

GUIDE TO CONTRACTUAL PRINCIPLES

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**STANDARD CONTRACTUAL PROVISIONS
OF THE EUROPEAN COMMISSION IN BELGIUM**

**ACQUISITION OF FULL OWNERSHIP OF A
BUILDING**

March 2017

**GUIDE TO CONTRACTUAL PRINCIPLES – STANDARD CONTRACTUAL
PROVISIONS
OF THE EUROPEAN COMMISSION IN BRUSSELS**

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Introduction

This guide is intended to improve transparency and provide market players with clearer and more detailed information on the main principles and the contractual conditions that the Commission wishes to be respected when usufruct of a building is established in its favour. This document is a guide which should be read in conjunction with the Manual of Standard Building Specifications (hereinafter ‘MIT’).

If, for duly substantiated reasons, the candidate is unable to comply with the Commission’s contractual principles, it must propose an alternative in its proposal.

The successful building project and its legal and financial arrangements, including the draft contract, must be subjected to internal approval procedures by the competent authorities; these procedures must be completed before the project can be implemented.

The contract, in the form of a private agreement, may be signed by the authorising officer by delegation (the Director of the Office for Infrastructure and Logistics in Brussels – OIB) only once these steps have been successfully completed. This signature is the only formal element that is binding on the Commission.

Under Article 114 of the Financial Regulation¹, the Commission may decide to withdraw at any moment prior to signature of the contract in the form of a private agreement, without the candidates being entitled to claim any compensation. This decision must be substantiated and brought to the attention of the candidates as soon as possible.

Negotiations and signature of the contract in the form of a private agreement, followed by signature of the authentic instrument, take place on Commission premises; technical inspections and site meetings are an exception to this and take place on site.

At the start of the negotiations, candidates must sign the ‘Notice for property market players’. This document must contain the following statements:

‘As a body of the European Commission, which manages the acquisition, rental and maintenance of property, the Office for Infrastructure and Logistics in Brussels (OIB) is, by the nature of its duties, constantly in contact with the various players on the Brussels property market.

To this end, the OIB conducts simultaneous negotiations with several property market players in order to meet the medium- to long-term requirements for office space of the European Commission and its executive agencies.

All real estate projects are submitted to the Commission’s internal approval procedures for obtaining the agreement of the competent supervisory authorities.

Until the OIB notifies the developer or owner of this formal agreement, the real estate project remains at the negotiation stage and the Commission is not bound in any way.

Consequently, as a general rule any initiative taken by the developer or building owner, or any order for work or materials placed before the conclusion of the internal procedure for the approval of the project and the formal signature of the contract, will be done on the developer or owner’s own account and under its own responsibility and may not in any circumstances be

¹ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, and subsequent amendments thereto.

charged to the European Commission.

The European Commission therefore accepts no responsibility for any loss or injury sustained by the developer or owner on this account and considers that such loss or injury constitutes an integral part of the risks inherent in the property market.

Any contractual undertaking is consequently dependent on prior notification of the formal agreement of the competent supervisory authorities, followed by the formal signature of the contract by the Director of OIB, who alone is authorised to enter into valid undertakings on behalf of the European Commission.

Read and approved

Signature of developer/owner + date'

For the purposes of evaluating the financial conditions of the project, the Commission takes account of the following factors:

- taxation aspects, in particular the taxes and dues for which the Commission would become liable, the effect of which must not be passed on in the price by the selling owner ('the vendor');
- recovery of VAT paid by the vendor in the case of the construction of a new building or of major renovation work;
- the volume of the contract;
- the Commission's ability to pay;
- the possibility for the Commission to choose to pay the price on the date of the deed or in several annual instalments.

1. General framework

1.1. Suitability of the candidate – guarantees and securities

The Commission reserves the right to request, until the end of the procedure, any guarantees it considers necessary to ensure the technical capacity and financial solvency of the candidate.

In particular, the Commission reserves the right to request a collateral security from the parent company where the building is the principal asset held by a company (SPV/SPC – Special Purpose Vehicle/Company) in the candidate's group. This guarantee is separate from the bank guarantee covering performance of the work (see point 3.3.5).

The legal status of the building, the lawful and continuous thirty-year record of ownership, and the solvency of the candidate are checked by due diligence if the Commission considers it necessary. In this respect, the candidate undertakes to provide all the relevant documents to the Commission.

1.2. Subject of the sale

The description of the building which is the subject of the sale must give the exact land-registry references, supported by a recent extract from the land register, and include a survey of the building carried out by a specialist surveyor approved by the Commission in accordance with the Commission Measuring Code, which can be found at the following internet address: http://ec.europa.eu/oib/pdf/mesuring-code_en.pdf.

