

ANNEX IV

Procurement by grant Beneficiaries in the context of European Union external actions

1. GENERAL PRINCIPLES

If the implementation of an Action requires procurement by the Beneficiary(ies), the contract must be awarded to the tender offering best value for money (i.e. the tender offering the best price-quality ratio), or, in case of work or supply contracts not involving after-sales service, to the tender offering the lowest price.

Contracts must be awarded in accordance with procurement rules and procedures:

- (a) ensuring sufficient transparency, fair competition and adequate ex-ante publicity
- (b) ensuring equal treatment, proportionality and non-discrimination;
- (c) avoiding conflicts of interests throughout the entire procurement procedure.

Contracts must not be split artificially to circumvent procurement thresholds.

To this end, the rules set out in sections 2 to 7 below, subject to section 8, must be followed. These lay down the minimum procedures to be followed and it is not precluded that other procedures offering more competition are used.

The European Commission will carry out *ex post* checks on Beneficiary(ies)'s compliance with these rules. Failure to comply with these rules would render the related expenditure ineligible for EU/EDF funding.

The provisions of this Annex apply *mutatis mutandis* to contracts to be concluded by the Beneficiary(ies)'s affiliated entity(ies).

2. ELIGIBILITY FOR CONTRACTS

2.1. The nationality rule

Participation in tender procedures managed by the Beneficiary(ies) is open on equal terms to all natural and legal persons effectively established in a Member State or a country, territory or region mentioned as eligible by the relevant regulation/basic act governing the eligibility rules for the grant as per Annexes a2a to a2c to the Practical Guide. Tenderers must state their nationality in their tenders and provide the usual proof of nationality under their national legislation.

This rule does not apply to the experts proposed under service tenders financed by the grant.

2.2. The rule of origin

If the basic act or the other applicable instruments so require, the tenderer must prove the origin¹ of the supplies acquired under the grant. Where rules of origin need to be respected², contractors must

¹ For the purpose of this annex, the term "origin" is defined in chapter 2 of Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the EU Customs Code (Modernised Customs Code).

² Under the CIR (i.e. not IPA I) and the EDF (once the 2014 amendment to Annex IV to the Cotonou Agreement has come into force) supplies may originate from any country if the amount of the supplies to be procured is below 100.000 € per purchase.

present proof of origin to the Beneficiary(ies) at the latest when the first invoice is presented. The certificate of origin must be made out by the competent authorities of the country of origin of the supplies and must comply with the rules laid down by the relevant Union legislation.

2.3. Exceptions to the rules on nationality and origin

Where an agreement on widening the market for procurement of goods, works or services applies, access must also be open to nationals and goods originating from other countries under the conditions laid down in that agreement.

In addition, in duly substantiated exceptional cases foreseen by the applicable regulations, in order to give access to nationals or goods originating from countries other than those referred to in sections 2.1 and 2.2, a derogation by the European Commission must be sought prior to the launch of the procedures..

2.4. Grounds for exclusion from participation in procurement

Candidates or tenderers will be excluded from taking part in a procurement procedure if:

- (1) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (2) they or persons having powers of representation, decision-making or control over them have been convicted of an offence concerning their professional conduct by a judgment of a competent authority which has the force of *res judicata*;
- (3) they have been guilty of grave professional misconduct proven by any means which the Beneficiary(ies) can justify;
- (4) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the Beneficiary(ies) or those of the country where the contract is to be performed;
- (5) they are not in compliance with their obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed.
- (6) they or persons having powers of representation, decision making or control over them have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation, money laundering or any other illegal activity, where such illegal activity is detrimental to the EU's financial interests;
- (7) they are currently subject to an administrative penalty referred to in section 2.3.4 of the Practical Guide

Candidates or tenderers must certify that they are not in one of the situations listed above.

Points (1) to (4) do not apply to the purchase of supplies on particularly advantageous terms from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, through an arrangement with creditors, or through a similar procedure under national law.

2.5. Exclusion from award of contracts

Contracts may not be awarded to candidates or tenderers which, during the procurement procedure:

- (a) are subject to a conflict of interests;
- (b) are guilty of misrepresentation in supplying the information required by the Beneficiary(ies) as a condition of participation in the contract procedure or fail to supply this information.

3. COMMON PROCUREMENT RULES

The tender documents must be drafted according to best international practice. If they do not have their own documents, Beneficiaries may voluntarily use the models published in the Practical Guide on the EuropeAid website. The European Commission will not publish notices and tender documents issued by the Beneficiary(ies).

The time-limits for applications and/or tenders must be long enough to give interested parties a reasonable period to prepare and submit their tenders.

An evaluation committee must be set up to evaluate both applications and/or tenders of a value of EUR 60 000 or more on the basis of the exclusion, selection and award criteria published by the Beneficiary(ies) in advance in the tender documents. This committee must have an odd number of members, at least three, with all the technical and administrative capacities necessary to give an informed opinion on the tenders.

