

k) contracts are to be awarded solely to penal establishments,

l) only one enterprise is eligible to perform the contract for special reasons.

6) Services up to an anticipated contract value of EUR 500 (without value added tax) can be procured without award procedure in keeping with the budgetary principles of sound financial management (direct purchase).

Article 4

Framework Agreements

(1) Framework agreements are contracts that one or several contracting authorities may award to one or several enterprises to stipulate the terms and conditions for specific contracts placed during a specific period of time, particularly the estimated price. The envisaged contractual scope must be defined as exactly as possible and notification given, need not, however, be finalised. The contracting authorities may not conclude several framework agreements for the same contractual performance. The term may not exceed four years, unless the contract subject-matter or other special circumstances justify an exception.

(2) Specific contracts may only be awarded between contracting authorities that have given notice of their prospective requirements for the award procedure and the enterprises with which framework agreements have been concluded.

Article 5

Dynamic Electronic Procedures

(1) The contracting authorities can define a dynamic electronic procedure for awarding contracts. A dynamic electronic procedure is an open, limited-term, fully electronic award procedure for commonly used purchases, where the specifications generally available on the market meet the requirements of the contracting authority. In setting up the dynamic electronic procedure and awarding the contracts, the contracting authorities shall only use electronic means as per Article 11(2 and 3) and Article 13(1 and 2). They must conduct this procedure in all phases from setup to contract award as an open award procedure in compliance with the provisions on public invitations to tender. All enterprises that have met the selection criteria and submitted an indicative tender in keeping with the tender documents and any other documents shall be admitted to take part. The enterprises may improve on their indicative tenders at any time, provided they continue to comply with the tender documents.

(2) In the dynamic electronic procedure, the following requirements have to be met:

- a) The notice must specify that the award procedure is a dynamic electronic procedure.
- b) The tender documents must detail in particular the subject-matter of the intended purchases and all requisite information on the dynamic electronic procedure, on the electronic equipment used by the contracting authority, the data formats and the technical arrangements and specifications for connection.
- c) From the time of publication of the notice and until completion of the dynamic electronic procedure, open, direct and unrestricted access to the tender documents and the additional documents must be assured by electronic means and the Internet address cited in the notice where these documents can be accessed.
- d) Throughout the dynamic electronic procedure, the contracting authorities shall enable each enterprise to submit an indicative tender to allow them to participate in the dynamic electronic procedure. They shall appraise this tender within an adequate period. The contracting authorities shall notify the enterprise without delay whether it has been admitted to the dynamic electronic procedure or its indicative tender has been rejected.
- e) The contracting authorities shall request all admitted enterprises to submit final tenders for the contracts to be awarded. They shall set an appropriate time limit for the submission of the tenders. They must award the contract to the enterprise that has submitted the most economically advantageous tender in keeping with the award criteria specified in the notice on setting up the dynamic electronic procedure. The award criteria can be specified more precisely in the invitation to submit a final tender.
- f) The term for a dynamic electronic procedure may not generally exceed four years. This term may only be exceeded in especially justified cases.

(3) A decision by the contracting authorities to dispense with a dynamic electronic procedure must be notified without delay to the admitted enterprises.

Article 6

Competitors

(1) Candidates and groups of contractors must be treated as individual candidates and tenderers. On contract award, the contracting authorities can demand that a group of contractors adopts a certain status, where this is necessary for the proper execution of the contract.

(2) Candidates and tenderers may not be charged any fees for the execution of the award procedures.

(3) Only documents and information certifying skills, efficiency and reliability (suitability) may be demanded of the enterprises that are warranted by the subject-matter of the contract. Self-declarations shall be generally required. Contracting authorities must provide grounds in the documentation for any requests for evidence other than self-declarations.

(4) The contracting authorities can allow evidence of suitability obtained through prequalification procedures.

(5) Candidates can be excluded from participation in the competition, if

- a) bankruptcy proceedings or similar legal proceedings have been initiated against their assets, a petition for such proceedings has been filed or has been rejected for lack of sufficient assets,
- b) they are in the process of liquidation,
- c) they are guilty of grave misconduct, which casts doubt on their reliability as a candidate,
- d) they have failed to meet their due obligation to pay taxes and fees as well as contributions to national insurance,
- e) they have made incorrect statements on their suitability in the award procedure.

(6) If a tenderer or candidate has advised or otherwise assisted the contracting authority prior to the commencement of the award procedure, the contracting authority must ensure that competition is not distorted through the participation of this tenderer or candidate.

(7) Penal establishments are not permitted to compete with commercial enterprises.

Article 7

Contractual Specifications

(1) The contractual performance must be described clearly and exhaustively, so that all candidates must understand the description in the same way and comparable tenders can be expected (contractual specifications).

(2) The contractual performance or parts of it must be described in adequate detail employing customary designations as to type, quality and scope. Otherwise it can be described

- a) by purpose, function and other requirements it must meet,
- b) by means of its essential features and constructional details or
- c) by combining these types of description.

(3) Specific makes of products or processes and specific places of origin and supply sources may only be explicitly prescribed if this is warranted by the type of performance contract to be awarded.

(4) Designations for specific makes of products or processes (e.g. brand names) may be employed in exceptional cases, if a description cannot be made with adequate precision using customary designations, but only when accompanied by the wording 'or equivalent'. The addition 'or equivalent' can be omitted, if product specification is warranted on objective grounds. Such grounds are if the contracting authorities would have to procure products or processes with different features to those already available to them and this would entail unreasonable financial outlay or unreasonable difficulties in integration, application, operation or maintenance. These grounds must be documented.

Article 8

Tender Documents

(1) Tender documents must contain all the information required to be able to make a decision on participation in the award procedure or on tendering. As a rule, they must consist of

- a) the letter (invitation to submit a tender or covering letter for the submission of the requested documents),
- b) details on procedure (terms and conditions for application) including specification of award criteria, where not already cited in the notice and
- c) the contractual documents consisting of the contractual specifications and terms and conditions.

(2) In a public invitation to tender, costs may be reimbursed for copying the tender documents in direct or postal delivery. The reimbursement amount must be specified in the notice.

(3) Where the contracting authorities demand evidence, they must compile this in a definitive list.

(4) The contracting authorities can permit alternative tenders. If this is not specified in the notice or the tender documents, no alternative tenders are permissible.

Article 9

Contractual Terms and Conditions

(1) The General Terms and Conditions for Supply and Service Contracts (VOL/B) must always be made the subject-matter of the contract. Additional general terms and conditions may not contradict VOL/B. To meet the requirements of a group of similar individual cases, supplementary terms and conditions can provide for derogations from VOL/B.

(2) Penalties for breach of contract shall only be agreed for exceeding time limits for performance, if this can incur substantial inconvenience. The penalty must be kept within reasonable limits.

(3) Provisions for other limitation periods than under Article 14 of VOL/B need only be made, if this is required by the special nature of the contractual performance.

(4) No or only partial collateral security should be required unless it appears necessary as an exception for the proper and timely execution of the requisite contractual performance. The collateral for the performance of all contractual obligations shall not exceed 5 per cent of the contract value.

Article 10

Time Limits

(1) Sufficient time limits must be set for the preparation and submission of the requests to participate and the tenders as well as the tender validity period (participation and tender submission time limits and binding period of tender).

(2) Until expiry of the time limit for tender submission, tenders may be withdrawn in all forms as provided for their submission.

Article 11

Principles of Information Transfer

(1) The contracting authorities shall indicate in the notice or the tender documents whether information is to be conveyed by post, fax, directly, by electronic means or a combination of these means of communication.

(2) The network chosen for electronic transmission must be generally available and may not restrict access for the candidates or tenderers to the award procedures. The programmes to be used and their technical specifications must be

- generally accessible,
- compatible with information and communication technology products in general use and
- non-discriminatory.

(3) The contracting authorities must ensure that the information on requirements relating to devices for the electronic transmission of the requests for participation and the tenders, including encryption, is accessible to prospective enterprises.

Article 12

Notice, Despatch of Tender Documents

(1) Notice must be given of public invitations to tender, restricted invitations to tender with a call for competition and single tendering procedure with a call for competition in daily newspapers, official gazettes and journals, professional journals or internet portals. Notices in internet portals must be accessible centrally via a search function of the internet portal www.bund.de.

(2) The notice must contain all information needed for a decision on participation in the award procedure or tender submission. At a minimum, it must include:

- a) the name and address of the body issuing the invitation to tender, the awarding body as well as the body to which the tenders or requests for participation are to be submitted,
- b) the type of award,
- c) the form in which requests to participate or tenders have to be submitted,
- d) the type and scope of performance and the place of delivery,
- e) where appropriate, the number, size and type of individual lots,
- f) where appropriate, the admissibility of alternative tenders,
- g) any provisions on time limits for performance,
- h) the name and address of the body issuing the tender documents or where they can be perused,
- i) the time limit for participation or tender submission and the binding period for the tender,
- j) the amount of any collateral security required,
- k) the main terms of payment or information on the documents in which they are contained,
- l) documents to be submitted with the tender or request for participation required by the contracting authorities for appraising the suitability of the candidate or tenderer,
- m) where required, the costs for copying the tender documents in public invitations to tender,
- n) the award criteria, where these are not cited in the tender documents.

- (3) The tender documents must be sent
- a) in public invitations to tender, to all requesting enterprises,
 - b) in restricted invitations to tender with a call for competition and single tendering procedure with a call for competition, to the enterprises that have submitted a request to participate, are suitable and have been selected, or
 - c) in restricted invitations to tender and single tendering procedure without a call for competition, to the enterprises selected by the contracting authorities.
- (4) The names of the enterprises that have received or perused tender documents must be treated confidentially.

Article 13

Form and Contents of Tenders

- (1) The contracting authorities shall specify in what form the tenders are to be submitted. Tenders submitted by post or directly must be signed; tenders transmitted by electronic means must be accompanied by an advanced electronic signature as per the Digital Signature Act³ and in keeping with the requirements of the contracting authorities or with a qualified electronic signature as per the Digital Signature Act; in the cases cited in Article 3(5i), the electronic signature as required under the Digital Signature Act is sufficient and for submission of the tender by fax, the signature on the fax document.
- (2) During invitations to tender, the contracting authorities must ensure that the tenders are kept intact and confidential. Tenders for postal or direct delivery must be submitted in a sealed envelope, designated as such and kept under seal until expiry of the tender submission time limit. Tenders for electronic transmission must be kept intact by appropriate organisational and technical means in keeping with the requirements of the contracting authority and confidentiality must be guaranteed through encryption. The encryption must remain in place until expiry of the time limit for tender submission.
- (3) The tenders must contain all the information, declarations and prices requested.
- (4) No changes may be made to the contractual documents. Corrections by the tenderer to his entries must be beyond reasonable doubt.
- (5) On request, the tenderer shall indicate in the tender whether the subject-matter of the contract is subject to industrial property rights or he or others have applied for such rights. The tenderer must always indicate if he is considering using the information in his tender to apply for an industrial property right.
- (6) In their tenders, groups of contractors must name their respective members and nominate one as an authorised representative for the conclusion and execution of the contract. If any of this information is lacking in the tender, it must be provided before contract award.

