

ANNEX IV

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

1. GENERAL PRINCIPLES

If the implementation of an Action requires procurement by the Beneficiary, the contract must be awarded to the most economically advantageous tender (ie, the tender offering the best price-quality ratio), in accordance with the principles of transparency and fair competition for potential contractors and taking care to avoid any conflicts of interest.

To this end, the Beneficiary must comply with the rules set out in sections 2 to 7 below, subject to section 8.

In the event of failure to comply with the rules referred to above, expenditure on the operations in question is not eligible for Community financing.

The Commission will carry out ex post checks on Beneficiaries' compliance with the rules.

The provisions of this Annex apply mutatis mutandis to contracts to be concluded by the Beneficiary's partners.

2. ELIGIBILITY FOR CONTRACTS

2.1. The nationality rule

Participation in tender procedures administered by the Beneficiary is open on equal terms to all natural and legal persons of the Member States and the States and territories of regions expressly covered and/or allowed by the Financial Regulation, the basic legislation or other instruments governing the aid programme under which the grant is being financed. Tenderers must state, in the tender, the country of which they are nationals by presenting the usual proof of nationality under their national legislation.

This rule does not apply to the experts proposed by service providers taking part in tender procedures or service contracts financed by the grant.

2.2. The rule of origin

If the basic act or the other instruments applicable to the programme under which the grant is financed contain rules of origin for supplies acquired by the Beneficiary in the context of the grant, the tenderer must state the origin of supplies. For the purpose of this annex, the term "origin" is defined in articles 23 and 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and other Community legislation governing non-preferential origin. Contractors must present proof of origin to the Beneficiary no later than when the first invoice is presented, for equipments and vehicles of a unit cost on purchase of more than €5 000. 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 Community legislation.

Where the basic act or other instruments applicable to the programme under which the grant is financed do not contain rules of origin for supplies acquired by the Beneficiary in the context of the grant, the origin of those supplies is free and no certificate of origin is required.

2.3. Exceptions to the rules on nationality and origin

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

In addition, in duly substantiated exceptional cases, the Commission may allow nationals of countries other than those referred to in section 2.1 to tender for contracts (or supplies of goods originating in such countries) on the basis of the specific conditions laid down in the basic act or other instrument governing the programme under which the grant is financed.

2.4. Grounds for exclusion from participation in procurement

Candidates or tenderers will be excluded from participation 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 have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*;
- (3) they have been guilty of grave professional misconduct proven by any means which the Beneficiary 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 or those of the country where the contract is to be performed;
- (5) they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;
- (6) they are currently subject to an administrative penalty referred to in section 2.3.5 of the Practical Guide to contract procedures for EC external actions.

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

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 as a condition of participation in the contract procedure or fail to supply this information.

3. RULES COMMON TO ALL TENDER PROCEDURES

The tender documents must be drafted in accordance with best international practice. If they do not have their own documents, Beneficiaries may use the models published on the European Commission's web site relating to external actions. The European Commission will not publish the tender documents established by the Beneficiary.

The time-limits for receipt of tenders and requests to participate must be long enough to allow interested parties a reasonable and appropriate period to prepare and submit their tenders.

All requests to participate and tenders declared as satisfying the requirements must be evaluated and ranked by an evaluation committee on the basis of the exclusion, selection and award criteria announced in advance. 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. RULES APPLICABLE TO SERVICE CONTRACTS

4.1. Contracts of €200 000 or more

Service contracts worth EUR 200 000 or more must be awarded by means of an international restricted tender procedure following publication of a procurement notice.

The procurement 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 ask to participate but only candidates satisfying the published selection criteria and invited in writing by the Beneficiary may submit a tender.

4.2. Contracts under €200 000

Service contracts worth less than € 200 000 must be awarded by means of a 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.

For services of a value of €5 000 (EDF¹)/€10 000 (Budget²) or less, the Beneficiary may place orders on the basis of a single tender.

