



European Investment Bank  
**Guide to Procurement**



**European Investment Bank**

**GUIDE TO PROCUREMENT  
for projects financed by the EIB**

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## **INTRODUCTION**

The purpose of this Guide to Procurement is to inform the promoters of a project whose contracts are financed in whole or in part by the European Investment Bank ("the Bank") - or are financed under loans guaranteed by the Bank - of the arrangements to be made for procuring works, goods and services required for the project.

This Guide applies specifically to those components of a project identified for Bank's financing. However, in order to ensure the overall feasibility of the project, the Bank requires that procurement of the other project components does not compromise the project's technical, economic and financial viability.

The terms "open, restricted and negotiated procedures, and competitive dialogue" are used in this Guide with the meaning defined by European Union (EU) Directives on procurement (see definitions set out in **Annex 1**).

This Guide will be updated as deemed necessary by the Bank.

Version dated June 2011.

## **1. GENERAL ASPECTS**

### **1.1. The Bank's Policy**

The main elements of the Bank's policy on procurement are:

- The Bank will ensure that its funds are employed as rationally as possible. This requires that the works, goods and services procured under its financing are of appropriate quality, and acquired at economic prices and in a timely manner. This is generally best achieved through open international competition. It is consistent with the Bank's statute and accords with the interests of promoters.
- In projects located within the European Union (EU), and in those Candidate Countries (with which negotiations are already in progress for their accession to the EU) and Potential Candidate Countries that have already incorporated the relevant EU legislation, the Bank requires that the applicable EU Law on public procurement, in particular the relevant EU procurement Directives concerning competitive tendering on the basis of fair and non-discriminatory terms, be complied with, particularly as concerns **open or restricted procedures** with publication in the Official Journal of the European Union (OJEU).
- In all other countries outside the Union, the Bank requires that the main mechanisms of the EU Directives on procurement be followed, with the necessary procedural adaptations. These mechanisms may be summarised as open international competition, non-discrimination of tenderers, fairness and transparency of the process, and selection of the economically most advantageous offer. Thus **open or restricted procedures** with publication in the OJEU is the Bank's preferred method. The actual choice of procurement procedures ultimately has to take into account a range of considerations, relating in particular to the commercial nature and interests of the promoter; the sector involved; the nature of the works, goods and services to be procured; the technology to be used; the size of individual components; the timetable for implementation; the number of firms potentially able to undertake the work or provide the supplies or services; the competitiveness of the market; etc. In the case where open or restricted procedures are not followed, promoters must, to the satisfaction of the Bank, justify their decision to use a different procedure; they must prove that the prices for the works, goods or services are commensurate with those obtained for equivalent investments in the light of market conditions and that, at the very least, any differences in cost can be explained by specific verifiable factors.

### **1.2. Eligibility of Contractors and Suppliers of Goods and Services**

In the usual case of projects (both inside and outside the Union) financed by the Bank's "own resources" (funds raised mainly through the Bank's borrowings on capital markets), firms originating from all countries of the world are eligible to tender for works, goods and services contracts.

In some specific cases of projects outside the Union, the Bank's financing comes from third parties, and the origin of firms eligible to participate in the procurement may then be partly restricted. Details of such restrictions are provided in section 3.2.

In addition, individuals or firms may not be eligible to tender in application of section 1.4 on Ethical Conduct.

### **1.3. Bank and Promoters: Respective Roles**

Promoters are fully responsible for implementing projects financed by the Bank, in particular for all aspects of the procurement process, from drafting tender documents and awarding contracts through to implementing contracts. The involvement of the Bank is confined solely to verifying whether or not the conditions attached to its financing are met.

The Bank may advise or assist promoters in the procurement process, but is not a party to the resulting contracts. The Bank has the right and obligation to ensure that, in the case of projects inside the Union, EU provisions in this field or, in the case of projects outside the Union, the relevant criteria with regard to the proper management of its financing are respected, and that the procurement process is fair and transparent and the tender selected is economically the most advantageous. The rights and obligations of the promoter vis-à-vis the tenderers for works, goods or services to be furnished for a project are governed by the local legislation and tender documents published by the promoter, and not by this Guide.

In addition, the EIB requires promoters to ensure that review procedures for effective remedies are available to any party having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. This should be distinguished from the Bank's own review of procurement decisions for projects located outside the European Union, which is summarised in section 3.5 and in **Annex 2**.

### **1.4. Ethical Conduct**

It is the Bank's policy to require that promoters, as well as tenderers, contractors, suppliers and consultants under Bank-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts. The Bank reserves the right to take all appropriate action in order to enforce this policy.

Moreover, the Bank is committed to ensuring that its loans are used for the purposes intended and its operations are free from prohibited conduct (including but not limited to, fraud, corruption, collusion, coercion<sup>1</sup>, and money laundering and terrorist financing).

In pursuance of this policy as set out in EIB's Anti-Fraud Policy and within the framework of its exclusion procedures (published in the Bank's website: [www.eib.org](http://www.eib.org)), the Bank:

- may declare an individual or an entity ineligible to be awarded a contract under any EIB Project or to enter into any relationship with the Bank, if it determines pursuant to its exclusion procedures that such individual or entity has engaged in any prohibited conduct in the course of the procurement process and/or implementation of the contract; and
- may cancel all or part of the Bank financing allocated to a contract for works, goods or services if it, at any time, determines pursuant to its exclusion procedures that an individual or an entity has engaged in any prohibited conduct during the procurement process or during the execution of the contract, without the promoter having taken action satisfactory to the Bank to investigate and/or terminate the prohibited conduct or, as the case may be, remedy the damage.

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<sup>1</sup> As defined in Annex 3. This would also include obstruction.

## **1.5 Conflict of Interest**

The Bank requires that candidates, tenderers, contractors, suppliers or consultants participating in an award procedure or a contract under a Bank-financed project shall not have a conflict of interest.

Conflict of interest occurs when the impartial and objective exercise of the functions of the promoter, or the respect of the principles of competition, non-discrimination or equality of treatment with regard to the procurement procedure or contract, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest.

The Bank will not accept candidates or tenderers affected by a conflict of interest in the award procedure to benefit from EIB financing in relation to the contract to be awarded under the concerned procedure.