Article 14

Opening of Tenders

- (1) In invitations to tender, tenders submitted by postal and direct delivery must be left unopened, provided with a file mark and kept under seal until the date of opening. Electronic tenders must be suitably marked and kept in encrypted form. Tenders submitted by fax must also be given a suitable file mark and held under seal in a suitable way.
- (2) The opening of the tenders shall be conducted and documented jointly by at least two representatives of the contracting authority. Tenderers may not be present. At a minimum, a record shall be made of:
- a) the name and address of the tenderers,

³ Digital Signature Act - SigG

- b) the final amounts of their tenders and other information concerning the price,
- c) whether alternative tenders have been submitted and by whom.

(3) The tenders and their annexes as well as the documentation on opening of tender must also be kept safe and confidential after completion of the award procedure.

Article 15

Details of Tenders, Non-negotiability

In invitations to tender, the contracting authorities may only request tenderers to provide information on the tender or their suitability. No negotiations may be conducted.

Article 16

Verification and Evaluation of Tenders

(1) The tenders must be verified for completeness and the accuracy of factual information and calculations.

(2) Declarations and evidence that are not submitted before expiry of the tender submission time limit as requested by the contracting authorities can be subsequently requested within an extended time limit to be determined. This does not apply for a subsequent request for price quotations, unless these pertain to insignificant individual items whose unit prices do not alter the total price or do not impair evaluation procedure and competition.

(3) Ineligible are:

- a) tenders which do not contain the declarations and evidence requested or subsequently requested,
- b) tenders that are not signed or not provided with an electronic signature,
- c) tenders in which entries altered by the tenderer are not beyond reasonable doubt,
- d) tenders where changes or additions have been made to the contractual documents,
- e) tenders that have not been submitted in due form and time, unless this is not the responsibility of the tenderer,
- f) tenders from tenderers who have reached inadmissible agreements restricting competition with respect to the award,
- g) inadmissible alternative tenders.

(4) In addition, tenders may be excluded from tenderers who could also have been ineligible for participation in competition as candidates (Article 6(5)).

(5) In the selection of tenders eligible for award, only tenderers may be considered that are qualified to perform the contractual obligations.

(6) If a tender appears to be abnormally low in relation to the service to be rendered, the contracting authorities shall require the tenderer to provide an explanation. No contract shall be awarded for tenders whose prices are evidently out of keeping with the contractual performance.

(7) When evaluating tenders, the contracting authorities shall take complete and sole account of the criteria cited in the notice or tender documents.

(8) When deciding on contract award, the contracting authorities shall take into account various criteria of relevance to the subject-matter of a contract, such as quality, price, technical merit, aesthetics, functional utility, environmental features, operating costs, lifecycle costs, cost-effectiveness, customer service and technical assistance, delivery date and delivery or completion time limit.

Article 17

Cancellation of Award Procedures

- (1) The award procedures may be cancelled in full or in part when awarding by lots, if
 - a) no tender has been submitted that meets the terms and conditions for application,
 - b) substantial alterations have been made to basic award procedures,
 - c) they have not yielded any economically advantageous result,
 - d) there are other serious grounds.
- (2) The candidates or tenderers shall be informed without delay of the cancellation of award procedures giving reasons.

Article 18

Contract Award

- (1) The award must be granted to the most economically advantageous tender with due consideration of all circumstances. The lowest tender price alone is not the sole decisive criterion.
- (2) The acceptance of a tender (award) shall be made in writing, by electronic means or by fax.
- (3) In the case of an electronic contract award, an advanced electronic signature shall suffice, in the cases cited in Article 3(5i), the electronic signature under the Digital Signature Act is sufficient and for submission of the tender by fax, the signature on the fax document.

Article 19

Unsuccessful Candidates and Tenders, Information

- (1) The contracting authorities shall notify the unsuccessful tenderers without delay, not later than 15 days after receipt of a relevant request, of the reasons for the rejection of their tender, the features and advantages of the successful tender as well as the name of the successful tenderer and the candidates of the reasons for their rejection.
- (2) After restricted invitations to tender without a call for competition and single tendering procedure without a call for competition, the contracting authorities shall provide information on every contract awarded above EUR 25,000 without value added tax for a duration of three months on internet portals or their websites. This information shall include at least the following:
 - name of the contracting authority and its procurement agency as well as its address data,
 - name of the contracted enterprise; where a natural person is concerned, his consent must be obtained or the information must be kept anonymous,
 - type of award,
 - type and scope of performance,
 - period of delivery or completion.
- (3) The contracting authorities may withhold the information, if its communication would obstruct law enforcement, would not otherwise lie in the public interest, would be detrimental to the legitimate commercial interests of enterprises or impair fair competition.

Article 20

Documentation

The award procedure must be continually documented from the outset to keep a record of the individual stages of the procedure, the individual measures and the grounds for the individual decisions.

VOL Part A General Provisions on Contract Awards for Public Supplies and Services (VOL/A)

Section 2: Provisions on Contract Awards for Public Supplies and Services under the Scope of Application of Directive 2004/18/EC⁴ (VOL/A-EC)

Article 1 EC

Scope of Application

(1) The following rules shall apply for awarding public contracts (for supplies and services), where they are subject to Part 4 of the Act against Restraints of Competition. They do not apply for

- construction works that fall under the scope of the Regulations on Contract Awards for Public Works - VOB - and
- services that fall under the Regulations on Contract Awards for Independent Professional Services - VOF.

(2) This section shall apply without restriction for awarding contracts for services as defined in Annex 1 Part A.

(3) The award of contracts for services as defined in Annex 1 Part B is subject to Article 4(4) of the Public Tender Regulation - VgV.

Article 2 EC

Principles

(1) As a rule, contracts shall be awarded in competition through transparent award procedures to skilled, efficient and reliable (suitable) enterprises at reasonable prices. No enterprise may be discriminated against.

(2) Special account shall be taken of the interests of small and medium-sized enterprises when awarding public contracts. Contracts shall be subdivided into partial lots and by type or trade (technical lots). Several partial or technical lots may be awarded together if required on economic or technical grounds.

(3) Award procedures may not be conducted merely for the purpose of market research and estimating returns.

(4) When awarding contracts, account must be taken of the provisions on prices for public contracts.⁵

Article 3 EC

Types of Award

(1) Contracts shall be awarded in open procedure. In duly justified exceptional cases, a restricted procedure, negotiated procedure or competitive dialogue is permitted.

(2) A restricted procedure is permissible, if

⁴ OJ No. L 134 p. 114 as rectified by the corrigendum of 26 November 2004 (OJ No. L 351 p. 44 of Commission Directive 2005/51/EC of 7 September 2005 (OJ No. L 257 p. 127) and Commission Regulation (EC) No. 2083/2005 of 19 December 2005 (OJ EU No. L 333 p. 28).

⁵ Pricing Regulation No. 30/53 for Government Contracts of 21 November 1953 (Federal Gazette No. 244 of 18 December 1953), last amended by Pricing Regulation 1/86 of 15 April 1986 (Federal Law Gazette. I p. 435 and Federal Gazette p. 5046) and Pricing Regulation No. 1/89 of 13 June 1989 (Federal Law Gazette. I p. 1094 and Federal Gazette p. 3042).

- a) due to its special nature, the contractual performance can only be suitably provided by a limited number of enterprises, particularly if exceptional qualification (Article 2(1) EC, first sentence) is required,
- b) an open procedure would incur costs for the contracting authority or the candidates which would not stand in reasonable relation to the prospective benefit gained or the value of the contract,
- c) an open procedure has not yielded any economically advantageous result,
- d) an open procedure is inexpedient for other reasons.

(3) The contracting authorities may award contracts in negotiated procedure with a prior public invitation to take part (a call for competition), if

- a) only tenders have been submitted in an open or restricted procedure or competitive dialogue that have been excluded, provided no fundamental changes have been made to the original terms and conditions of the contract; the contracting authorities may in these cases refrain from a call for competition, if they include all enterprises in the negotiated procedure that meet the requirements of skills, efficiency and reliability and have submitted tenders in due form and time,
- b) by nature or due to the risks entailed, the contracts do not permit of prior specification of total price,
- c) the type of service contracts to be performed, particularly creative services in Category 6 of Annex I A, preclude the stipulation of contractual specifications with adequate precision to be able to award the contract by selecting the best tender in compliance with the provisions on open and restricted procedures.

(4) The contracting authorities can award contracts in negotiated procedure without a call for competition:

- a) if in an open or restricted procedure no or no economically advantageous tenders have been submitted, provided no fundamental changes have been made to the original terms and conditions of the contract;
- b) if the goods to be supplied are only being produced for the purpose of research, tests, studies, developments or improvements, where this provision does not include batch production to verify the marketability of the product or recover research and development costs;
- c) if due to its exceptional technical or artistic features or the protection of exclusive rights (e.g. patent, copyright), the contract can only be performed by a specific enterprise;
- d) this is absolutely necessary, where for urgent compelling reasons, which the contracting authorities could not have foreseen, the specified time limits cannot be adhered to. The circumstances justifying such compelling urgency may under no condition be attributable to the conduct of the contracting authorities;
- e) in the case of additional supplies by the original contractor that are intended either for the partial replacement of goods or facilities provided for ongoing use or extension of supplies or existing facilities, if a change of enterprise would result in the contracting authorities having to purchase goods with different technical specifications and this would entail technical incompatibility or unreasonable technical difficulties in use, operation or maintenance. As a rule, the terms of these contracts and those of the standing orders may not exceed three years;
- f) in the case of additional services not provided for either in the project initially awarded or in the contract initially concluded, but due to unforeseen circumstances have become necessary to the performance of the services specified therein, provided that the contract is awarded to the enterprise that provides this service, when such additional works or services cannot be technically or economically separated from the main contract without

great inconvenience to the contracting authorities, or when such additional services, although separable from the performance of the original contract, are strictly necessary to its completion.