4. SPECIFIC RULES FOR SERVICE CONTRACTS

4.1. Contracts from EUR 300 000 and above

Service contracts from EUR 300 000 and above must be awarded by means of an international restricted tender procedure following publication of a contract notice.

The contract notice is to be published in all appropriate media, in particular on the Beneficiary's web site, in the international press and the national press of the country in which the Action is being carried out, or in other specialist periodicals. It must state the number of candidates which will be invited to submit tenders within a range of four to eight candidates, and must be sufficient to ensure genuine competition.

All would-be service providers fulfilling the conditions referred to in section 2 may take part but only candidates satisfying the published selection criteria and invited in writing by the Beneficiary may submit a tender.

4.2. Contracts of less than EUR 300 000 but more than EUR 60 000

Such contracts must be awarded by means of a competitive negotiated procedure without publication, in which the Beneficiary consults at least three service providers of its choice and negotiates the terms of the contract with one or more of them.

4.3. Contracts of EUR 60 000 or less

For services of a value of EUR 60 000 or less, the procedures established by the Beneficiary may be used, while respecting the rules and principles laid down in sections 1, 2 and 3 of this annex.

5. SPECIFIC RULES FOR SUPPLY CONTRACTS

5.1. Contracts from EUR 300 000 and above

Supply contracts from EUR 300 000 and above must be awarded by means of an international open tender procedure following publication of a contract notice.

The contract notice is to be published in all appropriate media, in particular on the Beneficiary's web site, in the international press and the national press of the country in which the Action is being carried out, or in other specialist periodicals.

Any would-be supplier which fulfils the conditions referred to in section 2 may submit a tender.

5.2. Contracts between EUR 100 000 and less than EUR 300 000

Such contracts are awarded by means of an open tender procedure published locally: the contract notice is published in all appropriate media at least in the country in which the Action is being carried out.

A local open tender procedure must provide other eligible suppliers with the same opportunities as local firms.

5.3. Contracts of less than EUR 100 000 but more than EUR 60 000

Such contracts must be awarded by means of a competitive negotiated procedure without publication of a contract notice. The Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them.

5.4. Contracts of EUR 60 000 or less

For supply contracts of EUR 60 000 or less, the procedures established by the Beneficiary may be used, while respecting the rules and principles laid down in sections 1, 2 and 3 of this annex.

6. SPECIFIC RULES FOR WORKS CONTRACTS

6.1. Contracts from EUR 5 000 000 and above

Works contracts of EUR 5 000 000 or more must be awarded by means of an international open tender procedure following publication of a contract notice.

The contract notice is to be published in all appropriate media, in particular on the Beneficiary's web site, in the international press and the national press of the country in which the Action is being carried out, or in other specialist periodicals.

Any contractor which fulfils the conditions referred to in section 2 may submit a tender.

6.2. Contracts of between EUR 300 000 and less than EUR 5 000 000

Such contracts must be awarded by means of an open tender procedure published locally: the contract notice is published in all appropriate media at least in the country in which the Action is being carried out.

A local open tender procedure must provide other eligible contractors with the same opportunities as local firms.

6.3. Contracts of less than EUR 300 000 but more than EUR 60 000

Such contracts must be awarded by means of a competitive negotiated procedure without publication, in which the Beneficiary consults at least three contractors of its choice and negotiates the terms of the contract with one or more of them.

6.4. Contracts of EUR 60 000 or less

For works contracts of EUR 60 000 or less, the procedures established by the Beneficiary(ies) may be used, while respecting the rules and principles laid down in sections 1, 2 and 3 of this annex.

7. USE OF NEGOTIATED PROCEDURE

The Beneficiary(ies) may decide to use the negotiated procedure on the basis of a single tender in the following cases:

- (a) for the purposes of humanitarian aid and civil protection operations or for crisis management aid. Crisis situations may be invoked only when they have been formally recognised by the European Commission. The Contracting Authority will inform the Coordinator if a crisis situation has been declared and the period for which the declaration will be in force.
- (b) where the services are entrusted to public-sector bodies or to non-profit institutions or associations and relate to activities of an institutional nature or designed to provide assistance to peoples in the social field;
- (c) where contracts extend on-going activities:
 - (i) not included in the main service contract which have become necessary to perform the contract for unforeseen circumstances, and provided that the additional service cannot be technically and economically separated from the principal contract without serious inconvenience for the Beneficiary(ies) and the aggregate amount of additional services does not exceed 50 % of the value of the principal contract; or
 - (ii) which consist in the repetition of similar services entrusted to the contractor providing services under the initial contract, provided that:
 - (a) a contract notice was published for the first service and the possibility of using the negotiated procedure for new services for the project and the estimated cost were clearly indicated in the contract notice published for the first service; and
 - (b) the extension of the contract for a value and duration not exceeding the value and the duration of the initial contract.
- (d) for additional deliveries by the original supplier intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the Beneficiary(ies) to acquire equipment having different technical characteristics which would result in either incompatibility or disproportionate technical difficulties in operation and maintenance;
- (e) for additional works not included in the initial contract concluded which have, through unforeseen circumstances, become necessary for carrying out the works and on condition that such works cannot be technically or economically separated from the main contract without serious inconvenience for the Beneficiary(ies) and on the condition that, although separable from the performance of the original contract, are strictly necessary for its completion and where the aggregate value of contracts awarded for additional works does not exceed 50 % of the value of the principal contract.
- (f) where the tender procedure has been unsuccessful, that is where no qualitatively and/or financially worthwhile tender has been received. In such cases, after cancelling the tender procedure, the Beneficiary may negotiate with one or more tenderers of its choice, from among

those that took part in the tender procedure, provided that the initial terms of the tender procedure are not substantially altered;

- (g) where the contract concerned follows a contest and must, under the rules applying, be awarded to the winner of the contest or to one of the winners of the contest, in which case, all winners shall be invited to participate in the negotiations;
- (h) where, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract can be awarded only to a particular service provider;
- (i) where warranted by the nature or particular characteristics of the supplies, for example, where performance of the contract is exclusively reserved for the holders of patents or licences to use patents;
- (j) where the orders are placed with a Humanitarian Procurement Centre, recognised as such by the relevant service of the European Commission or with a central buying office (see section 8.5);
- (k) for the issue of the expenditure verification report and the financial guarantee where they are required under the contract;
- (l) for contracts declared to be secret, or for contracts whose performance must be accompanied by special security measures or when the protection of the essential interests of the European Union or the partner country so requires;
- (m) for contracts in respect of supplies quoted and purchased on a commodity market;
- (n) for contracts in respect of purchases on particularly advantageous terms, either from a supplier which is definitively winding up its business activities, or from the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national law;
- (o) where a new contract has to be concluded after early termination of an existing contract.

8. SPECIAL CASES

Different rules than those specified in this annex may apply in the following cases, with the exception of the principles described in section 1 and the rules on nationality and origin provided for in section 2, which always apply.

8.1. Co-financing

When the Action is co-financed by several donors and one of the other donors, whose contribution is greater than that of the European Commission, imposes procurement rules on the Beneficiary(ies) that differ from those set out in sections 3 to 7, the Beneficiary(ies) may apply these rules.

8.2. Public administrations of the Member States

Where the Beneficiary(ies) or an affiliated entity is a contracting authority and/or a contracting entity within the meaning of the EU Directives applicable to procurement procedures, it must apply the relevant provisions of those texts, in preference to the rules set out in this annex. Notwithstanding the foregoing, the rules on nationality and origin set out in section 2 still apply.

8.3. International Organisations

Where the Beneficiary(ies) or an affiliated entity is an international organisation, it applies its own procurement rules if they offer guarantees equivalent to internationally accepted standards. Where its pillars have been positively assessed the relevant rules are considered equivalent. If the Organisation's rules do not offer equivalent guarantees, or in specific cases, the European

3

Commission and the Beneficiary will agree on the use of other procurement procedures offering such guarantees. In this case, the rules to be followed are set forth in the Special Conditions.

If allowed by the applicable regulatory provisions of the European Union, the origin of the goods and the nationality of the organisations, companies and experts selected for carrying out activities in the Action shall be determined in accordance with the Organisation's relevant rules. In any event goods, organisations, companies and experts eligible under the applicable regulatory provisions of the European Union shall be eligible.

In all other cases the contractors and supplies shall originate in the Member States or the countries, territories or regions mentioned as eligible by the relevant regulation/basic act governing the eligibility rules for the grant as per Annexes a2a to a2c to the Practical Guide. Any departure from the rules of origin and nationality set out above is subject to the specific provisions of the applicable regulatory provisions of the European Union.

8.4. Traditional Agencies

Where the Beneficiary(ies) or an affiliated entity is a traditional agency (public legal entities created by the Union legislator to exercise Union competences in specific areas of expertise), it applies its own procurement rules.

8.5. Central Buying Offices / Humanitarian Procurement Centres

Where the Beneficiary(ies) uses a central buying office as service provider, he selects it in conformity with the procedures set out above for service contracts. This central buying office applies the rules imposed on the Beneficiary.

Where a Humanitarian Procurement Centre recognised as such by the European Commission (see: http://ec.europa.eu/echo/partners/humanitarian_aid/procurement_en.htm) is used, it applies the rules agreed upon at the time of its approval.

* * *