The assessment of whether or not there is a conflict of interest has to be carried out on a case by case basis, considering the actual risk of conflict based on the specific circumstances of the case at stake. The individual or entity in question should be allowed to present supporting evidence which might remove all suspicion of a conflict of interest.

## **1.6. Transparency of Bank Activities**

The Bank is committed to achieving the highest possible level of transparency. It follows a Transparency Policy, which is an integral part of its Corporate Responsibility Policies. Two aspects of this Policy are relevant to procurement: the public disclosure of information and the EIB Complaints Mechanism. All these policies are available on the Bank's website: [www.eib.org](http://www.eib.org).

### **1.6.1. Disclosure of Information**

The Transparency Policy sets out the rules under which the public may access information held by the Bank. While in accordance with the Policy, the Bank is committed to a presumption of disclosure, it also has a duty to respect professional secrecy in compliance with the relevant legislation and standards.

### **1.6.2. Complaints against the Bank**

The EIB Complaints Mechanism ([www.eib.org/about/publications/complaints-mechanism-policy.htm](http://www.eib.org/about/publications/complaints-mechanism-policy.htm)) applies to all complaints of alleged maladministration lodged against the EIB Group. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples of failure to respect the principles of good administration, as set by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB.

When exercising the right to lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal – the Complaints Office - and one external – the European Ombudsman. The exhaustion of the internal complaints mechanism procedure is a necessary requisite for any complaint to be entitled to escalate to the European Ombudsman.

## **1.7. Environmental and Social Policies**

The EIB aims to add value by enhancing the environmental and social sustainability of all the projects that it is financing and as such all projects must comply with the environmental and social requirements of the Bank. The Promoters are responsible for preparing, implementing and operating projects financed by the Bank and for the fulfilment of Bank environmental and social requirements. In respect to procurement, tenderers are required to comply with applicable labour laws and national and international standards of environmental protection, health and safety, including those contained in any relevant International Labour Organization (ILO) conventions and international agreements on environmental protection. The Bank's environmental and social policies are summarized in the 2009 "The EIB Statement of Environmental and Social Principles and Standards", available on the Bank's website.

## **2. OPERATIONS WITHIN THE EUROPEAN UNION**

### **2.1. Operations to which EU Directives apply**

Within the Union, procurement is covered by national legislation implementing EU Law, in particular EU Directives on procurement as they may be amended from time to time<sup>2</sup>. It constitutes the legal framework for procurement in EU Member States. It is the role of the relevant national and EU authorities to ensure that procurement is carried out in line with this legal framework.

For those promoters who fall under the EU Directives on procurement<sup>3</sup>, whether they are public or private institutions or companies, the Bank will:

- require the promoter, at the project appraisal stage, to ensure that the applicable procurement Directives concerning competitive tendering, on the basis of fair and non-discriminatory terms are complied with under the project; one essential step is the publication of a Procurement Notice in the OJEU when this is required; and
- take further steps during project implementation, to the extent necessary, to control compliance with applicable procurement Directives in order to ensure the rational employment of the Bank's funds, protect the soundness of the project and reduce the risks involved.

When the Bank finances multi-scheme operations where the details of all sub-projects are not known at appraisal (case of **Framework Loans**), it requires the Promoter to ensure that the procurement of works, goods and services relating to the sub-projects that the Bank finances will be undertaken in accordance with the applicable legal framework.

When the Bank makes a loan to an intermediary institution (case of **Global Loans** and **Mid-Cap Loans**), it requires such intermediary institution to take all the requisite measures to ensure that

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<sup>2</sup> In certain autonomous regions of EU Member States, regional procurement law may also apply.

<sup>3</sup> In particular, European Parliament and Council Directive 2004/18/EC of 31 March 2004 regarding public works, public supply, and public service contracts; European Parliament and Council Directive 2004/17/EC of 31 March 2004 regarding entities operating in the water, energy, transport and postal service sectors; European Parliament and Council Directive 2007/66/EC of 11 December 2007 regarding Remedies, amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; and European Parliament and Council Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC. A full list of EU legal instruments concerning procurement can be found at the website:  
[http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm)

the procurement by the final beneficiaries of works, goods and services relating to the sub-projects that the Bank finances will be undertaken in accordance with the applicable legal framework.

When the Bank finances a project developed under a concession or a public-private partnership (PPP) scheme, it requires that the concession/PPP award process by the relevant public contracting authority complies with the applicable legal framework<sup>4</sup>.

## **2.2. Operations to which EU Directives do not apply**

In all its operations, the Bank aims at the effective use of its resources and ensures that the criteria of economy and efficiency are applied consistently.

For public contracts that are not covered by the EU Directives (e.g., public contracts, the amounts of which are below the thresholds of the Directives), the Bank requires promoters to ensure that procurement complies with the relevant principles of the EU Treaty (in particular the principles of transparency, equal treatment and non-discrimination on the basis of nationality) and applicable national legislation<sup>5</sup>.

For contracts other than public contracts, promoters (most frequently private) operating in sectors where EU Directives do not apply can satisfy the criteria of economy and efficiency in their procurement by recourse to commercial practices other than open or restricted procedures.

In any event, the Bank satisfies itself that promoters follow suitable procurement procedures, ensuring an appropriate selection of works, goods and services offered at competitive prices and in a timely manner. Contracts awarded by promoters must be negotiated impartially and accord with the project's best interests.

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<sup>4</sup> For further guidance, see in particular the Commission Interpretative Communication on Concessions under Community Law, OJEU C 121 dated 29 April 2000, and the Commission Interpretative Communication on the Application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), OJEU C(2007)6661 dated 5 February 2008.

<sup>5</sup> For further guidance, see the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJEU 2006/C 179/02 dated 1 August 2006.

### **3. OPERATIONS OUTSIDE THE EUROPEAN UNION**

#### **3.1. General**

The cooperation agreements and financial protocols agreed upon between the European Union and countries outside the EU lay down the conditions under which the Bank can mount operations either in the form of loans from its own resources (originating mainly from the Bank's borrowings on capital markets) or under resources from third parties managed by the Bank on behalf of the Commission or the Member States. In all cases, the Bank requires that the main mechanisms of the EU Directives on procurement, as described in Sub-section 1.1, be followed, with the necessary procedural adaptations.