The total value of the contracts for the additional services may not, however, exceed 50 per cent of the value of the main contract;

- g) in the case of new services consisting in the repetition of similar services assigned by the same contracting authority to the enterprise that received the previous contract, provided they conform with a basic project for which the first contract was awarded either in open or restricted procedure. The possibility of applying negotiated procedure must already be indicated in the invitation to tender for the first project; the total contract value estimated for the subsequent services shall be taken into account by the contracting authority when calculating the contract value. Negotiated procedure may, however, only be applied for up to three years after conclusion of the first contract;
- h) if following a competition as described in paragraph 8 first sentence, the contract under the conditions of this contest must be awarded to the winner or one of the prize-winners. In the latter case, all prize-winners of the contest must be invited to participate in the negotiations;
- i) in the case of goods noted and purchased on a commodity market;
- j) if goods are purchased on particularly favourable terms from suppliers terminating their business activity or from insolvency administrators or liquidators as part of bankruptcy, settlement or composition proceedings or similar proceedings provided for in another Member State.

(5) If the contracting authorities award a contract in restricted or negotiated procedure with a call for competition, they may specify a maximum number of enterprises to be invited to submit a tender. The number must be specified in the notice. In restricted procedure, it must amount to at least five and in negotiated procedure with a call for competition, at least three.

(6) The contracting authorities may arrange for the negotiated procedure to be organised in separate successive phases, so as to reduce the number of tenders to be negotiated or reduce the solutions to be discussed in line with the prescribed award criteria. If the contracting authorities make arrangements for this, they must indicate it in the notice or the tender documents. In the final phase of the procedure enough tenders must be available to ensure genuine competition, provided a sufficient number of suitable candidates is available.

(7) For the purpose of awarding a contract, the contracting authorities may conduct a competitive dialogue, if they are objectively unable to specify

- the technical means to meet their needs and purposes or
- the legal or financial conditions of the project.

To this end, the contracting authorities shall proceed as follows:

- a) They must describe and explain their needs and requirements in the notice or contractual specifications. In the notice, they may specify a maximum number of enterprises be invited to take part in the dialogue, which must amount to at least three.
- b) The contracting authorities shall then enter into dialogue with the enterprises selected following the notice, in which they ascertain and specify how best to meet their needs. They may discuss all details of the contract with the selected enterprises. They must ensure that all enterprises are treated equally during the dialogue, shall not divulge proposals for solutions or confidential information from an enterprise to the other enterprises without its consent and make use of these only as part of the award procedure.
- c) The contracting authorities may arrange for the dialogue to proceed in different successive phases to reduce the number of solutions to be discussed in the dialogue

phase in line with the award criteria. The enterprises whose proposed solutions are not scheduled for the next dialogue phase shall be informed of this.

- d) The contracting authorities shall conclude the dialogue, if one or several solutions have been found that meet their needs or it is evident that no solution can be found. In the case of the first alternative, they shall invite the enterprises to submit their final tender based on the solutions proposed and detailed in the dialogue phase, which must contain all the information needed to execute the project. The contracting authorities may require more precise specifications, clarifications and additions in these tenders. These more precise specifications, clarifications or additions may not, however, result in any change to the basic elements of the tender or invitation to tender that could distort competition or have a discriminatory effect.
 - e) The contracting authorities shall appraise the tenders based on the award criteria set out in the notice or tender documents and select the most economically advantageous tender. They may request the enterprise whose tender has been identified as the most economically advantageous one to explain certain aspects of the tender in more detail or confirm commitments contained in it. This may not result in any changes to essential aspects of the tender or the invitation to tender and distortion of competition or the discrimination of other enterprises taking part in the procedure.
 - f) If the contracting authorities require that enterprises participating in the competitive dialogue prepare drafts, plans, drawings, calculations or other documents, they must provide uniform, adequate reimbursement of costs for this to all enterprises that have submitted the document requested on time.
- (8) Provided the relevant contractual performances do not fall under VOF, the contracting authorities may hold calls to competition (design contests) for procuring services. They must proceed as follows:
- a) The contracting authorities shall announce their intention using the respective formats contained in Annex XII of the Regulation (EC) as regards the standard forms for the publication of notices in the framework of public procurement, as amended, and make the rules governing the conduct of the contest available to those interested in taking part.
 - b) In contests with a limited number of participants, the contracting authorities must set clear and non-discriminatory selection criteria. The number of candidates must suffice to ensure genuine competition.
 - c) The jury may only be composed of members who are independent of the participants in the contest. Where a particular professional qualification is required of participants in a contest, at least a third of the jury members shall have the same or equivalent qualification. The jury shall be autonomous in its decisions and opinions based on projects submitted anonymously, applying criteria cited in the notice. The jury shall prepare a report to be signed by the members on the ranking of the projects it has selected and the individual entries.
 - d) Contracting authorities that have carried out a contest shall notify the Office for Official Publications of the European Communities not later than 48 days after conducting the contest in the format contained in Annex XIII of Regulation (EC) No. 1564/2005. The provisions on the treatment of unsuccessful candidates shall apply accordingly.

Article 4 EC

Framework Agreements

- (1) Framework agreements are contracts that one or several contracting authorities can award to one or several enterprises to stipulate the terms and conditions for specific contracts to be awarded during a specific period of time, particularly the estimated price. The envisaged contractual scope must be defined as exactly as possible and notification given,

but it need not be finalised. The contracting authorities may not conclude several framework agreements for the same performance.

(2) Awarding specific contracts under paragraphs 3 to 6 is only permissible between contracting authorities that have notified their prospective needs for the award procedure and enterprises with which framework agreements have been concluded.

(3) If a framework agreement has been concluded with an enterprise, the specific contracts based on this framework agreement shall be awarded under the terms and conditions of the framework agreement. Before awarding the specific contracts, the contracting authorities may consult with the enterprise involved in the framework agreement in writing and request it to complete his tender if required.

(4) If a framework agreement has been concluded with several enterprises, at least three enterprises must be involved, provided a sufficient number of enterprises meet the selection criteria and a sufficient number of admissible tenders meet the award criteria.

(5) Specific contracts based on a framework agreement concluded with several enterprises shall be awarded

- a) where all terms and conditions have been stipulated in accordance with the terms and conditions of the framework agreement without a renewed a call for competition or
- b) where not all terms and conditions have been stipulated in the framework agreement, after a renewed a call for competition in accordance with the same terms and conditions, which may need to be specified more precisely or with other terms and conditions cited in the framework agreement.

(6) In the case of paragraph 5(b) the following procedure must be adopted:

- a) Before awarding each specific contract, the contracting authorities shall confer with the enterprises in writing on whether they are able to execute the specific contract.
- b) The contracting authorities shall set an appropriate time limit for the submission of the tenders for each specific contract; they must take particular account of the complexity of the contract subject-matter and the time required for the submission of tenders.
- c) The contracting authorities shall specify in what form the tenders are to be submitted; the contents of the tenders must be kept secret until expiry of the tender submission time limit.
- d) The contracting authorities shall award the specific contracts to the enterprise that submits the most economically advantageous tender based on the award criteria cited in the framework agreement.

(7) The term of a framework agreement may not exceed four years, unless the contract subject-matter or other special circumstances justify an exception.

Article 5 EC

Dynamic Electronic Procedures

(1) The contracting authorities can define a dynamic electronic procedure for purchases of goods and services in general use as per Article 101(6), second sentence of GWB. In setting up the dynamic electronic procedure and awarding the contracts, the contracting authorities shall use solely electronic means in accordance with Article 13 (2 and 3) EC and Article 16 (1 and 2) EC. They must conduct this procedure in all phases from setup to contract award as an open award procedure. All enterprises that have met the selection criteria and submitted an indicative tender in keeping with the tender documents and possible other documents, shall be admitted to take part. The enterprises may improve on their indicative tenders at any time, provided they continue to comply with the tender documents.

(2) In the dynamic electronic procedure, the following requirements must be met:

- a) The notice must specify that the award procedure is a dynamic electronic procedure.
 - b) The tender documents must detail in particular the subject-matter of the intended procurements and all requisite information on the dynamic electronic procedure, on the electronic equipment used by the contracting authority, the data formats and the technical arrangements and specifications of the electronic connection.
 - c) From the time of publication of the notice and until completion of the dynamic electronic procedure, open, direct and unrestricted access to the tender documents and the additional documents must be assured by electronic means and the Internet address cited in the notice where these documents can be accessed.
 - d) The contracting authorities must enable every enterprise throughout the term of the dynamic electronic procedure to submit an indicative tender so as to be admitted to take part in the dynamic electronic procedure. They shall appraise this tender within a period of not more than 15 calendar days as of the date of submission. They may prolong the period for tender evaluation, provided that no a call for competition has been issued in the meantime. The contracting authorities shall inform the enterprise without delay about whether it has been admitted to take part in the dynamic electronic procedure or its indicative tender has been rejected.
 - e) A separate a call for competition must be made for every specific contract. Before this a call for competition, the contracting authorities must publish a simplified notice in compliance with Annex IX of Regulation (EC) as regards the standard forms for the publication of notices in the framework of public procurement, as amended, in which all interested enterprises are invited within a period of at least 15 calendar days after dispatch of the simplified notice to submit an indicative tender. The contracting authorities may only issue a call for competition, when all indicative tenders submitted in due time have been evaluated.
 - f) The contracting authorities shall invite all admitted enterprises to submit final tenders for the contracts to be awarded. They must set an appropriate time limit for the submission of the tenders. They shall award the contract to the enterprise that has submitted the most economically advantageous tender according to the award criteria cited in the notice for setting up the dynamic electronic procedure. The award criteria may be defined in more detail in the invitation to submit a final tender.
 - g) The term for a dynamic electronic procedure may not generally exceed four years. This term may only be exceeded in special duly justified cases.
- (3) A decision by the contracting authorities to refrain from a dynamic electronic procedure already in place, must be notified without delay to the admitted enterprises.

Article 6 EC

Competitors

- (1) Candidates or tenderers that are entitled under the legal provisions of the state in which they are domiciled (state of establishment) to provide the service in question may not be rejected solely because they must either be a natural or legal person under the relevant German legal provisions.
- 2) Candidates and groupings of contractors must be treated as individual candidates and tenderers. In the case of contract award, the contracting authorities may demand that a grouping of contractors adopt a certain legal status, if this is necessary for the proper execution of the contract.
- (3) Candidates and tenderers may not be charged a fee for the implementation of the award procedures.