1.3. Absence of disputes

The candidate guarantees that there are no disputes relating to the building.

1.4. Freedom from debt

The sale is subject to the obligation on the candidate to hand over the property clear of all charges and debts subject to real estate liens or mortgage whatsoever, and in particular fiscal charges.

1.5. Easements

The candidate will provide a summary of the legal and contractual easements, drawn up by a specialist surveyor approved by the Commission on the basis of the title deeds and a physical inspection of the building. This summary must be attached to the contract.

1.6. Compulsory co-ownership

In the case of a multiple-occupancy building, the Commission prefers the areas occupied by the Commission to be independent of the other areas of the building in order to avoid a system of compulsory co-ownership.

If such independence is not possible because of the physical situation of the building (a fact which must be demonstrated by the candidate), the *acte de base* (deed describing the building) must be approved in advance by the Commission. If necessary, the *acte de base* must be amended to incorporate the Commission's comments before the notarial deed is concluded.

1.7. Occupancy

The areas to be occupied by the Commission must be otherwise unoccupied.

In the case of a multiple-occupancy building, the candidate must notify the Commission of all the leases in force.

The candidate undertakes to seek prior approval from the Commission for any new occupant of the building.

1.8. Copyright

The sale in the Commission's favour must include the transfer of copyright on the building as an architectural work, with the exception of the right of authorship of the work, at no additional cost to the Commission.

2. Financial conditions, taxes and insurance

2.1. Transfer of ownership and risk

Ownership of the property is transferred when the authentic instrument is concluded.

The risks relating to and use of the property are transferred on provisional acceptance of the building by the Commission. Between the date of the provisional acceptance and the date on which the notarial instrument is concluded, the Commission will occupy the building free of charge but entirely on its own responsibility.

2.2. Price and payment of the price

The price is payable either in full on signature of the notarial deed or in several annual instalments, as the Commission chooses.

The Commission may make use of a loan in accordance with Article 203(8) of the Financial Regulation. The level of financing will be determined following an invitation to tender (service contracts) conducted in accordance with the provisions of the Financial Regulation, including prior authorisation from the competent authorities.

2.3. Assignment of claims

If the Commission chooses to pay the price split into several annual instalments, a specific clause governing any cases of assignment of claims will be included in the deed:

‘Any assignment of a claim relating to part or all of the price will be carried out in accordance with the procedures laid down by Article 1689 et seq. of the Civil Code, supplemented by the provisions of this paragraph, with which the vendor undertakes to comply. Furthermore, the vendor must assure the Commission that any future assignees will comply with these procedures, and undertakes to impose the procedures on any such assignees.

To be enforceable against the Commission, any assignment of claims must be notified by registered letter, using the form annexed to the agreement, duly completed and signed by the assignor and the assignee, accompanied by the declaration attached in the Annex, duly completed and signed by the assignee, and a copy of any official document (for example, the Belgian Official Gazette or an extract from the trade register) confirming the name of the assignee, the address of its head office and its registration number with the national authorities, and sent to the Commission in accordance with the provisions of the ‘Notification’ section of the agreement.

In addition, if assignment of the claim created on the annual instalments of the price is made to the benefit of several third parties, these parties must be represented by a single representative and the payment must be made to a single account, the holder of which will be responsible for distributing the payment amongst the third parties concerned.

The assignor of the claim also undertakes to transfer to the new holder(s) of the claim without delay any amount overpaid following the entry into force of the assignment, without concerning the Commission in any way.

In general, assignment of a claim must not lead to any costs on the part of the Commission. This clause will be applied to the new assignee.’

2.4. Provisional twelfths system

If the Commission chooses to pay the price split into several annual instalments, a specific clause will apply.

The Commission operates using an annual budget. If the budget is not adopted in December, the budget for the previous year is automatically renewed until the new budget is approved. Pursuant to Article 16 of the Financial Regulation, this renewal is not applied to the whole of the previous year’s budget, but to one twelfth of it (a ‘provisional twelfth’). In this case, the Commission has one twelfth of its budget for the previous year at its disposal each month; in exceptional circumstances, the Commission may have four twelfths of its budget for the previous year at its disposal each quarter. The following clause applies in all Commission contracts:

‘If, on 1 January of a given year, the budget of the European Union has not been adopted and the

Commission therefore has at its disposal only monthly appropriations limited to one twelfth of the appropriations made available in the budget of the previous financial year, payment of the annual instalment of the price during the period concerned may be made monthly or quarterly on the basis of the annual instalment paid in the previous year. Payments will therefore be made on the last day of each month or each quarter until final approval of the budget. Default interest will be due as of right at the statutory interest rate on the difference between the annual instalment of the price due and the amounts actually paid, in accordance with the date of these payments. Any arrears will be paid as soon as the budget has been finally approved, subject to the time period required for the Commission to make the payment.'