Candidate and Potential Candidate Countries are progressively incorporating EU Directives in their legislation. In this Guide, they fall under chapter 3, Operations Outside the European Union, until the deadline when they are committed to applying the EU Directives on procurement as agreed during their negotiations with the EU to the extent that they have transposed these Directives into their national legislation at that moment. Then they fall under chapter 2, Operations Inside the European Union.

#### **3.2. Eligibility of Providers of Works, Goods and Services**

##### **3.2.1. Financing from Own Resources**

In operations financed from the Bank's own resources (subsidized or non-subsidized), tenders are open to nationals of all countries. However there may be restrictions in the case of a joint co-financing (see article 3.2.3 below).

##### **3.2.2. Financing under Resources from Third Parties**

Tenders financed by funds made available under the Investment Facility created by the Cotonou Agreement (ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000) are open to nationals of all countries.

In other cases of financing a contract under resources from third parties (or from a combination of the Bank's own resources and resources from third parties), eligibility of tenderers, goods and services is governed by the rules applicable to the corresponding financing instrument. These rules are summarised in **Annex 4**.

##### **3.2.3. Co-financing from Own Resources**

The Bank may co-finance projects with other financial instruments and institutions, particularly some instruments of the European Commission, the World Bank Group (IBRD, IDA and IFC), regional development banks such as the European Bank for Reconstruction and Development (EBRD), the African Development Bank (AfDB), the Asian Development Bank (AsDB), the Inter-American Development Bank (IDB), as well as bilateral aid agencies of EU countries and various banks from other countries, etc.

Such co-financing can be arranged on a joint or parallel basis:

- in **joint co-financing**, two separate financiers, who may have different eligibility rules with regard to the origin of works, goods and services, agree to finance the same contract. In this case, the Bank will make its participation conditional upon having the other co-financier open its eligibility as much as possible, but at least to all the works, goods and services originating from the European Union and the beneficiary country. In the case of a co-financing with EU budgetary instruments, the eligibility is generally restricted to that of the EU instrument; and
- in **parallel co-financing**, each separate project component or contract is financed by a single financier. In this case, the procedures adopted by each co-financier apply to those components or contracts that it finances. The Bank's eligibility rules with regard to the origin of works, goods and services would therefore apply only to the Bank-financed components or contracts.

### **3.3. Description of Procurement Procedures**

#### **3.3.1. General**

The procurement procedures for Bank's projects outside the Union are consistent with the provisions of the Bank's statute, the Treaty on the Functioning of the European Union, the above-mentioned cooperation agreements and financial protocols, and the relevant decisions of the European Court of Justice.

The procedures are based on the following:

- the development objective entrusted to the Bank, and specifically the Bank's fundamental task to contribute, through its operations, to economic progress in the countries concerned, implying not only careful selection of projects but also, at the implementation stage, access to the appropriate technology at the most advantageous cost;
- the main mechanisms, procedures and rules incorporated in the relevant EU Directives, as appropriate to the specific operations and countries concerned; and
- the duty of the Bank, as the European Union's long-term financial institution, to ensure that the application of the rules on procurement gives companies from Member States an equitable chance of participating in the works and the provision of goods and services for implementing the project components that the Bank finances.

See **Annex 1** for a definition of specific procurement terms.

#### **3.3.2. International Procurement Procedures**

These procedures derive from the EU Directives as they may be amended from time to time:

- **Open procedures** allow all interested parties (contractors or suppliers as the case may be) to submit tenders. They involve strict requirements for international notification (including publication in the Official Journal of the European Union); clear and comprehensive tender documents; and fair and transparent tendering, evaluation and award practices.

Specific provisions applicable to open procedures, which reflect best international practices, are described in section 3.7.

- **Restricted procedures** provide that only those candidates invited by the promoter may submit tenders. They are similar to open procedures regarding the tendering stage (involving clear and comprehensive tender documents, and fair and transparent tendering, evaluation and award practices). The selection of candidates follows:

- either an international notification (including publication in the OJEU) and the list of candidates is prepared through a formal pre-qualification exercise;
  - or the list of candidates is established through a system of qualification of contractors and suppliers established and maintained through publication in the OJEU respecting the principles of fairness, transparency, and non-discrimination. The said list should not be closed for long periods and should be revised regularly to allow new actors to apply for qualification.
- **Competitive dialogue** is a procedure which may be used for particularly complex contracts, for which the promoter is not objectively able to prepare formal tender documents like in the open or restricted procedures. The contract notice must be published internationally (including in the OJEU). The promoter opens a dialogue with selected candidates in order to define the means best suited to satisfy his needs.
  - **Negotiated procedures** allow promoters to consult candidates of their choice and negotiate the terms of the contract with one or more of them. The selection of candidates either follows an international notification (including publication in the OJEU), or is directly established by the promoter. In the latter case, the promoter, to the extent possible, should invite at least three qualified candidates from at least two different countries to negotiate.

### **3.3.3. National Procurement Procedures**

For small contracts and particular works that, if within the EU, would not fall under the scope of the EU Directives, other procedures may be more appropriate:

- **National competitive bidding** (with publication only in the local press) follows the normal procedures of the country of the promoter. Tender documents are normally in the official language of the country; the national currency is generally used for the purposes of tendering and payments; and tender prices are normally inclusive of all applicable local duties and taxes.
- **Shopping and direct contracting** allow promoters to negotiate prices and other conditions with several local contractors or suppliers or only one of them.
- **Force account** (also called **direct labour**) is not really a procurement procedure since it consists of the carrying out of works using the promoter's own workforce and equipment. This may be the only practicable method for constructing some kinds of works, or providing the appropriate in-house services, such as basic design, R&D (research and development), etc.

## **3.4. Selection of Procurement Procedures**

### **3.4.1. Operations in the Public Sector**

Outside the EU, the Bank defines operations in the public sector as those carried out by:

- in all cases: public authorities;
- in addition, in the case of gas, heat, electricity, water, transport, exploration for or extraction of oil, gas, coal or other solid fuels, ports and airports, telecommunications, and postal services:
  - public undertakings operating in markets which are not liberalised, and
  - privately-owned entities that have been granted special or exclusive rights without a competitive process and operate in markets which are not liberalised.

A precise definition of the public sector is given in **Annex 5**.

All other operations are considered to belong to the private sector.