(4) An enterprise may be excluded from participation in an award procedure on the grounds of unreliability, if the contracting authority has knowledge that a person whose conduct is attributable to the enterprise, has been legally convicted under:

- a) Article 129 of the Criminal Code – StGB (Formation of Criminal Organisations), Article 129a of StGB (Formation of Terrorist Organisations), Article 129b of StGB (Criminal and Terrorist Organisations Abroad),
- b) Article 261 of StGB (Money Laundering; Concealment of Unlawfully Acquired Assets),
- c) Article 263 of StGB (Fraud), where the criminal offence has been committed against the budget of the European Communities or budgets administered by the European Communities or on their behalf,
- d) Article 264 of StGB (Subsidy Fraud), where the criminal offence has been committed against the budget of the European Communities or budgets administered by the European Communities or on their behalf,
- e) Article 334 of StGB (Offering a Bribe), also in conjunction with Article 2 of the EU Anti-Corruption Act, Section 1 of Article 2 of the Act Against International Corruption, Article 7(2.10) of the Fourth Criminal Code Amendment Act and Article 2 of the Act on Suspending the Statute of Limitation and Equal Treatment of Judges and Employees of the International Criminal Court,
- f) Section 2 of Article 2 of the Act on Combating International Bribery (Bribery of Foreign Public Officials in International Business Transactions) or
- g) Article 370 of the Fiscal Code, also in conjunction with Article 12 of the Common Market Organisations Implementation Act and Direct Payments (MOG), where the criminal offence has been committed against the budget of the European Communities or budgets administered by the European Communities or on their behalf.

A violation of these provisions shall be treated as equivalent to violations of penal provisions in other states. The conduct of a legally convicted person shall be attributed to an enterprise if he acted responsibly in conducting business on behalf of the enterprise or if supervisory or organisational fault under Article 130 of the Code of Administrative Offences (OWiG) lies with a person in connection with the conduct of another legally convicted person acting on behalf of the enterprise.

(5) Exclusion under paragraph 4 may only be waived on compelling grounds of general interest and if the service cannot be adequately rendered by other enterprises or if due to special circumstances of the individual case the violation does not cast doubt on the reliability of the enterprise.

(6) Candidates can be excluded from participation in competition, if

- a) bankruptcy proceedings or similar legal proceedings have been initiated against their assets or a petition for such proceedings has been filed or has been rejected for lack of sufficient assets,
- b) they are in process of liquidation,
- c) they have committed proven acts of grave misconduct, which casts doubt on their reliability as a candidate,
- d) they have not met their obligation to make due payments of taxes and contributions to statutory national insurance,
- e) they have deliberately made inaccurate declarations as to their suitability in the award procedure.

(7) If a tenderer or candidate has advised the contracting authority or otherwise supported it before the commencement of the award procedure, the contracting authority must ensure that competition is not distorted by the participation of the tenderer or candidate.

Article 7 EC

Evidence of Qualification

(1) Only documents and information certifying skills, efficiency and reliability (suitability) may be demanded of the enterprises that are warranted by the subject-matter of the contract. Self-declarations shall be generally required. Contracting authorities must provide grounds in the documentation for any requests for certification other than self-declaration.

(2) As a rule, the enterprise may be required to provide the following as evidence of its financial and economic standing:

- a) presentation of relevant bank references,
- b) for service contracts, either appropriate bank statements or proof of related professional third-party insurance cover,
- c) presentation of balance sheets or summarised balance sheets of the enterprise, where their publication is prescribed under the company law of the state in which the enterprise is domiciled,
- d) statement of total turnover of the enterprise and turnover with respect to the special type of service which is the subject-matter of the award, each pertaining to the last three financial years.

(3) Depending on the type, scope and purpose of the service to be rendered, the enterprise can provide evidence of its professional and technical capabilities as follows:

- a) by means of a list of the main services rendered over the last three years citing invoice value, time of performance and the public or private contracting entities:
 - in the case of services to contracting authorities by means of a certificate issued or authenticated by the responsible authority,
 - in the case of services to private contracting entities by means of a certificate issued by them; if such a certificate is not available, the enterprise may make a simple declaration,
- b) by means of a description of the technical equipment, the measures taken by the enterprise to assure quality and its study and research facilities,
- c) by means of information on the technical management or technical bodies, regardless of whether they are attached to the enterprise or not, and in particular those engaged in quality assurance,
- d) in the case of contracts for supplies, by means of samples, descriptions and/or photographs of the products to be supplied, whose authenticity must be verified on request of the contracting authority,
- e) in the case of contracts for supplies, by means of certificates from the competent official quality assurance institutes or offices attesting that the services precisely designated by corresponding references comply with certain specifications or standards,
- f) if the type of services to be rendered are complex or if they are intended for an exceptional special purpose, by means of inspection to be performed by the authorities of the contracting authority or by another competent agency agreeing to act on its behalf from the country where the enterprise is domiciled; this inspection shall comprise the production capacities and if necessary the study and research facilities of the enterprise as well as the measures it takes to assure quality,
- g) by means of educational and professional qualifications, particularly of the persons responsible for the services.

(4) The contracting authorities can permit evidence of qualification obtained through prequalification procedures.

(5) The contracting authorities shall already indicate in the notice what evidence must be presented. If an enterprise cannot provide the evidence demanded by the contracting authority for good reason, it can verify its capacity by submitting other evidence considered appropriate by the contracting authority.

(6) As evidence that the knowledge under Section 6 EC paragraph 4 is incorrect and the cases cited therein do not apply, the contracting authorities shall accept an extract from the Federal Central Criminal Register or an equivalent document from the competent judicial or administrative authority of the state of establishment. If a document or certificate is not issued by the country of establishment or does not cite all the cases provided for in full, this may be replaced by a declaration on oath or a solemn declaration to a competent judicial or administrative authority, a notary or a specially qualified professional organisation in the state of establishment.

(7) The contracting authorities may demand of the candidates or tenderers appropriate certificates from the responsible agencies or declarations that the grounds for exclusion cited in Article 6(6) EC do not apply to them. Acceptable as sufficient proof that the cases cited in Article 6(6) EC do not apply includes:

- in the case of letters a and b, an extract from the criminal records, a declaration by the office that keeps the bankruptcy register or, in the absence of this, an equivalent certification from a judicial or administrative authority from the country of origin or establishment of the enterprise indicating that the enterprise is not in such a situation,
- in the case of letter d, a certificate issued by the competent authority of the Member State in question.

If such a certificate is not issued in the country in question or it does not cite all cases provided for in Article 6(6a to 6c) EC, it can be replaced by a declaration on oath made by the enterprise concerned to a judicial or administrative authority, a notary or any other competent authority in the state in question.

In states where such a declaration on oath is not made, this may be replaced by a solemn declaration. The competent authority or the notary shall issue a certificate authenticating the declaration on oath or solemn declaration.

(8) Enterprises can be required to furnish proof that they are recorded in the trade or commercial registry under the legal provisions of the Community state or the signatory state of the EEA Treaty where they are domiciled.⁶

(9) Also as a member of a grouping of contractors, an enterprise may avail itself of the skills and capabilities of other enterprises as evidence of capacity, regardless of the legal status of the relations between it and such enterprises. In this case, it must prove to the contracting authority that it has the requisite means at its disposal to perform the contract, by presenting an appropriate undertaking by these enterprises, for example.

(10) If the contracting authorities demand as proof that the enterprise meets certain quality requirements the submission of certificates from independent quality assurance agencies, these must refer to quality assurance procedures based on the relevant standards and certificates that are certified by agencies that meet European certification standards.

⁶ These professional and trade registers are: in Germany, the Handelsregister and the Handwerksrolle and the Vereinsregister; in Belgium, the Registre du Commerce or the Handelsregister and the Ordres professionnels or Bereopsorden; in Denmark, the Aktieselskabs-Registret, the Forenings-Registret or the Handelsregistret or Erhvervs-og Selskabsstyrelsen; in France, the Registre du commerce and the Répertoire des métiers; in Italy, the Registro della Camera di Commercio, Industria, Agricoltura e Artigianato or the Registro delle Commissioni provinciali per l'artigianato, or the Consiglio nazionale degli ordini professionali; in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers; in the Netherlands, the Handelsregister; in Portugal, the Registo Nacional das Pessoas Colectivas. In the United Kingdom and Ireland, the contractor may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies certifying that the supply company is incorporated or registered or, if this not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is domiciled, in a specific place under a given business name; in Austria, the Firmenbuch, the Gewerberegister, the Mitgliedsverzeichnisse der Landeskammern; in Finland, the Kaupparekisteri/Handelsregistret; in Iceland, the Firmaskrá/Hlutafelagaskrá; in Liechtenstein, the Gewerberegister; in Norway, the Foretaksregisteret; in Sweden, the Aktiebolagsregistret, the Handelsregistret and Föreningsregistret.

Equivalent certificates from agencies from other Member States must be recognised. The contracting authorities shall also recognise other equivalent proof of quality assurance measures.

(11) If when awarding service contracts the contracting authorities require as proof of technical capacity that the enterprises meet specific standards of environmental management the submission of certificates from independent agencies, these must refer to the Community System for Environmental Management and Industrial Inspection (EMAS) or standards of environmental management based on the relevant European or international standards and certified by the relevant agencies that comply with European Community law or European or international certification standards. Equivalent certificates from agencies from other Member States must be recognised. The contracting authorities shall also recognise other evidence of equivalent environmental management measures submitted by the enterprises.

(12) The enterprises are obliged to submit the requested evidence before expiry of the participation or tender submission time limit or the period provided for under Article 19(2), EC, if these are not available to the contracting authority by electronic means.

(13) The contracting authorities may require enterprises to complete or explain the evidence presented.

Article 8 EC

Contractual Specifications, Technical Requirements

(1) The contractual performance must be described clearly and exhaustively, so that all candidates must understand the description in the same way and comparable tenders can be expected (contractual specifications).

(2) The technical requirements must be defined in the contractual specifications:

1. either with reference to the technical specifications defined in the TS Annex and ranked as follows:

- a) national standards transposing European standards,
- b) European technical approvals,
- c) common technical specifications,
- d) international standards and other technical reference systems established by the European standardisation bodies or
- e) if such standards and specifications are lacking, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of products;

each reference shall be accompanied by the words 'or equivalent';

2. or in terms of performance or functional requirements, which must be specified with adequate precision to convey a clear picture of the contract subject-matter and enable the contracting authorities to award the contract;

3. or as a combination of numbers 1 and 2, i.e.