2.5. Taxes

Pursuant to Articles 3 and 4 of Protocol No 7 on the Privileges and Immunities of the European Union annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty establishing the European Atomic Energy Community, the Commission is exempt from all taxes and duties.

The standard clause is as follows:

'Each party must pay all taxes and duties of whatever kind – whether ordinary or extraordinary, current or future, permanent or temporary – imposed on the property being transferred to it or on its use by national, regional, provincial, municipal or any other public authorities from the date of their registration in its name.'

Pursuant to Articles 3 and 4 of Protocol No 7 on the Privileges and Immunities of the European Union annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty establishing the European Atomic Energy Community, the Commission is exempt from all taxes and duties.'

Under no circumstances does the Commission undertake to pay to any tax authority any tax or duty from which it is exempt under Articles 3 and 4 of Protocol No 7 on the Privileges and Immunities of the European Union annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty establishing the European Atomic Energy Community.'

2.6. VAT and registration - Protocol on Privileges and Immunities

The candidate undertakes, if the building fulfils the necessary legal conditions, to subject the operation to VAT.

3. Technical conditions pertaining to the building

3.1. Compliance with internal and external standards

3.1.1. Compliance with the Manual of Standard Building Specifications (MIT)

The candidate guarantees that the subject of the contract is a building fitted out in accordance with the Commission's needs and which meets MIT standards (available at http://ec.europa.eu/oib/pdf/mit-standard-building-specs_en.pdf), except in the case of derogations listed in an annex to the contract.

The provisions of the MIT in relation to the compliance of the building with regulations and standards are as follows:

- Any building selected to house Commission departments must conform in every respect to the public-buildings legislation in force.

- Buildings legislation can be categorised according to the various stages of the building process from planning to use, namely:

- urban development legislation (planning permission and environmental licences),
- architectural legislation (architectural design, structural calculations for the building shell),
- legislation governing technical installations (dimensions, energy consumption),
- legislation on health and safety at work,
- environmental legislation.

Standards, for their part, are categorised according to the issuing body and the technical domain to which they relate.

For the purposes of safety legislation, buildings occupied by the Commission's departments are treated as private buildings. By contrast, premises which are specifically intended to receive the public, such as info-points and reception offices, are treated as public buildings.

Any building site within a building must comply with the safety regulations.

The candidate must provide the Commission with the administrative documents listed in the MIT.

3.1.2. Law on access for persons with reduced mobility

The candidate guarantees that, on the date of provisional acceptance, the building complies with the legislation on access for persons with reduced mobility.

The candidate will send the Commission a report from an approved body on the compliance of the building, on the date of provisional acceptance, with the requirements of the legislation in force and the MIT.

3.2. Urban planning

The candidate must send the Commission a copy of the planning permits by virtue of which the building has been built/renovated.

The candidate must guarantee that the planning permits are definitive and not subject to appeal on the date of the provisional acceptance of the fitted-out building granted by the Commission.

The candidate must provide the Commission with a certificate from an architect confirming that the constructed/renovated building is in conformity with the plans annexed to the application for planning permission or, if necessary, the candidate must give the Commission an undertaking that it will remedy with the appropriate authorities any violations of the planning permit identified by the architect. If the violations are substantial, the Commission reserves the right to make such remedy a condition precedent of the signing of the private agreement.

3.3. Environment

3.3.1. Environmental licence

The candidate must send the Commission a copy of the environmental licences governing the use of the fitted-out building.

The candidate must guarantee that the environmental licences are definitive and not subject to appeal.

The candidate must provide the Commission with a certificate from an approved inspection office

confirming that the installations classified as present in the property are identical to those authorised by the environmental licences or, if necessary, the candidate must give the Commission an undertaking that it will remedy with the appropriate authorities any violations of the environmental licences identified by the inspection office. If the violations are substantial, the Commission reserves the right to make such remedy a condition precedent of the signing of the private agreement.

The candidate will be responsible for carrying out the formalities for the transfer of the environmental licence to the Commission.

3.3.2. Soil pollution

The candidate must send the Commission:

- a certificate from the administration for the environment and energy² stating that the building is not on the list of sites with polluted soils. This certificate must be provided before the contract is signed; or
- a reconnaissance study of the soil, approved by the administration for the environment and energy, and the additional studies and/or measures required where appropriate. The study must be carried out before the contract is signed. In the case of additional measures or studies, the contract must include a condition precedent or a condition subsequent (the choice to lie with the Commission).