In order to ensure economy, efficiency, non-discrimination and transparency in procurement, the Bank requires that, in all appropriate cases, contracts in public sector operations are procured following open or restricted procedures with publication in the OJEU. Exceptions are only warranted on the grounds of special circumstances, relating to the nature of the project or the promoter, the estimated value of the contract, or other factors peculiar to the context of the project. In all cases, the procedures adopted must be fully justified by the promoter, acceptable to the Bank, in the best interest of the project, and consistent with the principles spelt out under article 3.3.1 above.

No proposed contract may be split up with the intention of evading the application of this Guide. In particular, splitting the works in several small contracts with the only purpose of favouring domestic contractors is not acceptable to the Bank, unless the promoter can prove that this would be more advantageous for the objectives of economy and efficiency of project implementation.

To these ends, the Bank requires promoters operating in the public sector to adopt appropriate procedures to procure works, goods and services (except consultancy services, for which procurement procedures are described in Section 4) consistent with the following principles:

- **Open procedures** with publication in the OJEU (and the international and national press) are the most common form of procurement for public contracts.
- **Restricted procedures** with publication in the OJEU (and the international and national press) are recommended for large or complex public contracts warranting pre-qualification of contractors or suppliers. In cases where a technical dialogue between the promoter and tenderers is useful, it is advisable to use the two-stage system described in **Annex 1**.
- **Competitive dialogue** with publication in the OJEU (and the international and national press) may be used for particularly complex contracts where the promoter is not objectively able to define the technical means capable of satisfying the needs or objectives, or is not able to specify the legal or financial make-up of the project.
- **Negotiated procedures** with publication in the OJEU (and the international and national press) may be used when:
  - the nature of the works or services or the risks involved do not allow an overall pricing;
  - the intellectual or financial nature of the services do not allow to use the selection rules of open or restricted procedures or competitive dialogue; or
  - the works are performed solely for purposes of research, testing or development.
- **Negotiated procedures** with the list of candidates directly established by the promoter may be used in exceptional cases where:
  - there has been an unsatisfactory response to open or restricted tenders carried out in accordance with this Guide;
  - the extension of an existing contract, awarded in accordance with this Guide, for additional works, goods or services of a similar nature would clearly be economic and efficient and no advantage would be obtained by further competition;
  - the extension of an existing contract, awarded in accordance with this Guide, is for procuring additional works, goods or services which cannot be technically or economically separated from the original contract without major inconvenience to the promoter;

- a product or service can only be provided by a limited number of suppliers because of exclusive capabilities or rights;
  - standardisation with existing equipment is determined to be important and justified; or
  - it is a case of extreme urgency brought about by unforeseeable events.
- **National competitive bidding** may be appropriate for contracts, which, by their size, nature or scope, are unlikely to attract foreign competition. These circumstances occur when:
    - the contract values are small;
    - works are scattered geographically or spread over time;
    - works are labour intensive; or
    - the advantages of open or restricted procedures are clearly outweighed by the administrative or financial burden involved.
  - **Shopping** is appropriate for procuring readily available off-the-shelf goods or standard specification commodities that are small in value; as much as possible, offers from at least three suppliers should be requested.
  - **Direct contracting** may be justified if only one contractor or supplier can fulfil a contract in a satisfactory manner and at the most advantageous cost.
  - **Force account** may be justified where:
    - services involve the intellectual property of the promoter;
    - quantities of work involved cannot be defined in advance;
    - works are small and scattered or in remote locations;
    - works are required to be carried out without disrupting ongoing operations;
    - the promoter is clearly in a favourable situation to carry out the works at an attractive price (e.g. railway track laying); or
    - there are emergencies requiring prompt action.

To be acceptable to the Bank, **national procedures** (covering national competitive bidding and shopping) must ensure economy, efficiency and transparency, and be broadly consistent with the principles underlying this Guide. If eligible foreign firms wish to participate in national procedures, they must be allowed to do so. The additional Bank requirement is that each tenderer or contract beneficiary must sign a Covenant of Integrity (see section 3.6 and **Annex 3**).

The threshold below which **national procedures** can be used will vary according to the nature of the project, the experience of the promoter and local conditions. The threshold will be agreed for each type of works, supply or services between the promoter and the Bank on a project-by-project basis. Except for consultancy services (see chapter 4), this threshold should not exceed: 5 million euro for works and 200,000 euro for goods and services, except electricity, gas, water and transport where it is 400,000 euro and telecommunications where it is 600,000 euro (all excluding the Value Added Tax, VAT, or equivalent direct taxes).

### 3.4.2. Operations in the Private Sector

Promoters operating in the private sector (i.e. outside the operations defined in **Annex 5**) normally satisfy the objectives of economy and efficiency by following established commercial practices. The Bank thus does not require that they follow the above public procurement procedures. For example, the less rigid, less costly and faster negotiated procedures (generally consisting of an international enquiry among a short-list of suppliers followed by negotiations) often prove to be more effective. Nevertheless, wherever appropriate, the Bank will encourage such promoters to publish a tender notice in the OJEU and adopt open or restricted procedures, particularly for large

contracts. In such cases it may be necessary to introduce appropriate safeguards to ensure that the legitimate confidentiality interests of the promoter and other commercial contracting parties are fully respected in the procurement process.

In any event, the Bank sees to it that promoters follow fair and transparent procurement procedures ensuring an appropriate selection of works, goods and services offered with an appropriate quality, at competitive prices and in a timely manner. The offer selected must be economically the most advantageous. Contracts awarded by promoters must be negotiated impartially and accord with the project's best interests. In this case, the Bank ensures that, as far as possible and depending on the magnitude of the contract, at least three qualified companies from at least two different countries are consulted. The Bank will also ensure that there is no discrimination on the basis of supplier's nationality.

If a company is a shareholder of the promoter (or the promoter is a shareholder of a company or if the promoter and a company have the same shareholders) and a contract is awarded by the promoter to this company (as contractor, manufacturer or otherwise) under a Bank-financed project, the Bank verifies that contract costs are in line with the initial estimates and with current market prices, and that the contractual conditions are fair and reasonable. The Bank will not finance works, goods or services for which the costs are considered to exceed market levels.