- a) in the form of performance requirements with reference to the specifications under number 1 as a means of presuming conformity with such performance or functional requirements,
- b) or with reference to the specifications under number 1 for certain features and by referring to the performance or functional requirements mentioned in number 2 for other features.

(3) If the contracting authorities refer to the technical requirements cited in paragraph 2(1a), they may not reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which they have referred, once the tenderer proves in his tender to the satisfaction of the contracting authority by whatever appropriate means that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications referred to. An appropriate means would be a technical dossier from the manufacturer or a test report from a recognised body.

(4) If the contracting authorities specify technical requirements in the form of performance or functional requirements, they may not reject a tender which complies with a national standard transposing a European standard or a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down. In their tenders, the tenderers must prove by suitable means that the respective goods or services comply with the performance or functional requirements of the contracting authorities. An appropriate means would in particular be a technical dossier from the manufacturer or a test report from a recognised body.

(5) Where contracting authorities lay down environmental features in terms of performance or functional requirements, they may use the specifications as defined by European or (multi)national eco-labels or by any other eco-label, provided that

- a) they are appropriate to define the features of the supplies or services required by the contract,
- b) the requirements for the eco-label are drawn up on the basis of scientifically verified information,
- c) the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and
- d) they are accessible and available to all interested parties.

In the tender documents, the contracting authorities may indicate in the case of goods or services bearing an eco-label that these presumably comply with the technical specifications described in the performance or functional requirements. The contracting authorities must accept any other suitable evidence, such as technical dossiers from the manufacturer or test reports from recognised bodies.

(6) Recognised bodies denote test and calibration laboratories as defined in the Verification Act and certification and inspection bodies that comply with applicable European standards. Contracting authorities shall accept certificates from recognised bodies established in other Member States.

(7) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain enterprises or certain products. Such references shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible; such references shall be accompanied by the words 'or equivalent'.

Article 9 EC

Tender Documents

(1) Tender documents must contain all the information required to be able to make a decision on participation in the award procedure or on tendering. As a rule, they consist of

- a) the letter (invitation to submit a tender or covering letter for the submission of the requested documents),

- b) details on procedure (terms and conditions for application), including award criteria and their weighting, where not already cited in the notice and
 - c) the contractual documents consisting of the contractual specifications and terms and conditions.
- (2) The contracting authorities must specify the relative weightings of award criteria. This weighting can provide for an appropriate range. Where in the opinion of the contracting authorities weighting is not possible for demonstrable reasons, the contracting authorities shall indicate the criteria in descending order of importance.
- (3) In an open procedure, costs may be reimbursed for copying the tender documents in direct or postal delivery. The reimbursement amount must be specified in the notice.
- (4) Where the contracting authorities demand evidence, they must compile this in a definitive list.
- (5) The contracting authorities can permit alternative tenders. If not specified in the notice or the tender documents, no alternative tenders may be submitted. Where the contracting authorities allow alternative tenders, they must set minimum requirements for these in the notice or tender documents.

Article 10 EC

Invitation to Tender and Take Part in Competitive Dialogue

- (1) If a call for competition has been carried out, based on the documents submitted with the requests to participate or provided by the candidates by electronic means, contracting authorities shall select those candidates that meet the requirements on skills, efficiency and reliability and simultaneously invite these in writing with attached tender documents to submit a tender in a restricted or negotiated procedure or take part in competitive dialogue. Requests to participate that do not meet the requirements of Article 14 EC after expiry of the prescribed time limit for submission may not be taken into consideration.
- (2) In invitations to tender in restricted and negotiated procedures or to invitations to take part in competitive dialogue, the tender documents must contain at least the following:
- a) in the case of restricted and negotiated procedures with public a call for competition, the reference to the published notice,
 - b) in the case of competitive dialogue, the date and place for commencing the dialogue phase,
 - c) all specified award criteria, including their weighting or, where these cannot be provided for demonstrable reasons, their ranking in descending order of importance,
 - d) whether there is an intention to conduct a negotiated procedure or competitive dialogue in separate phases so as to reduce the number of tenders,
 - e) the authority which the candidate or tenderer may approach to verify alleged violations of public procurement provisions.

The information pertaining to letters c and d may also be provided in the contract notice instead of the invitation.

Article 11 EC

Contractual Terms and Conditions

- (1) The General Terms and Conditions for Supply and Service Contracts (VOL/B) must always be made the subject-matter of the contract. Additional general terms and conditions may not contradict VOL/B. To meet the requirements of a group of similar individual cases, supplementary terms and conditions can provide for deviations from VOL/B.

(2) Penalties for breach of contract shall only be agreed for exceeding performance time limits, if this can incur substantial inconvenience. The penalty must be kept within reasonable limits.

(3) Provisions for other limitation periods than under Article 14 of VOL/B need only be made, if this is required by the special nature of the contractual performance.

(4) No or only partial collateral security should be required, unless it appears necessary for the timely and proper execution of the requisite service. The collateral for the performance of all contractual obligations shall not exceed 5 per cent of contract value.

(5) If an enterprise which is not a contracting authority is entrusted with the performance or execution of a public service, the contracting authority shall oblige the enterprise, if it subcontracts third parties, to abide by the rules on accounting for the interests of small and medium-sized enterprises (Article 2(2) EC).

Article 12 EC

Time Limits⁷

(1) When setting the time limits for the receipt of tenders and requests for participation, the contracting authorities shall, regardless of the minimum time limits specified below, take particular account of the complexity of the contract and the time required for the preparation of tenders. The contracting authorities shall set an appropriate time limit in which the tenderers are bound to their tenders (binding time limit).

(2) In the open procedure, the time limit for the receipt of tenders shall be at least 52 days from the date on which the notice was sent.

(3) This time limit for submitting the tender can be shortened, if

- a) the contracting authorities have published an indicative notice as required under Article 15(6) EC using the respective formats (Annex I of the Regulation (EC) as regards the standard forms for the publication of notices in the framework of public procurement, as amended) at least 52 days, but not exceeding 12 months, before the date of despatch of the contract notice in open procedure as under Article 15(1 to 4) EC in the Official Journal of the European Communities or in their buyer profile under Article 15(5) EC. This indicative notice or the buyer profile must contain at least as much information as the format of a notice for the open procedure (Annex II of the Regulation cited in the first sentence [EC]), provided this information was available at the time of the publication of the indicative notice and
- b) the reduced time limit is sufficient for the interested parties to be able to submit proper tenders. As a rule, it should not be less than 36 days from the date of despatch of the contract notice; it may in no case be less than 22 days.

(4) In the case of restricted procedure, competitive dialogue and in negotiated procedure with public a call for competition, the contracting authorities must set a time limit of at least 37 days for the request for participation as of the date on which the notice was sent. In cases of special urgency (accelerated procedure) in restricted and negotiated procedures with a public a call for competition, this time limit may not be less than 15 days or 10 days in the case of electronic transmission, respectively as of the day the notice was sent.

(5) In restricted procedure, the contracting authorities must set a time limit for receipt of tender of at least 40 days as of the day the invitation to tender was sent. In cases of special urgency, the time limit shall not be less than 10 days as of the day the invitation to tender was sent. Where the contracting authorities have published an indicative notice, they may generally set the time limit for the receipt of tenders at 36 days as of the day the invitation to

⁷ The time limits shall be set in keeping with Council Regulation (EEC, Euratom) No. 1182/71 of 3 June 3 1971 determining the rules applicable to periods, dates and time limits, OJ EC No. L 124 of 8 June 1971, p. 1 (cf. Annex III).

tender was sent, in no case, however, at less than 22 days. Paragraph 3(a) shall apply accordingly.

(6) In the case of notices prepared and transmitted by electronic means, the time limits can be reduced by 7 days as per paragraphs 2(b) and 3(b) and paragraph 4, first sentence. Where the contracting authorities make the tender documents and all additional documents freely, directly and fully available by electronic means, they may reduce the time limit for the receipt of tenders under paragraph 2 and paragraph 5, first sentence by another 5 days.

(7) Where the contracting authorities do not make the tender documents and all additional documents freely, directly and fully available by electronic means and the tender documents and the additional documents have been requested on time, the contracting authorities must send the cited documents to the enterprises within 6 days of receipt of request.

(8) The contracting authorities must provide additional information requested on time about the tender documents and the letter 6 days at the latest before expiry of the time limit for tender submission, in the case of restricted procedures or accelerated negotiated procedures, 4 days at the latest.

(9) If the tenders can only be prepared after an inspection on-site or perusal of tender documents not sent or the time limits could not be met under paragraph 7 or 8, the time limits for tender submission must be prolonged accordingly.

(10) Until expiry of the tender submission time limit, tenders may be withdrawn in all forms as provided for their submission.

Article 13 EC

Principles of Information Transfer

(1) The contracting authorities shall indicate in the notice or the tender documents whether information is to be conveyed by post, fax, directly, by electronic means or a combination of these means of communication.

(2) The network chosen for electronic transmission must be generally available and may not restrict access for the candidates or tenderers to the award procedures. The programmes to be used and their technical specifications must be

- generally accessible,
- compatible with information and communication technology products in general use and
- non-discriminatory.

(3) The contracting authorities must ensure that the information on equipment specifications required for the electronic transmission of the requests for participation and tenders, including encryption, is available to the interested enterprises. In addition, they must ensure that the equipment can meet the requirements cited in Annex II.

Article 14 EC

Requirements for Requests to Participate

(1) The contracting authorities shall ensure that submitted requests to take part are kept intact and confidential.

(2) Tenders for postal or direct delivery must be submitted in a sealed envelope and designated as such. Until expiry of the time limit for their submission, they must be held under seal.

(3) In the case of requests to participate conveyed by fax, this must be ensured by appropriate organisational and technical means in keeping with the requirements of the contracting authority; this also holds for requests for participation transmitted by electronic

means, whose confidentiality must be ensured through encryption. The encryption must remain in place until expiry of the submission time limit.

(4) Requests to participate notified by phone must be submitted by the candidate in writing before expiry of the time limit for receipt of requests to participate.

Article 15 EC

Notice, Despatch of Tender Documents

(1) The contracting authorities shall give notice of their intention to award a contract using the respective formats contained in Annex II of the Regulation (EC) as regards the standard forms for the publication of notices in the framework of public procurement, as amended.

(2) The notice must be conveyed by electronic⁸ or other means without delay to the Office for Official Publications of the European Communities.⁹ Where the notice is not transmitted by electronic means, the contents of the notice must be limited to approx. 650 words. In cases of special urgency, the notice must be transmitted by fax or by electronic means. The contracting authorities must be able to provide proof of the day of despatch.