3.3.3. Energy efficiency

The candidate must send the Commission a report from an approved body showing that the energy efficiency of the building meets the legislation in force.

3.3.4. Asbestos

The candidate must produce an 'asbestos free/asbestos safe' certificate issued by an official inspection body, at the candidate's expense and under its own responsibility.

4. Fitting-out of the building

4.1. Definition of work

The term 'work' refers to:

- basic works carried out by the candidate on its own account and under its own responsibility up to the date of provisional acceptance of the fitted-out building issued by the Commission;
- specific fitting-out works carried out by the candidate on its own account and under its own responsibility up to the date of the provisional acceptance in order to meet the Commission's requirements and in accordance with a programme agreed between the candidate and the Commission.

4.2. General rules for carrying out the work

The candidate must perform this work, or have it performed, to the highest professional standards. The candidate is under an obligation to produce results in this respect.

² In the Brussels-Capital Region, this is *Bruxelles Environnement* [the Brussels Department of the Environment].

The candidate has sole responsibility for complying with all the legal obligations incumbent on it, notably those resulting from employment, tax and social legislation. The candidate must also obtain adequate insurance to cover liability during the works (particularly by taking out Comprehensive Worksite Insurance).

The candidate has sole responsibility for taking the necessary steps to obtain the permits or licences required for performance of the work under the laws and regulations in force.

The candidate must ensure that any person performing the work has the professional qualifications and experience required for the execution of the tasks assigned to it.

The candidate must neither represent the Commission nor behave in any way that would give such an impression.

The Commission will be invited to take part in all planning meetings or site meetings organised after the signature of the contract. The Commission will have the right to propose agenda items for such meetings. The Commission will also have the right to call meetings relating to the work at its own initiative, without this implying any recognition of the capacity of project manager on its part.

The Commission will be sent all the implementation documents (plans, sketches, technical datasheets, etc.) drawn up by participants involved in the work. It will have a period of two weeks in which to make any comments.

The representatives appointed by OIB will be entitled to have free access to the site, provided that they comply with the safety regulations in force on the site.

4.3. Permits

The candidate must guarantee that all enforceable permits are definitive and not subject to appeal on the date of the final acceptance of the fitted-out building issued by the Commission. The candidate's obtaining the enforceable permits in definitive form and not subject to appeal may, depending on the nature of the work to be carried out, be a condition precedent of the signing of the contract in the form of a private agreement.

4.4. Alteration work: indirect costs

Should the Commission ask for alteration work to be carried out, the candidate vendor must notify the Commission in writing of any implications this might have for the price and the hand-over date.

4.5. Performance guarantee

Outfitting works will be covered by a bank guarantee of between 5% and 10% of their cost. The guarantee will be payable on demand and must be lodged on signature of the contract.

One half of the guarantee will be released on provisional acceptance and the other half on final acceptance.

4.6. Penalties in the event of a delay in making the building available

The penalty per day of delay in the event of late delivery of the building is 1/365th of the price. Such compensation does not constitute a discharge of the candidate's obligations and is due to the Commission as of right and with no advance notice.

If the delivery deadline is exceeded by six months the Commission may terminate the contract

provided that the delay is not attributable to the Commission. The Commission will retain the right to compensation.

4.7. Provisional acceptance

Provisional acceptance is between the Commission and the vendor, and is different from the provisional acceptance between the vendor, the architects, the design offices and the consultants.

Provisional acceptance is a single operation covering both the building and the works. Only the Commission has the power to derogate from this principle.

Provisional acceptance is a condition precedent to the occupation of the building by the Commission.

The contract contains details of the procedure for organising the provisional acceptance between the candidate and the Commission (pre-acceptance visits, documents to be provided before, during and after acceptance, form and content of the provisional acceptance report, etc.).

Unless otherwise specified in the contract, the Commission will have one month from the date of provisional acceptance in which to give notice of any visible defects overlooked at the time of the provisional acceptance. Should the Commission decide to carry out the provisional acceptance in stages, the month will start to run from the provisional acceptance of the final stage and for the entire building.

Provisional acceptance is the starting point for the total guarantee referred to in point 4.9 below.

4.8. Final acceptance

Final acceptance is between the Commission and the vendor, and is different from the final acceptance between the vendor, the architects, the design offices and the consultants.

Final acceptance will follow the same principles as provisional acceptance.

The candidate will transfer to the Commission all the rights of action and guarantees relating to the works and to the building with effect from the final acceptance, without prejudice to Article 606 of the Civil Code.