### 3.4.3. Concession Operations

Where the Bank is participating in financing a project developed under a BOT (Build, Operate, Transfer) or similar concession scheme which enjoys special or exclusive rights, or other state concession such as a recognized monopoly, the Bank's approach is as follows:

- If the concessionaire has been selected following a formal international tender procedure (which may include several stages but has been the subject of an adequate international publicity) acceptable to the Bank, and has explicit responsibility for carrying out the works and providing the services under his concession, the works, goods and services covered by the Bank's financing are considered by the Bank as operations in the private sector and can be procured according to the relevant provisions of this Guide.
- If the concessionaire has not been selected through a formal international tender procedure, but the Concession Agreement is considered by the Bank to be economically reasonable in terms of price, quality and risk-sharing, the Bank will review the selection process to check that the concession was awarded through a transparent process in line with the principles of the EU Treaty, implying that the three following criteria are met:
  - i) There was adequate international publicity to allow for international competition;
  - ii) The process was fair and non-discriminatory; and
  - iii) The process followed can be traced.

If this is the case, the works, goods and services covered by the Bank's financing are also considered by the Bank as operations in the private sector and can be procured according to the relevant provisions of this Guide.

- If the Concession Agreement is considered by the Bank to be economically reasonable in terms of price, quality and risk-sharing, but the review found that some of the above criteria are not fulfilled, the Bank may, on an exceptional basis, still consider supporting the project should it find that the project "added value"<sup>6</sup> is sufficiently strong to outweigh the deviations. In that case:

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<sup>6</sup> The project "added value" encompasses the following three aspects: (i) the alignment of the project with the Bank's overall objectives and priorities; (ii) the quality and soundness of the project; and (iii) the EIB contribution to the project.

- In the areas of gas, heat, electricity, water, transport, exploration for or extraction of oil, gas, coal or other solid fuels, ports and airports, telecommunications, and postal services - if the concessionaire has been granted special and exclusive rights without a competitive process and operates in a market that is not liberalised<sup>7</sup> - the Bank will consider the works, goods and services covered by the Bank's financing as operations in the public sector, which have to be procured according to the relevant provisions of this Guide.
- In other areas, notably when several concessionaires operate in a liberalised market, private procurement procedures may be accepted by the Bank on a case-by-case basis, depending on the degree of compliance with the three above criteria and taking into account the co-financing arrangements.

When private procurement procedures are accepted, the Bank will encourage the concessionaire to publish a General Notice in the OJEU regarding the part of his investment programme to be carried out outside his own organisation.

In the case of a Private Initiative in a Public-Private Partnership, also called “unsolicited proposal” (a private investor bears the entire cost of preparing a project which will then be put to international tender by the public promoter), the Bank may accept that this private investor benefit from limited compensation incentives in the tender procedure, provided that these incentives do not affect the transparency, fairness and competitiveness of the tender process.

#### **3.4.4. Specific Operations**

- **Framework Loans:** when the Bank finances multi-scheme operations where the details of all sub-projects are not known at appraisal, it requires the Promoter to ensure that the procurement of works, goods and services relating to the sub-projects that the Bank finances will be undertaken in accordance with the provisions of this Guide.
- **Intermediated loans (case of Global Loans and Mid-Cap Loans):** when the Bank makes a loan to an intermediary institution (usually a financial institution providing loans to small and medium-scale enterprises), it requires such intermediary to take all the requisite measures to ensure that the procurement by the final beneficiaries of works, goods and services relating to the sub-projects which the Bank finances is the most economically-advantageous option, following appropriate procedures in view of the circumstances and the local legislation. When open or restricted procedures are involved, these must be undertaken in line with the provisions of this Guide.
- **Share capital operations:** in certain regions outside the EU, the Bank may finance the share capital of a public or private company. In this case, the Bank agrees with the promoter on which particular contracts its financing will be disbursed, and requires that the promoter follow procurement procedures in the same fashion as for the direct financing of projects. However, in case of a purely financial assistance (such as the strengthening of a company's capital), where there is no directly associated procurement of works, goods and services, the above does not apply.
- **Loans guaranteed under the Investment Facility (Cotonou Agreement):** if the Bank guarantees the repayment of a loan made by another lender, the works, goods and services financed under the said loan must be purchased following procedures which ensure transparency of the procurement process, fairness with regard to the tenderers, and selection of the economically most advantageous offer along the principles of articles 3.4.1 and 3.4.2 above. The Bank may request that the competition be opened to an adequate number of suppliers of works, goods or services (for example through an international advertisement of the Procurement Notice).

<sup>7</sup> As defined in Annex 5.

### 3.4.5. Specific Case of Joint Co-financing

In the case of joint co-financing between Multi- or Bilateral Financial Institutions or other international organisations, procurement of jointly co-financed contracts may be carried out, with the agreement of the Bank, under the rules of another co-financing institution or organisation (the Co-financing Institution), as long as they meet the Bank's minimum requirements and standards:

- The Co-financing Institution opens its eligibility along the principles of section 3.2 above;
- Calls for tenders receive an adequate publicity to ensure wide international competition; and
- Procurement rules conform with internationally-accepted practices respecting the principles of non-discrimination of tenderers, fairness and transparency of the process, and contract award to the most economically advantageous offer.

In addition, the Bank may decide to entrust the Co-financing Institution to monitor the procurement of jointly co-financed contracts on its behalf.

Furthermore, the Bank may decide to entrust the Co-financing institution to appraise and/or monitor the project on its behalf. In such case, the Co-financing Institution is fully in charge of overseeing project procurement and applies its own rules to all the project components, provided the above principles are respected<sup>8</sup>.

## **3.5. Bank Review of Procurement Decisions (for both public and private operations)**

During the project appraisal stage, the promoter must provide the Bank with information about a detailed procurement plan (choice of procedures appropriate for the project, timetable, technical specifications, publication of Procurement Notices, time allowed for the preparation of tenders, etc.).

In the case of international procurement procedures as defined in article 3.3.2, the Bank requests promoters to seek its concurrence for all major decisions regarding procurement and monitors the procurement process as follows:

- the Procurement Notice, the documents relating to the pre-qualification stage (if this takes place), and the tender documents must be sent to the Bank for information and possible comments before being published or given to potential tenderers;
- the pre-qualification of tenderers (if any), the evaluation of bids and the proposed decision on the award of contracts must obtain the non-objection from the Bank based on appropriate documents; and

In case there is no international procurement procedure, the promoter must obtain the non-objection from the Bank for the procurement procedure chosen and the final selection of the tenderer on the basis of adequate justifications provided by the promoter.

The requirements covering the review by the Bank of procurement decisions are outlined in **Annex 2**.