(3) Notices prepared and transmitted by electronic means must be published five days after their despatch to the Office for Official Publications of the European Communities at the latest. Notices not prepared and transmitted by electronic means shall be published no later than twelve days after despatch. The unabridged notices shall be published free of charge in the Supplement to the Official Journal of the European Communities in the respective original language and a summary of the most important parts in the other official languages of the Community; only the wording in the original language shall be binding.

(4) The notice may not be published in the Federal Republic of Germany before the day of despatch to the Office for Official Publications of the European Communities. This publication may not contain other information than in the notice sent to the Office for Official Publications of the European Communities or published in a buyer profile. The national notice must indicate the date of despatch of the Europe-wide notice to the Office for Official Publications of the European Communities.

(5) The contracting authorities may publish a buyer profile on the Internet. It must contain information on planned and ongoing award procedures, awarded contracts as well as all other information relevant for contract award, such as the contact point, telephone and fax number, address and email address of the contracting authority.

(6) As soon as possible after the beginning of the respective financial year, the contracting authorities shall publish indicative notices containing information on all contracts intended to be awarded in the next 12 months, whose respective estimated value amounts to at least EUR 750,000 under the Public Tender Regulation. The supply contracts must be broken down by goods category with reference to the Regulation (EC) of the European Parliament and of the Council on Common Procurement Vocabulary (CPV) as amended, and the service contracts by the categories cited in the Annex I A.

(7) The indicative notice must be sent as soon as possible after the beginning of the financial year to the Office for Official Publications of the European Communities or published in the buyer profile. Where the contracting authorities publish an indicative notice in the buyer profile, they must give prior notification to the Office for Official Publications of the European Communities by electronic means in the format contained in Annex VIII of the Regulation (EC) cited in paragraph 1. Giving notice is only compulsory, if the contracting authorities opt to reduce the time limit for receipt of tenders under Article 12(3) EC.

⁸ The format and modalities for electronic transmission of notices are available at the website: <http://simap.europa.eu/>.

⁹ Office for Official Publications of the European Communities 2, rue Mercier, L2985 Luxembourg

(8) The indicative notice must be prepared in the format contained in Annex I of the Regulation (EC) cited in paragraph 1 and conveyed to the Office for Official Publications of the European Communities.

(9) The contracting authorities may also convey notices on public supply or service contracts that are not subject to advertising obligations to the Office for Official Publications of the European Communities.

(10) The contracting authorities shall specify the authority which the candidate or tenderer may approach to verify infringements of public procurement provisions.

(11) The tender documents must be forwarded

- a) in open procedures, to all requesting enterprises,
- b) in restricted and negotiated procedures with a call for competition, to the enterprises that have submitted a request to participate, are qualified and have been selected, or
- c) in negotiated procedures without a call for competition, to the enterprises selected by the contracting authorities.

(12) The names of the enterprises that have received or inspected the tender documents must be treated confidentially.

Article 16 EC

Form and Contents of Tenders

(1) The contracting authorities shall specify in what form the tenders are to be submitted. Tenders submitted by postal or direct delivery must be signed; tenders transmitted electronically must be accompanied by an advanced electronic signature as per the Digital Signature Act¹⁰ and in keeping with the requirements of the contracting authorities or a qualified electronic signature under the Digital Signature Act; where the tender is submitted by fax, the signature on the fax document is sufficient.

(2) The contracting authorities must ensure that the tenders are kept intact and confidential. Tenders for postal or direct delivery must be submitted in a sealed envelope, designated as such and kept under seal until expiry of the tender submission time limit. Tenders for electronic transmission must be kept intact by appropriate organisational and technical means in keeping with the requirements of the contracting authority and confidentiality must be guaranteed through encryption. The encryption must remain in place until expiry of the tender submission time limit.

(3) The tenders must contain all the information, declarations and prices requested.

(4) No changes may be made to the contractual documents. Corrections by the tenderer to his entries must be beyond reasonable doubt.

(5) On request, the tenderer shall indicate in the tender whether the subject-matter of the tender is subject to industrial property rights or whether these have been applied for by the tenderer or others. The tenderer must always indicate if he is considering using the information in his tender to apply for an industrial property right.

(6) In their tenders, groupings of contractors must name their respective members and nominate one as an authorised representative for the conclusion and execution of the contract. If any of this information is lacking in the tender, it must be provided before contract award.

¹⁰ Digital Signature Act - SigG

Article 17 EC

Opening of Tenders

(1) Tenders conveyed by postal and direct delivery must be left unopened, provided with a file mark and kept under seal until the date of opening. Electronic tenders must be appropriately marked and kept in encrypted form. Tenders submitted by fax must also be given a suitable file mark and held under seal in a suitable way.

(2) The opening of the tenders shall be conducted and documented jointly by at least two representatives of the contracting authority. Tenderers may not be present. A record shall be made at least of:

- a) the name and address of the tenderers,
- b) the final amounts of their tenders and other information concerning the price,
- c) whether alternative tenders have been submitted and by whom.

(3) The tenders and their annexes as well as the documentation on opening of tender must also be kept safe and confidential after completion of the award procedure.

Article 18 EC

Details of Tenders, Non-negotiability

In open and restricted procedures, the contracting authorities may only request tenderers to provide details on the tender or their qualification. No negotiations may be conducted.

Article 19 EC

Verification and Evaluation of Tenders

(1) The tenders must be verified for completeness and the accuracy of calculations and factual information.

(2) Declarations and evidence not submitted before expiry of the tender submission time limit as requested by the contracting authorities can be subsequently requested within an extended time limit to be determined. This does not apply for price quotations, unless these pertain to insignificant individual items whose unit prices do not alter the total price or do not impair evaluation procedure and competition.

(3) Ineligible are:

- a) tenders which do not contain the declarations and evidence requested or subsequently requested,
- b) tenders that are not signed or not provided with an electronic signature,
- c) tenders in which changed entries made by the tenderer are not beyond reasonable doubt,
- d) tenders where changes or additions have been made to the contractual documents,
- e) tenders that have not been submitted in due form and time, unless this is not the responsibility of the tenderer,
- f) tenders from tenderers who have reached inadmissible agreements restricting competition with respect to the award,
- g) inadmissible alternative tenders and alternative tenders that do not meet the minimum requirements.

(4) In addition, tenders may be excluded from tenderers who could also have been excluded as candidates for participation in competition (Article 6(6)).

(5) When selecting tenders that are eligible for award, only tenderers may be considered who are qualified to perform the contractual obligations.

(6) If a tender appears to be abnormally low in relation to the contractual performance to be rendered, the contracting authorities shall require the tenderer to provide an explanation. Tenders whose prices are evidently out of keeping with the contractual performance may not be awarded a contract.

(7) Tenders that are abnormally low due to state aid may only be rejected for this reason alone if on request the enterprise cannot provide evidence after an appropriate time limit set by the contracting authorities that the relevant financial assistance has been lawfully granted. Contracting authorities that reject an offer under these circumstances must duly notify the Commission of the European Communities.

(8) When evaluating tenders, the contracting authorities shall take full and sole account of the criteria cited in the notice or the tender documents in keeping with the notified weighting.

(9) When deciding on contract award, the contracting authorities shall take into account various criteria of relevance to the subject-matter of the contract, for example quality, price, technical merit, aesthetics, functional utility, environmental features, operating costs, lifecycle costs, cost-effectiveness, customer service and technical assistance, delivery date and delivery or completion time limit.

Article 20 EC

Cancellation of Award Procedures

(1) The award procedures may be cancelled in full or in part when awarding by lots, if

- a) no tender has been submitted that meets the terms and conditions for application,
- b) substantially alterations have been to basic award procedures,
- c) they have not yielded any economically advantageous result,
- d) there are other serious grounds.

(2) The candidates or tenderers must be informed of the cancellation of the award procedures without delay, providing reasons.

(3) After cancellation of the award procedure, the contracting authorities shall inform the candidates or tenderers without delay of the reasons for their decision to dispense with the award of a contract announced in the Official Journal of the European Communities or recommence the procedure. They shall inform them about this in writing on request.

Article 21 EC

Contract Award

(1) The award must be granted to the most economically advantageous tender with due consideration of all circumstances. The lowest tender price alone is not the sole decisive criterion.

(2) The acceptance of a tender (award) shall be made in writing, by electronic means or by fax.

(3) In the case of an electronic contract award, an advanced electronic signature will suffice under the Digital Signature Act and for submission of the tender by fax, the signature on the fax document.

Article 22 EC

Unsuccessful Candidates and Tenders

(1) Without delay and not later than 15 days after receipt of a relevant request, the contracting authorities shall notify the unsuccessful tenderers of the reasons for the rejection of their tender, the features and advantages of the successful tender, the name of the successful tenderer and the candidates of the reasons for their rejection.

(2) The contracting authorities may withhold the information, if its communication would obstruct law enforcement, would not otherwise lie in the public interest or would be detrimental to the legitimate commercial interests of enterprises or impair fair competition.

Article 23 EC

Notice of Contract Award

(1) The contracting authorities shall give notification of each contract awarded within 48 days after contract award using the respective formats contained in Annex III of the Regulation (EC) as regards the standard forms for the publication of notices in the framework of public procurement, as amended, to the Office for Official Publications of the European Communities.¹¹ The contracting authorities need not, however, provide certain information on contract award if its communication would obstruct law enforcement, would not lie in the public interest, would affect the legitimate commercial interests of individual public or private enterprises or impair fair competition among the enterprises.

(2) When giving notice of contracts awarded for services under Annex I B, the contracting authorities shall specify whether they consent to publication.

(3) In the case of framework agreements, the notice must include the conclusion of the framework agreement, but not the specific contracts awarded on the basis of the framework agreement.

(4) The contracting authorities may group the notice under paragraph 1 with the results of the awards for specific contracts as part of a dynamic electronic procedure every quarter of a calendar year. In this case, they must send the grouped notice not later than 48 days after the end of the quarter.

Article 24 EC

Documentation

(1) The award procedure must be continually documented from the outset to keep a record of the individual stages of the procedure, the individual measures and the grounds for the individual decisions.