4.9. Total guarantee on the building

Any building which is new, has been renovated, or is to be fitted out, will be covered by a 'total' guarantee for at least twelve months, during which the vendor must, at its own expense and risk, repair or have repaired, alter or have altered, replace or have replaced by any means all defective items or defective parts; all such operations are at the owner's own risk and expense, including transport, assembly, disassembly, demolition, construction, restoration and putting back into service. In this case the vendor undertakes to extend to the Commission, without prejudice to the guarantee against hidden defects, the benefits of the manufacturer's or installer's guarantee on the repaired, altered or replaced item from the date of repair, alteration or replacement.

Only the following defects and their consequences that appear after the date of provisional acceptance will not be the responsibility of the vendor:

- *defects attributable to normal use or normal wear-and-tear;*
- *defects attributable to abnormal use or occupancy.*

This guarantee will apply to the basic building and to the outfitting works, even if the basic building has already been the subject of a provisional acceptance.

4.10. Ten-year liability

Without prejudice to the total guarantee enjoyed by the Commission, the candidate must guarantee, in accordance with Articles 1792 and 2270 of the Civil Code, the soundness of the building's structure (including the concrete), its watertightness and its façades for a period of ten (10) years from the date of final acceptance.

4.11. Liability for hidden defects

Without prejudice to the total guarantee and ten-year liability period enjoyed by the Commission, the candidate will be liable for any hidden defects that may affect the building and the specific fittings; this liability is limited to a period of ten (10) years from the date of provisional acceptance.

5. General legal conditions

5.1. Measures for supervision and the protection of the Commission's interests

The standard clause requested by the Commission is as follows:

'Pursuant to Article 161 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, as amended, the European Court of Auditors will be empowered to audit the documents held by the natural or legal persons receiving payments from the budget of the European Union from signature of the contract up to five years after payment of the balance.

The Commission or an outside body of its choice will have the same rights as the European Court of Auditors for the purpose of checks and audits limited to compliance with contractual obligations from signature of the contract up to five years after payment of the balance.

In addition, the European Anti-Fraud Office may carry out on-the-spot checks and inspections in accordance with Council Regulation (Euratom, EC) No 2185/96 and Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council from signature of the contract up to five years after payment of the balance.'

5.2. Conflict of interest and professional conflicting interests

The standard clause requested by the Commission is as follows:

'The vendor must take all the necessary measures to prevent any situation of conflict of interest or professional conflicting interest.

It must notify the Commission in writing as soon as possible of any situation that could constitute a conflict of interest or a professional conflicting interest during the performance of the contract. It must immediately take the necessary steps to rectify this situation.

The Commission may take the following action:

- a) *verify that the measures taken by the vendor are appropriate;*
- b) *require the vendor to take further action within a specified deadline.*

The vendor must pass on all the relevant obligations in writing to:

- a) its personnel;*
- b) any natural person with the power to represent it or take decisions on its behalf;*
- c) all third parties involved in performance of the contract.*

The vendor must also ensure that the persons referred to above are not placed in a situation which could give rise to conflicts of interest.

5.3. Confidentiality

The standard clause requested by the Commission is as follows:

'The vendor undertakes to treat in the strictest confidence and not make use of or divulge to third parties any information or documents which are linked to this agreement and to its performance, unless it is under a legal obligation to make certain information public. In that case it must disclose only the minimum required to fulfil its legal obligations.'

5.4. Force majeure

Force majeure is defined as 'any unforeseeable and insurmountable event that is not attributable to any error on the part of the debtor and that prevents the debtor from fulfilling its obligations or complying with the requisite standards, within the limits of the diligence that can be expected from it. A strike may be invoked as force majeure only if it involves a business sector in Belgium that is essential for carrying out the specific fitting-out works. Situations in which force majeure can be legitimately invoked include, but are not limited to, acts by public authorities, complete suspension of access to the road networks adjoining the building site, suspension of works ordered by a judicial or administrative authority or court, except for cases in which these circumstances are owing to an error by the vendor and/or by any entity dependent on the vendor.'

5.5. Technical disputes

In the event of a technical disagreement, the parties must submit the points at issue to an independent technical expert appointed by common accord between the candidate and the Commission for a decision, by means of the mail annexed to the contract. The independent technical expert's decision is final and binding on the parties.

The parties will each pay half of the independent technical expert's fees and expenses.

5.6. Applicable law – jurisdiction

Any disputes arising out of the performance or interpretation of this contract will be governed by the laws of Belgium.

Disputes relating to the interpretation and application of the contract will fall within the exclusive jurisdiction of the courts of Belgium.

The language of the proceedings will be French.