Commission Decision (EU, Euratom) 2019/1963 of 17 October 2019 laying down implementing rules on industrial security with regard to classified procurement contracts

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 249 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106 thereof,

Having regard to Commission Decision (EU, Euratom) 2015/443 of 13 March 2015 on Security in the Commission[(1)],

Having regard to Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information[(2)],

Having regard to Commission Decision (EU, Euratom) 2017/46 of 10 January 2017 on the security of communication and information systems in the European Commission[(3)],

After consulting the Commission Security Expert Group, in accordance with Article 41(5) of Decision (EU, Euratom) 2015/444,

Whereas:

(1) Articles 41, 42, 47 and 48 of Decision (EU, Euratom) 2015/444 provide that more detailed provisions to supplement and support Chapter 6 of that Decision are to be laid down in implementing rules on industrial security, governing issues such as tendering, conclusion of classified contracts, facility security clearances, personnel security clearances, visits and transmission and carriage of European Union classified information (EUCl).

(2) Decision (EU, Euratom) 2015/444 states that classified contracts are to be implemented in close cooperation with the national security authority, the designated security authority or any other competent authority of the Member States concerned; the Member States have agreed to ensure that any entity under their jurisdiction which may receive or generate classified information originating in the Commission is appropriately security cleared and is capable of providing suitable protection equivalent to that afforded by the security rules of the Council of the European Union for protecting EU classified information bearing a corresponding classification marking, as provided in Agreement between the Member States of the European Union, meeting within

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Council, regarding the protection of classified information exchanged in the interests of the European Union (2011/C 202/05)[4].

(3) The Council, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy have agreed to ensure maximum consistency in the application of security rules regarding their protection of EUCI while taking into account their specific institutional and organisational needs, in accordance with the declarations attached to the minutes of the Council session at which Council Decision 2013/488/EU[5] on the security rules for protecting EU classified information was adopted.

(4) The Commission's implementing rules on industrial security with regard to classified contracts should therefore also ensure maximum consistency and take into account the Guidelines on Industrial Security approved by the Council Security Committee on 13 December 2016 and Articles 7 and 22 of Directive 2009/81/EC of the European Parliament and of the Council[6].

(5) On 4 May 2016 the Commission adopted a decision[7] empowering the Member of the Commission responsible for security matters to adopt, on behalf of the Commission and under its responsibility, the implementing rules provided for in Article 60 of Decision (EU, Euratom) 2015/444,

HAS ADOPTED THIS DECISION:

CHAPTER 1

GENERAL PROVISIONS

Article 1

Subject matter and scope

1 This Decision sets out implementing rules on industrial security with regard to classified procurement contracts to support the implementation of Decision (EU, Euratom) 2015/444, and in particular Chapter 6 of that Decision.

2 This Decision lays down specific requirements to ensure the protection of EU classified information (EUCI) by economic operators in pre-contract stage, throughout the life cycle of classified contracts concluded by the European Commission, and in subcontracts concluded by Commission contractors.

3 This Decision concerns information classified at the following levels:

a RESTREINT UE/EU RESTRICTED;

b CONFIDENTIEL UE/EU CONFIDENTIAL;

c SECRET UE/EU SECRET.

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Article 2

Responsibility within the Commission

1 As part of the responsibilities as described in the Financial Regulation[8], each authorising officer of the Commission contracting authority shall ensure that the classified contract refers to the minimum standards on industrial security set out in Chapter 6 of Decision (EU, Euratom) 2015/444 and in these implementing rules, and where appropriate in the contract notice or the invitation to tender, and that these standards are met in the course of implementation.

2 To that end, the authorising officer concerned shall, at all stages, seek the advice of the Commission security authority on issues regarding the security elements of a classified contract, programme or project, and shall inform the local security officer about the contracts concluded. The decision on the classification level of specific subjects shall rest with the contracting authority and shall be taken with due regard to the security classification guide.

3 In respecting the requirements of these implementing rules, the Commission security authority shall cooperate closely with the national security authorities (NSAs) and the designated security authorities (DSAs) of the Member States concerned, in particular as regards facility security clearances (FSCs) and personnel security clearances (PSCs), visit procedures and transportation plans.

CHAPTER 2

HANDLING OF CALLS FOR TENDER FOR CLASSIFIED CONTRACTS

Article 3

Basic principles

1 Classified contracts shall be awarded only to economic operators registered in a Member State, or to economic operators registered in a third country or established by an international organisation where that third country or international organisation has concluded a security of information agreement with the European Union or entered into an administrative arrangement with the Commission[9].

2 Before launching an invitation to tender for a classified contract, the contracting authority shall determine the security classification of any information that could be provided to tenderers. The contracting authority shall also determine the maximum security classification of any information generated in the performance of the contract or programme or project, or at least the anticipated volume and type of information to be produced or handled, and the need for a classified communication and information system (CIS).

3 The contracting authority shall ensure that contract notices for classified contracts provide information about the special security obligations related to classified information. Annex I contains a sample template for the contract notice information.