(2) The documentation shall include the following at least:

- a) the name and the address of the contracting authority, the subject-matter and value of the contract, the framework agreement or the dynamic purchasing system,
- b) the names of the candidates or tenderers taken into account and the reasons for their selection,
- c) the names of the candidates or tenderers not taken into account and the reasons for their rejection,
- d) the reasons for the rejection of abnormally low tenders,
- e) the name of the successful tenderer and the reasons for the selection of his tender as well as - where known - the share of the contract or the framework agreement the successful tenderer intends to subcontract to third parties,
- f) in the case of restricted procedures, negotiated procedures and competitive dialogues, the reasons justifying the application of these procedures,
- g) if necessary, the reasons why the contracting authorities have abandoned their intention to award a contract, conclude a framework agreement or set up a dynamic purchasing system,
- h) the reasons why several partial or technical lots are to be awarded together.

¹¹ Office for Official Publications of the European Communities 2, rue Mercier, L2985 Luxembourg

- i) the reasons why the subject-matter of the contract requires the submission of evidence of qualification and, if necessary, why in these cases evidence must be required that goes beyond self-declarations,
- j) the reasons for not providing information on the weighting of award criteria.

Annex I
Part A¹²

Category	Name	CPC Codes ¹³	CPV Codes
1	Maintenance and repair services	6112, 6122, 633, 886	From 50100000-6 to 50982000-5 (except for 50310000-1 to 50324200-4 and 50116510-9, 50190000-3, 50229000-6, 50243000-0) and from 51000000-9 to 51900000-1
2	Land transport, ¹⁴ including armoured car services, courier services, except transport of mail	712 (except 71235) 7512, 87304	From 60100000-9 to 87304 60183000-4 (except for 60121000 to 60160000-7, 60161000-4, 60220000-6), and from 64120000-3 to 64121200-2
3	Air transport services of passengers and freight, except transport of mail	73 (except 7321)	From 60410000-5 to 60424120-3 (except for 60411000-2, 60421000-5) and 60500000-3, from 60440000-4 to 60445000-9
4	Transport of mail by land ¹⁵ and by air	71235, 7321	60160000-7, 60161000-4, 60411000-2, 60421000-5
5	Telecommunications services	752	From 64200000-8 to 64228200-2, 72318000-7, and from 72700000-7 to 72720000-3
6	Financial services: a) Insurance services b) Banking and investment services ¹⁶	Ex 81, 812, 814	From 66100000-1 to 66720000-3
7	Computer and related services	84	From 50310000-1 to 50324200-4, from 72000000-5 to 72920000-5 (except for 72318000-7 and from 72700000-7 to 72720000-3), 79342410-4
8	Research and development services ¹⁷	85	From 73000000-2 to 73436000-7 (except for 73200000-4, 73210000-7, 73220000-0)
9	Accounting, auditing and book-keeping services	862	From 79210000-9 to 792230000-3
10	Market research and public opinion polling services	864	From 79300000-7 to 79330000-6, and 79342310-9 79342311-6

¹² Where CPV is inconsistent with CPC, the CPC nomenclature shall apply.

¹³ CPC nomenclature (provisional version) used to specify the scope of application of Directive 92/50/ EEC.

¹⁴ Except transport services by rail in Category 18

¹⁵ Except transport services by rail in Category 18

¹⁶ Except financial services for the issue, sale, purchase or transfer of securities or other financial instruments and central banking services.

Also excepting services - regardless of the financial arrangements - for the purchase or rent of land, existing buildings or other immovable property or related rights to this; financial services rendered under contract for purchase or rent concurrently, prior or subsequent to it, regardless of form, fall, however, under this.

¹⁷ Except contracts for other types of research and development services than those where the benefits accrue solely to the contracting authority for its use in the conduct of its own affairs, on condition that the service is wholly remunerated by the contracting authority.

11	Management consulting services ¹⁸ and related services	865, 866	From 73200000-4 to 732200000-0, from 79400000-8 to 794212000-3 and 793420000-3, 79342100-4, 79342300-6, 79342320-2, 79342321-9, 79910000-6, 79991000-7, 98362000-8
12	Architectural services, engineering services and integrated engineering services, urban planning and landscape architectural services, related scientific and technical consulting services, technical testing and analysis services	867	From 71000000-8 to 71900000-7 (except for 71550000), and 79994000-8
13	Advertising services	871	From 79341000-6 to 793422200-5 (except for 79342000-3 and 79342100-4)
14	Building-cleaning services and property management services	874, 82201 to 82206	From 70300000-4 to 70340000-6, and from 90900000-6 to 90924000-0
15	Publishing and printing services on a fee or contract basis	88442	From 79800000-2 to 79824000-6, from 79970000-6 to 79980000-7
16	Sewage and refuse disposal services, sanitation and similar services	94	From 90400000-1 to 90743200-9, (except for 9071220-3), from 90910000-9 to 90920000-2 and 50190000-3, 50229000-6, 50243000-0

¹⁸ Except arbitration and conciliation services

Part B

Category	Name	CPC Codes	CPV Codes
17	Hotel and restaurant services	64	From 55100000-1 to 55524000-9, and from 98340000-8 to 98341100-6
18	Transport services by rail	711	60200000-0 to 60220000-6
19	Water transport services	72	From 60600000-4 to 60553000-0 and from 63727000-1 to 63727200-3
20	Supporting and auxiliary transport services	74	63000000-9, to 63734000-3 (except for 63711200-8, 63712700-0, 63712710-3 and from 63727000-1 to 63727200-3), and 98361000-1
21	Legal services	861	From 79100000-5 to 79140000-7
22	Personnel placement and supply services ¹⁹	872	From 79600000-0 to 79635000-4 (except for 79611000-0, 79632000-3, 79633000-0), and from 98500000-8 to 98514000-9
23	Investigation and security services, except armoured car services	873 (except 87304)	From 79700000-1 to 797230000-8
24	Education and vocational education services	92	From 80100000-5 to 806600000-8 (except for 80533000-9, 80533100-0, 80533200-1)
25	Health, veterinary and social work services	93	From 79611000-0 and from 85000000-9 to 85323000-9 (except for 85321000-5 and 85322000-2)
26	Recreational, cultural and sporting services ²⁰	96	From 79995000-5 to 79995200-7, and from 92000000-1 to 92700000-8 (except for 92230000-2, 922231000-9, 92232000-6)
27	Other services		

¹⁹ Except contracts of employment

²⁰ Except contracts for the purchase, development, production or co-production of programmes by broadcasting companies and contracts on broadcasting time.

Annex II

Requirements relating to devices for the electronic receipt of requests to participate and tenders

The devices must at least guarantee that

- a) an electronic signature can be used for the tenders;
- b) the exact time and date of the receipt of requests to participate and tenders can be determined precisely,
- c) no-one can have access to the data before expiry of the time limit set for this,
- d) if that access prohibition is infringed, it may be ensured that the infringement is clearly detectable,
- e) only authorised persons may set or change the dates for opening data received,
- f) access to all data submitted must be possible only through simultaneous action by authorised persons and only after the prescribed date,
- g) data received must remain accessible only to persons authorised to acquaint themselves with it.

Annex III

Regulation (EEC, EURATOM) No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof;

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;²¹

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms working days or public holidays;

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties;

HAS ADOPTED THIS REGULATION:

Article 1

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

CHAPTER I

Periods

Article 2

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the Official Journal of the European Communities the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of this Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

²¹ OJ EC No. C51 of 29 April 1970, p 15

Where a period, expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

- a. a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;
- b. a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;
- c. a period expressed in weeks, months or years shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;
- d. if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having thirty days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission — or of provisions of such acts — fixed at a given date shall occur at the beginning of the first hour of the day falling on that date.

This provision shall also apply when entry into force, taking effect or application of the aforementioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission — or of any provisions of such acts — fixed at a given date shall occur on the expiry of the last hour of the day falling on that date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

Article 6

This Regulation shall enter into force on 1 July 1971.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 3 June 1971.

For the Council
The President
R. Pleven

Annex IV

Notes on VOL/A

I. Preliminary remark

VOL/A specifies both the principles of sound financial management as set out in budgetary law and the EC principles of competition, non-discrimination and transparency in greater detail for all contracting authorities obliged to apply them. Competition is the best way to ensure the most economically advantageous award of contracts. Furthermore, VOL/A also ensures competition based on merit.

II. General notes

In its present version, VOL/A takes account of 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, the Commission Directive and Regulation (EC) No. 1564/2005 as regards the standard forms for the publication of notices in the framework of public procurement, as amended; it therefore also takes account of the commitments under the Agreement on Government Procurement of the World Trade Organisation (WTO).

Part A contains two sections. They apply as follows:

- **Section 1:** Provisions on contract awards for public supplies and services below the EU thresholds under the provisions of budgetary law;
- **Section 2:** Provisions on contract awards for public supplies and services under the scope of application of Directive **2004/18/EC** (VOL/A-EC) equal to or greater than the EU threshold. The provisions do not apply where the contracts concern activities in the drinking water, energy or transport sector, which fall under the Regulation amending the Rules on Awarding Contracts in Transport, Drinking Water Supply and Energy Supply (SektVO).

For the contracting authorities, the word ‘**shall**’ means the obligation to comply with the provision, unless compelling reasons justify a deviation.

The **contract award** must be granted to the most economically advantageous tender. In the evaluation, all contractual considerations must be taken into account (e.g. price, technical, functional, formal, aesthetic aspects; customer service; follow-on costs; lifecycle costs).

III. Notes on the individual sections

Section 1

Provisions on Contract Awards for Public Supplies and Services

- | | |
|------------------------|--|
| Article 1 | As specified in the wording of Article 1, VOL/A applies for all supplies and services that are not construction works or independent professional services (based, for example, on purchase, work, work and service, rental and leasing contracts). |
| Article 1 first indent | Construction works are works of any kind that construct, maintain, alter or demolish physical structures. This also includes all components installed for the construction, maintenance or alteration of a physical structure, particularly the supply and installation of mechanical and electrotechnical equipment. Equipment that can, however, be detached from the physical structure without impairing its completeness or utility and perform an independent functional purpose, fall under the purview of VOL/A. |
| Article 1 second | Furthermore, all performances rendered as part of an independent professional activity have been removed from Section 1. The performances |

indent that fall under this can be inferred from the list in Article 18(1.1) of the German Fiscal Code (EStG). The list is not definitive.

If an independent professional service is offered by a commercial enterprise in competition at the same time, VOL shall not apply to the corresponding service of the commercial enterprise either. If there is no competitive relationship between independent professionals and commercial enterprises, i.e., if by nature an independent professional service is solely rendered by commercial enterprises, VOL is, however, applicable in full.