<sup>8</sup> In the specific case of projects outside the EU under the "Mutual Reliance Initiative" between EIB, AFD and KfW, one of the three co-financing partners, called the Lead Institution, is entrusted by the two others to appraise and/or monitor the project on their behalf. In such case, the Lead Institution is fully in charge of overseeing project procurement and applies its own rules as agreed with the EIB.

### **3.6. Prohibited Conduct - Covenant of Integrity**

As noted in section 1.4, the Bank is committed to ensuring that its loans are used for the purposes intended and its operations are free from prohibited conduct (including but not limited to, fraud, corruption, collusion, coercion and obstruction<sup>9</sup>, and money laundering and terrorist financing). In particular, in countries outside the EU, the Bank will, as a general rule, require that promoters insert in the tender documents (or in the contract in the case of a negotiated procedure) a clause that:

- requires any tenderer for works, goods or services, as a condition of admission to eligibility, to execute and attach to its tender a Covenant of Integrity in the form indicated in **Annex 3**; and
- grants the promoter, the Bank and auditors appointed by either of them, as well as any authority or European Union institution or body having competence under European Union law, the right of inspection of the records of the contractor, supplier or consultant in connection with any Bank-financed contract.

The requirement for a Covenant of Integrity may be waived for those private sector promoters who can satisfy the EIB that they have implemented anti-fraud standards at least equivalent to the Bank's policy.

### **3.7. International Procurement Procedures**

#### **3.7.1. General Aspects**

As a general rule, the Bank requires public contracts to be awarded following open or restricted procedures with publication of a Procurement Notice in the OJEU. Any exception must be justified by the promoter and approved by the Bank.

The various steps of the procurement procedure to be followed by the promoter are normally as indicated below:

- publication of a Procurement Notice inviting tenders (or pre-qualification of tenderers) in the OJEU and other media with the indication that the Bank may finance the contract;
- decision on the list of pre-qualified tenderers and notification to candidates (for restricted procedures);
- dispatch of tender documents to potential tenderers;
- receipt, public opening and evaluation of tenders;
- award of contract, notification of the result to all other bidders, and publication of an Award Notice in the OJEU; and
- implementation of the contract.

When following open or restricted procedures, promoters should apply the rules and incorporate the provisions set out below.

#### **3.7.2. Publication of the Procurement Notice**

The Bank requires the promoter to publish a Procurement Notice in the OJEU. If necessary, the Bank will assist in arranging such publication on behalf of the promoter.

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<sup>9</sup> As defined in Annex 3

In the case of a direct call for tenders without prior pre-qualification, the notice must mention at least (see standard form in **Annex 6**):

- promoter's title, project's name and reference to the Bank's potential financing;
- description of the works or nature of the supplies or services to be furnished;
- projected timetable;
- list of tender evaluation criteria in decreasing order of importance;
- place where tender documents can be obtained;
- final date for receipt of tenders; and
- date and place of public opening of tenders.

The Bank also encourages the placing of Procurement Notices in other international media or local publications. In this case, these must appear not before but preferably at the same time as in the OJEU, and with the same conditions and wording.

Should the promoter already have started the tender procedure for a project component before the Bank's involvement, the Bank may still accept to finance this component in spite of the absence of publication in the OJEU, provided the promoter can demonstrate that the publicity of the tender has been sufficient to foster wide international competition.

### **3.7.3. Pre-qualification in Restricted Procedures**

In restricted procedures, the promoter has to select those candidates that will be invited to submit tenders. The selection of the candidates must be carried out following a formal pre-qualification process open to all interested firms and advertised in the OJEU. Such pre-qualification exercise is usually necessary for large or complex contracts.

The pre-qualification factors, which should be referred to in the Procurement Notice and specified in the pre-qualification documents, should be based on the capability and resources of the prospective tenderers to perform the particular contract. Factors that are normally considered are the candidates':

- experience and past performance on previous contracts;
- capabilities with respect to personnel, equipment and construction or manufacturing facilities; and
- financial position.

The promoter should inform all candidates of the pre-qualification decision, including a summary of the relevant reasons for that decision.

In all respects other than notification and selection of candidates through a pre-qualification process, restricted procedures are the same as open procedures.

### **3.7.4. Tender Documents**

Promoters may use the conditions of contracts originating from their country's legislation, but they are encouraged to use internationally-recognised standard procurement documentation such as those prepared by the World Bank (website [www.worldbank.org](http://www.worldbank.org), Projects & Operations / Procurement / see Index of Standard Bidding and Proposal Documents, or Procurement Policies and Procedures for guidance), and the FIDIC (Fédération Internationale des Ingénieurs-Conseils) documents that can be ordered at the FIDIC website [www.fidic.org](http://www.fidic.org), provided that these are compatible with the provisions of this Guide.

Tender documents must be drafted in such a way as to permit wide international competition. They must also fully comply with the rules set out in this Guide.

The sale price of tender documents should be in line with the cost of their production and eventual shipment.

If any modifications to the tender documents are made during the tendering period, the promoter must send them to all tenderers and provide adequate time to respond.

Tender documents should include provisions dealing with the applicable law and the settlement of disputes. International commercial arbitration may have practical advantages and the Bank encourages promoters to use it as appropriate.

The time allowed for the preparation of tenders should depend on the magnitude and complexity of the contract. Normally, it should be at least six weeks from the time when tender documents are made available to potential tenderers. Where large works or complex items of equipment are involved, the period must be extended accordingly. In such case, the promoter is encouraged to organise explanatory briefings and on-site visits to make it easier for tenderers to understand the subject of the tender. If tenderers raise specific questions on the tender documents, the promoter must answer them within a week. In any event, all tenderers must be treated equally and fairly.

The tender documents should include a statement to the effect that tenderers should alert the promoter in writing, with a copy to the Bank, in case they should consider that certain clauses or technical specifications of the tender documents might limit international competition or introduce an unfair advantage to some tenderers.

### **3.7.5. Language**

The Procurement Notice, pre-qualification documents (if any), tender documents, and the tender evaluation report should be prepared in one of the official languages of the European Union (preferably in English or French).

In specific cases, the original tender documents may be drawn up in the language of the country (which may also be adopted as the legally binding version in the event of litigation), with the proviso that the promoter prepares and makes available to the Bank and the tenderers a certified translation of the main parts of the tender documents. All correspondence and discussions with the foreign tenderers and the Bank relating to the tender must use the EU language utilised for translating the tender documents. Tenderers should be allowed to tender in this EU language.