4 The contracting authority shall ensure that information classified RESTREINT UE/EU RESTRICTED, CONFIDENTIEL UE/EU CONFIDENTIAL and SECRET UE/EU SECRET is disclosed to tenderers only after they have signed a non-disclosure agreement,

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obliging tenderers to handle and protect EUCI in accordance with Decision (EU, Euratom) 2015/444 and its implementing rules.

5 All contractors which are required to handle or store information classified CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET within their facilities, either during the performance of the classified contract itself or at the pre-contractual stage, shall hold an FSC at the required level. The following identifies the three scenarios that may arise during the tendering stage for a classified contract involving EUCI at CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET level:

a no access to EUCI at CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET level during the tendering stage:

Where the contract notice or the invitation to tender concerns a contract that will involve EUCI at CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET level, but does not require the tenderer to handle such information at the tender stage, a tenderer which does not hold an FSC at the required level shall not be excluded from the bidding process on the grounds that they do not hold an FSC.

b access to EUCI at CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET level on the premises of the contracting authority during the tendering stage:

Access shall be granted to tenderer personnel who hold a PSC at the required level and who have a need-to-know. Before such access is granted, the contracting authority shall verify, through the Commission security authority, with the respective NSA/DSA whether an FSC is also required under national laws and regulations at this stage.

c handling or storage of EUCI at CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET level on the premises of the tenderer during the tendering stage:

Where the contract notice or the invitation to tender requires tenderers to handle or store EUCI on their premises, the tenderer shall hold an FSC at the required level. In such circumstances the contracting authority shall obtain, through the Commission security authority, an assurance from the relevant NSA/DSA that the tenderer has been granted an appropriate FSC. Access shall be granted to tenderer personnel who hold a PSC at the required level and who have a need-to-know.

6 In principle, an FSC shall not be required for access to RESTREINT UE/EU RESTRICTED information, either at the tender stage or for the performance of the contract. Where Member States require an FSC for contracts or subcontracts at RESTREINT UE/EU RESTRICTED level under their national laws and regulations, as listed in Annex IV, those national requirements shall not place any additional obligations on other Member States or exclude tenderers, contractors or subcontractors from Member States that have no such FSC requirements for access to RESTREINT UE/EU RESTRICTED information from related contracts/subcontracts or a competition for such. These contracts shall be performed in Member States in accordance with their national laws and regulations.

7 Where an FSC is required for the performance of a classified contract, the contracting authority shall submit, through the Commission security authority, a request to the contractor's NSA/DSA using a facility security clearance information sheet (FSCIS). Annex III, Appendix D, contains an example of an FSCIS[10]. The classified contract shall not be awarded until the contractor's NSA/DSA has confirmed the tenderer's FSC. Response to an FSCIS is provided, to the extent possible, within ten working days of the date of the request.

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Article 4

Subcontracting in classified contracts

1 The conditions under which a contractor awarded a Commission classified contract may subcontract shall be defined in the invitation to tender and in the contract documentation. Where the classified contract permits subcontracting of some of its parts, such subcontracting shall be subject to prior written consent from the contracting authority. Before giving its consent, the contracting authority shall consult the Commission security authority.

2 Classified contracts shall be subcontracted only to economic operators registered in a Member State, or to economic operators registered in a third country or established by an international organisation where that third country or international organisation has concluded a security of information agreement with the EU or entered into an administrative arrangement with the Commission[(11)].

CHAPTER 3

LETTING COMMISSION CLASSIFIED CONTRACTS

Article 5

Basic principles

1 When letting a classified contract, the contracting authority, together with the Commission security authority, shall ensure that the contractor's obligations regarding the protection of EUCI provided to that contractor or generated in the performance of the contract are an integral part of the contract. Contract-specific security requirements shall take the form of a security aspects letter (SAL). A sample template of a SAL is set out in Annex III.

2 Before signing a classified contract, the contracting authority shall prepare, after consulting the Commission security authority, a security classification guide (SCG) for the tasks to be performed and information generated in the performance of the contract, or at programme or project level, where applicable. The SCG shall be part of the SAL.

3 Programme or project-specific security requirements shall take the form of a programme (or project) security instruction (PSI). The PSI may be drafted using the provisions of the SAL template as set out in Annex III. The PSI shall be developed by the Commission department managing the programme or project, in close cooperation with the Commission security authority, and submitted for advice to the Commission Security Expert Group. Where a contract is part of a programme or project with its own PSI, the SAL of the contract shall have a simplified form and shall include reference to the security provisions set out in the PSI of the programme or project.

4 The contracting authority shall be considered the originator of classified information created and handled for the performance of the contract.

5 The contracting authority, through the Commission security authority, shall notify the NSAs/DSAs of all contractors and subcontractors about the conclusion of classified contracts or subcontracts and any extensions or early terminations of such contracts or subcontracts. A list of country requirements is provided in Annex IV.