The question of whether a competitive relationship exists between independent professionals and commercial enterprises must be assessed by the respective contracting authority in the individual case beforehand and based on the available market profile. It does not depend on the prospective capability of the independent professional to render such performance, but on the experience of the contracting authority that these performances have also actually been rendered by independent professionals in the past. If the performance is only rendered by commercial enterprises and independent professionals are therefore not expected to submit a parallel tender, the contract has to be awarded under the VOL procedure.

If contrary to expectation it emerges in the course of the VOL procedure that independent professionals also render the performance and may even compete for the tender, of decisive importance is that this performance has only been rendered by commercial enterprises in the past and not by independent professionals.

Article 1 second indent is without prejudice in particular to Articles 7 and 55 of the Federal Budget Code (BHO) (and/or the relevant federal state and municipal provisions). There are no uniform principles for awarding contracts for all independent professional services. Procedure must therefore abide by the legal principles of Article 55 of BHO (and/or the relevant federal state and municipal provisions). Under Article 55(1) of BHO, the conclusion of contracts for supplies and services must be preceded by a public invitation to tender, unless the nature of the business or special circumstances justify an exception.

The exceptional situation provided for in Article 55 of BHO must be assessed in each individual case. It may, however, be assumed that the exception criterion is as a rule met in services by independent professionals. The contracts for these may therefore be generally awarded under single tendering.

Contracts for independent professional services must be awarded to candidates whose skills, efficiency and reliability are assured, have gained adequate experience and can ensure efficient planning and execution. The contracts shall be distributed as broadly as possible.

Article 2(1) first sentence Reasonable prices are those that are in keeping with the principle of sound financial management (cf. Notes to Article 18(1)).

second sentence National and foreign candidates shall be treated equally. In particular, competition may not be restricted to candidates domiciled in certain districts.

Article 2 second sentence Grounds for refraining from a distribution of lots could include, for example, excessive cost disadvantages, a prolonged delay of the project, reduced coordination expenses, easier enforcement of warranty or guarantee claims and inefficient fragmentation due to division. The latter also applies in particular if the contract value is so small as to allow the participation of small and medium-sized enterprises from the outset.

- Article 3(2) The precedence accorded a public invitation to tender is based on Article 30 of the Budgetary Principles Act and/or Article 55 of BHO.
- Article 3(3 and 4) The list of cases is definitive.
- Article 3(4a) For the term 'economically advantageous', see Notes to Article 18(1).
- Article 3(5) The list of cases in letters a to j is definitive.
- Article 3(5a) For the term 'economically advantageous', see Notes to Article 18(1).
- Article 3(5e) For the term 'economically advantageous', see Notes to Article 18(1).
- Article 3(5g) The criteria for this case are stricter than in Article 3(3b). Only in cases of special urgency can resort be made to single tendering procedure.
- Article 3(5f) In contrast to Article 3(3b), secrecy must be required; in individual cases, a restricted invitation to tender may already also take account of provisions on secrecy.
- Article 3(5h) The words 'prior to award' shall mean that the contractual performance cannot be described clearly at the beginning of the award procedure. In the case of an invitation to tender, it would be difficult to properly compare tenders in response to imprecise contractual specifications.
- Article 3(5j) This exception shall also apply for contracts to the remaining approved workshops for the blind after the repeal of the Act on the Sale of Goods Manufactured by the Blind (see also Article 141 of the Social Security Code – SGB IX).
- Article 3(5l) This exception comprises cases where only one enterprise can be considered for objective and legal reasons, so that the attempt to hold a contest would only result in no more than one tender. This is the case with
- a supply monopoly or
 - industrial property rights in favour of a certain enterprise, unless the contracting authority or other enterprises are entitled to use these rights or
 - an advantageous opportunity. The term 'advantageous opportunity' must be interpreted narrowly. Taking an advantageous opportunity must lead to a more economically advantageous procurement than would be the case by conducting a public or restricted invitation to tender.
- Article 6 third sentence In their procurements, authorities from the security or defence sector in particular, where the requisite contractual performances go beyond everyday needs, such as office material, will not as a rule be able to rely on self-declarations on reliability. This applies in particular in cases under Article 100(2b and 2e) of GWB but also, for example, in cases where the prospective provider has access to sensitive documents of the contracting authority that have not been declared secret under Article 100(2d) of GWB. In such cases, therefore, sufficient grounds shall be provided by the indication that the procurement in question has a bearing on security or defence. This relevance must, however, follow from the grounds provided and/or be demonstrably or evidently the case from the type of performance to be rendered.
- Article 6(4) A prequalification procedure facilitates the provision of evidence for the enterprises and the verification of non-contractual qualifications for the contracting authorities. It minimises the risk of disqualification on grounds of formal defects. VOL/A also provides scope for the contracting authorities to

request evidence of relevance to the contract. Various providers carry out prequalification procedures.

Article 7(1) The obligation to give a clear and exhaustive description of the contractual performance lies in the interest of contractor and contracting authority. The provision is intended to guarantee that the candidates understand the description in the same way so that on the basis of clear contractual specifications the contracting authorities are better able to compare tenders.

Article 7(2) Simple, common and, above all, standardised goods can be described with the customary designations for type, quality and scale.

Equally acceptable forms of contractual specifications are the functional (letter a) or constructional (letter b) description. These types of description may also be combined (letter c). Constructional contractual specifications may include functional elements, for example, and vice versa.

The so-called functional contractual specifications allow the candidates to offer a diversity of suitable goods or services to meet requirements, including technical innovations.

In the so-called constructional contractual specifications, the framework provided for in the contractual specifications is restricted, without excluding competition. Owing to the more exact contractual specifications, the so-called constructional description facilitates the comparison of tenders.

Article 8(4) The term 'alternative tender' comprises any deviation from the tender requested. Modification proposals are also to be treated as alternative tenders. To take advantage of ways of meeting requirements through innovative proposals, alternative tenders shall be permitted particularly in cases where the main tender generally involves requests for conventional goods or services.

Article 9(4) The contracting authority is obliged in each case to verify whether collateral security is required for the timely and proper performance (including warranty claims).

Strict standards must be applied when verifying this. Collateral security may not be demanded as a standard procedure and must be confined to certain contract awards where experience shows defects may arise due to the type of performance (e.g. when there are similarities with construction works).

Collateral may, for example, be waived if the contractor has an adequate reputation for providing sufficient warranty for the contractual performance and the rectification of any defects that may arise. Article 9(3) does not apply for securing advance and instalment payments, which is regulated in the relevant budgetary provisions.

Article 10(1) A time limit for the contract award as provided for in Article 10(6) of VOB/A (30 calendar days) cannot be specified in VOL/A due to the variety of procurement needs.

Article 12(1) The contracting authorities may publish notifications of awards for supply or service contracts in the Official Journal of the European Communities (for address see Article 15(2) EC) that are below the EU thresholds.

Internet portals as under Article 12 are internet pages that group various services required on a regular basis or provide an overview for familiarisation with a set of topics. Via generally easy-to-operate, secure and personalised access systems and depending on his respective access authorisations, the user can obtain Internet-based access to information, applications, processes and persons available on the systems accessible

through the portal.

Article 16 The sequence of the paragraphs in Article 16 implies no binding order of importance for verification and evaluation.

Paragraph 1 The verification of the factual correctness also includes technical aspects.

Paragraph 6 second sentence An evident discrepancy between price and performance may only be assumed, if the price divergence from empirical figures for competitive pricing is so drastic as to be immediately apparent. When assessing whether there is an evident discrepancy, the awarding agency shall take into account all information in the individual case for judging the price/performance ratio.

Article 17(1c) This also includes the case where even the lowest tender is considered too high.

Article 18(1) The most economically advantageous tender must be determined applying the principles of sound financial management. The most economically advantageous tender is the one with the most favourable price-performance ratio. All contractual factors are decisive for performance (also see Article 16(8)). Matters of no contractual relevance may not be applied as criteria for the evaluation of tenders.

Article 20 The documentation should at least contain the following information:

- the reasons for applying the restricted invitation to tender and single tendering procedure,
- the reasons for refraining from awarding partial or technical lots,
- the reasons why the subject-matter of the contract requires the submission of evidence of suitability and, if necessary, why in these cases evidence must be required that goes beyond self-declarations,
- the names of the candidates or tenderers taken into account and the reasons for their selection,
- the names of the candidates or tenderers not taken into account and the reasons for their rejection,
- the name of the successful tenderer and the reasons for the selection of his tender,
- if necessary, the reasons why the contracting authority has not awarded a contract or framework agreement.

Section 2

Provisions on Contract Awards for Public Supplies and Services under the Scope of Application of Directive 2004/18/ EC (VOL/A-EC)

General In full or in part, Section 2 contains provisions from paragraphs that also apply under Section 1. Where notes have been provided for these provisions in Section 1, these also apply for Section 2 (e.g. Article 7(1) EC and Article 6(3), Article 19 EC and Article 16).

Article 4(2) EC Specific contracts can be awarded through specific contract or by call.

Annex I A and I B Annexes I A and I B contain references to the United Nations CPC nomenclature, which is only available in English.

TS Annex

Technical Specifications

Definition of Terms

1. 'Technical specifications' mean the totality of the technical requirements contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it meets the purpose for which it is intended by the contracting authority. These technical requirements shall include levels of quality and environmental performance, design for all requirements, including accessibility for disabled persons, and conformity assessment, specifications on usability, use, safety and dimensions, including provisions on marketed product name, terminology, symbols, tests and testing methods, packaging, marking and labelling and production processes and methods as well as conformity assessment procedures. They shall also include rules relating to design and costing of construction works; the conditions for testing, inspection and acceptance of construction works, the construction methods or procedures and all other technical requirements which the contracting authorities are able to prescribe in relation to the finished works and to the materials or parts entailed by way of general or special provisions.
2. 'Standard' means a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory.
3. 'International standard' is a standard adopted by an international standards organisation and made available to the general public.
4. 'European standard' is a standard adopted by a European standards organisation and made available to the general public.
5. 'National standard' is a standard adopted by a national standards organisation and made available to the general public.
6. 'European technical approval' means a favourable technical assessment of the fitness for use of a product to meet the essential requirements for building works; it is made based the specific features of the product and the prescribed conditions of application and use. European technical approvals are issued by an approved body designated for this purpose by the Member State.
7. 'Common technical specifications' mean technical specifications laid down in accordance with a procedure recognised by the Member States which has been published in the Official Journal of the European Communities.
8. 'Technical reference' means any frame of reference which is not an official standard that has been prepared by European standardisation bodies using procedures adapted to developments in market needs.

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