### **3.7.6. Technical Specifications**

Promoters must use European Union or international standards and specifications such as those issued by the International Standard Organization, wherever these are applicable and appropriate, and apply them consistently across the tender documents. If particular standards, national or other, are adopted, the tender documents must state that standards guaranteeing a level of quality or performance equivalent or superior to those indicated will also be accepted. Reference to trademarks or other specific designations that would lead to discrimination between suppliers must be avoided. If such reference is necessary to explain the nature of the products required, the tender documents must specify that any other product of equal or superior quality or performance is acceptable.

### **3.7.7. Tender Prices for Goods, Works and Services**

When a public promoter (or a private promoter exempted from import duties) calls a tender for the supply of goods, tender prices should be requested on the basis of CIF (port of destination), or CIP (place of destination) for all goods offered from abroad, and EXW (ex-works, ex-factory, or off-the-shelf) for locally available or manufactured or assembled goods, including those previously

imported. The evaluation for the supply of goods should exclude import duties and taxes payable on imported goods and the value added tax or similar taxes on locally supplied goods, but should include all costs associated with the supply, delivery, handling and insurance of the goods to the final destination.

Tender prices for works and services contracts to be substantially executed in the purchaser's country may be requested inclusive of all duties, taxes and other levies. The evaluation and comparison of tenders will be on this basis and the selected contractor would be responsible for all duties, taxes and levies in the performance of the contract.

### **3.7.8. Currency**

Promoters may wish to restrict, with the agreement of the Bank, the tender currency to a specific, internationally tradable currency. Otherwise, tenderers should be allowed to express their tenders in any currency traded internationally, or a combination of these for the foreign exchange component of the contract, but must accept to be paid in local currency for the local component of the contract. In this case, tenderers must justify the percentage of foreign exchange that they request in their tender.

Payments under the contract shall be made in the currency or currencies in which the selected tender is expressed. When the tender price is required to be stated in a single currency, but the tenderer has requested payment in other currencies expressed as a percentage of the tender price, the exchange rates used for purposes of payments shall be those specified by the tenderer in the tender, so as to ensure that the value of the various portions of the tender (in other currencies) is maintained without loss or gain. The tender documents must include clear provisions for price escalation, if any.

For the purpose of tender evaluation and comparison, tender prices will be converted to a single currency, selected by the promoter, using the selling (exchange) rates for the currencies of the tender price quoted on an internationally-recognised currency exchange market (e.g. published in the Financial Times) for a date selected in advance and specified in the tender documents, provided that such date should not be earlier than 30 days prior to the date specified for the opening of the tenders<sup>10</sup>.

### **3.7.9. Local Preference for Goods**

Except for operations in Candidate Countries, Borrowers may grant a 15% margin of preference for goods manufactured or produced in the country (defined as having at least a 30% local content ex-factory). Bidding documents must clearly indicate such preference. The comparison is then made between the price (net of taxes and duties at the place of delivery) of the imported good increased by 15% and the price (net of the value added tax or similar taxes) at the place of delivery of the locally manufactured good. The Bank does not allow for preference to be given to works (even if they include the supply of goods) or services originating in the beneficiary country.

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<sup>10</sup> The date should normally not be later than the original date prescribed in the tender documents for the expiry of the period of tender validity. However, where the payment provisions in the contract entail a few significant payments at specific predictable dates in the future (e.g. CIF supply contracts), the Promoter may wish to specify the use of quoted forward exchange rates for the estimated dates of the payments for the evaluation, and enter into forward currency contracts for these payments at the time of award, in order to hedge the risks of currency fluctuations. The forward dates and the currency exchange market to be used must be clearly specified in the tender documents.

### **3.7.10. Tender Evaluation Criteria**

The tender evaluation may be based on:

- either the lowest price of the compliant and technically responsive tenders; or
- the most economically advantageous tender, applying a number of criteria adapted to the contract in question: e.g. price, payment terms, construction or delivery period, technical merit (proposed staff, equipment, construction method and planning, technical characteristics, etc.), environmental characteristics, technical compatibility with other equipment, availability of service and spare parts, operating costs, maintenance costs, etc.

The evaluation criteria selected must be indicated in the Procurement Notice and quantified in the tender documents. The evaluation criteria specified in the tender documents must be applied in whole, without omission or addition, in the evaluation of tenders. In case no criterion should be indicated, the lowest price only will apply.

Exceptionally, the tender documents may specifically request the tenderers to submit financing proposals. In such case, the documents should include a clear methodology to evaluate them. In addition, the Bank recommends that tenderers also make a proposal without financing.

### **3.7.11. Opening of Tenders**

In public operations, tenders and associated documents must be opened in public, in the presence of representatives of the tenderers if they wish to attend, on a date and at a place indicated in the Procurement Notice or tender documents. Tenders arriving after the deadline for receipt are not to be opened.

At the opening of tenders, the name of the tenderers and the amount of each tender, including special conditions, rebates and variants if permitted, must be read out aloud and recorded in the minutes of the tender opening. A copy of these minutes must be appended to the tender evaluation report sent to the Bank.

### **3.7.12. Evaluation of Tenders**

The promoter or his representative must scrutinise the tenders for compliance and responsiveness, and correct all arithmetical errors. He must ask the tenderers for any clarification needed to assess the tenders, but no amendment to the substance of the tender or to the price can be accepted after the tender opening.

For large or complex contracts, it is advisable for the evaluation to proceed in two steps (technical then financial) called the two-envelope system and described in **Annex 1**.

Unsolicited financing offers should not be considered in the evaluation of tenders.

### **3.7.13. Award and Signature of the Contract**

The promoter should inform all tenderers of the contract award decision, including a summary of the relevant reasons for that decision. To ensure that review procedures for effective remedies are available to any concerned tenderer, the contract should not be signed until the expiry of a reasonable time period from the date on which the contract award decision was sent to the tenderers.

### 3.7.14. Award Notice

Immediately after the signature of the contract, the promoter must publish an Award Notice in the OJEU. If necessary, the Bank will assist in arranging such publication on behalf of the promoter.