5. RULES APPLICABLE TO SUPPLY CONTRACTS

5.1. Contracts of €150 000 or more

Supply contracts worth €150 000 or more must be awarded by means of an international open tender procedure following publication of a procurement notice.

The procurement 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.

¹ applicable when the grant contract is financed from the European Development Fund

² applicable when the grant contract is financed from the EC General Budget

Contracts between €30 000 (EDF)/€60 000 (Budget) and €50 000 Such contracts are awarded by means of an open tender procedure published locally: the procurement notice is published in all appropriate media but only 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.

5.2. Contracts under €30 000 (EDF)/€60 000 (Budget)

Supply contracts worth less than €30 000 (EDF)/€60 000 (Budget) must be awarded by means of a negotiated procedure without publication, in which the Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them.

For supplies of a value of €5 000 (EDF)/€10 000 (Budget) or less, the Beneficiary may place orders on the basis of a single tender.

6. RULES APPLICABLE TO WORKS CONTRACTS

6.1. Contracts of €5 000 000 or more

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

The procurement 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 €300 000 and €5 000 000

Such contracts are awarded by means of an open tender procedure published locally: the procurement notice is published in all appropriate media but only 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 under €300 000

Works contracts worth less than €300 000 must be awarded by means of a 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.

For works of a value of €5 000 (EDF)/€10 000 (Budget) or less, the Beneficiary may place orders on the basis of a single tender.

7. USE OF THE NEGOTIATED PROCEDURE

The Beneficiary may use the negotiated procedure on the basis of a single tender in the following cases:

- (a) where, for reasons of extreme urgency brought about by events which the Beneficiary could not have foreseen and which can in no way be attributed to him, the time-limit for the procedures referred to in sections 3 to 6 cannot be kept. The circumstances invoked to justify extreme urgency must in no way be attributable to the Beneficiary.

Actions carried out in crisis situations identified by the Commission are considered to satisfy the test of extreme urgency. The Commission will inform the Beneficiary if a crisis situation exists and when it comes to an end.

- (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 activities already under way which are not included in the main contract but which, because of unforeseen circumstances, have become necessary to perform the contract, or which consist of the repetition of similar services entrusted to the contractor providing services under 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 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;
- (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 central buying office, recognised as such by the relevant service of the European Commission;
- (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 beneficiary 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.

8. SPECIAL CASES

8.1. Co-financing

Where:

- the Action is co-financed by several donors and
- one of the other donors, whose contribution to the total cost of the Action is greater than that of the Commission, imposes procurement rules on the Beneficiary that differ from those set out in sections 3 to 7,

the Beneficiary may apply the rules imposed by the other donor. In all cases, the general principles and rules on nationality and origin set out in sections 1 and 2 still apply.

8.2. Public administrations of the Member States

Where the Beneficiary or a partner is a contracting authority and/or a contracting entity within the meaning of the Community Directives applicable to procurement procedures, it must apply the relevant provisions of those texts, in preference to the rules set out in 3 to 7. In all cases, the general principles and rules on nationality and origin set out in 2 still apply.

8.3. International Organisations

Where a partner is an international organisation, it applies its own procurement rules if they offer guarantees equivalent to internationally accepted standards. If they do not or in specific cases, the Commission and the Beneficiary agree on the use of other procurement procedures which offer such guarantees. In all cases the general principles and rules on nationality and origin set out in point 2 still apply.

8.4. Central Buying Offices

Where the Beneficiary uses a central buying office as service provider, he selects it in conformity with the procedures set out above for service contracts.

A central buying office for the purpose of point 7 (j) is a non-profit making, autonomous and professional structure, specialised in the technical and commercial management of supplies.

This central buying office applies the rules imposed on the Beneficiary. Where it is a humanitarian central buying office recognised as such by the relevant service of the European Commission, it applies the rules agreed upon at the time of its approval, subject to the rules on nationality and origin set out in point 2 above.