The Award Notice must include the following information (either in the title or in the text):

- Project title and number;
- Lot number and name;
- Publication reference;
- Publication date of the Procurement Notice;
- Promoter's name;
- Reference of the Bank's financing;
- Contract value (only when price is the evaluation criterion);
- Date of award of contract;
- Number of bids received; and
- Name and address of successful bidder.

## **4. CONSULTANCY SERVICES FINANCED BY THE BANK**

This chapter covers work undertaken by consultants in a project financed by the Bank, either through a loan or a grant. Section 3.6 – Prohibited Conduct - Covenant of Integrity, – fully applies to this chapter as well. Regarding Candidate and Potential Candidate Countries, the second paragraph of section 3.1 of this Guide defines whether their operations are considered Within or Outside the EU.

### **4.1. Projects Located Within the European Union**

The rules applicable in this respect to the Bank's activities within the European Union are the relevant EU Directives.

### **4.2. Projects Located Outside the European Union**

The provisions set out below are only valid for Bank operations in the public sector. The general provisions of article 3.4.2 are valid for consultancy services procured under Bank operations in the private sector.

The procedures for selecting consultants/experts and drawing up contracts governing their services must be transparent, and they must also ensure that the work is carried out in the most economically advantageous way, i.e. that the services are of appropriate quality, acquired at economic prices and performed in a timely manner.

The rules applying to Bank activities outside the European Union with respect to the selection of consultants are always guided by the spirit of the EU Directive applicable for similar services within the Union, with the requisite adjustments to take account of the specific conditions relating to the Bank's operations outside the Union.

#### **4.2.1. Description of Procedures**

The various procurement procedures are described below:

- Open procedures: international call for proposals (at least via the OJEU, and additionally the press and other media), allowing any consultant or expert interested to submit a proposal for the services required.
- Restricted procedures: call for proposals on the basis of a list that allows only consultants/experts invited by the promoter to submit a bid. The list of pre-qualified candidates must be drawn up by means of an international call for expression of interest open to all consultants and advertised at least in the OJEU. The Bank finds that this procedure is more efficient than the open procedure above.
- Negotiated procedures with the list of candidates established directly by the promoter: analysis of proposals (technical and financial) from consultants/experts selected by the promoter and negotiation of final conditions with one or several of these. Promoters can establish a list of potential candidates (short-list) by using their experience, contacts and/or consultants register.

#### **4.2.2. Selection of Procedures**

The procurement procedures to be adopted must conform to the following provisions:

- For an estimated amount of 200,000 euro (excluding VAT) or above (the contractual value taken into account is the supplier's total remuneration), the procedures applicable are:
  - either open procedures with publication in the OJEU; or
  - restricted procedures including an international call for expression of interest in the OJEU.
- For an estimated amount below 200,000 euro (excluding VAT), negotiated procedures with the list of a maximum of seven candidates drawn up on the basis of registers/research/recommendation and with the participation of at least three candidates of at least two different nationalities.
- Exceptions from the above procedures:

Promoters may find it necessary to contact fewer or only one candidate for the following reasons:

- the expertise sought is such that there are only a very few specialists in this field;
- the degree of urgency, duly justified, is such that there is no time for broader research;
- confidentiality and/or continuity are required;
- another procedure has already been conducted without producing any useful results; or
- when a consultant has been or is involved in the early phases of the project, such as feasibility or design studies, and it has been established that continuity is necessary and no additional advantage would be gained from pursuing competitive procedures; this is one of the most common cases and provisions for such an extension should be envisaged in advance and included in the original terms of reference and contract, which preferably should have been awarded following a competitive procedure.

A single reason or a combination of reasons are possible but must always be clearly justified by the promoter and received a prior non-objection from the Bank.

In the case of a contract estimated to be below 50,000 euro, the Bank may accept a contract negotiated with only one company or individual in order to speed up project preparation or implementation.

#### **4.2.3. Evaluation of Consultants Proposals**

The evaluation of proposals is based on a series of factors that must be specified, with their respective weights, in the request for proposals issued to consultants. Indicative factors are:

- consultant's specific experience;
- understanding of the terms of reference and scope of the services;
- methodology proposed for the services;
- qualification and experience of key personnel included to render the services;
- international, regional and local experience; and
- proposed work programme.

Depending on the characteristics of the task to be performed, price may be considered as a factor, but it should have a lower weight than the other factors as a whole. In certain circumstances, the

most efficient way of integrating the price factor in the tender is to indicate the available budget for the services in the request for consultant's proposals, and require that this budget should not be exceeded if the consultant's offer is to be considered.

The promoter's evaluation report must be submitted to the Bank for its non-objection of the proposed award.

#### **4.2.4. Management of the Contract**

In common with other contracts awarded within the context of projects financed by the Bank, the promoter is fully responsible for supervising and managing the consultant's services.

## ANNEX 1

# SPECIFIC PROCUREMENT TERMS AND PRACTICES

A company which submits an offer, called a “**tender**” or “**bid**” is designed by the term “**tenderer**” or “**bidder**”, and one which has sought an invitation to take part in a restricted or negotiated procedure by the term “**candidate**”.

## International Procedures

The terms open, restricted and negotiated procedures, and competitive dialogue, are used here in the sense defined by EU Directives as they may be amended from time to time.

1. “**Open procedures**” are formal procedures whereby all interested companies may submit tenders. They must be advertised at least in the Official Journal of the European Union (OJEU). They involve clear and comprehensive tender documents; and fair and transparent tendering, evaluation and award practices. Outside of the EU these procedures are often referred to as **International Competitive Bidding (ICB)** or **Open Tendering**.
2. “**Restricted procedures**” are formal procedures whereby only those companies invited by the promoter may submit tenders. They must be preceded by a pre-qualification exercise open to all interested companies and advertised at least in the OJEU, in order to select the companies to be invited (or the list of candidates is established through a system of qualification of contractors and suppliers established and maintained through publication in the OJEU). They are similar to open procedures regarding the tendering stage (involving clear and comprehensive tender documents, and fair and transparent tendering, evaluation and award practices). Outside of the EU, these procedures are also referred to as **ICB (including a pre-qualification phase)**.
3. The “**Competitive dialogue**” is a procedure designed for particularly complex contracts where the promoter is not objectively able to define the technical means capable of satisfying the needs or objectives, or is not able to specify the legal or financial make-up of the project and where it considers that direct use of a restricted procedure will not allow the contract to be awarded to the tender offering best value for money. The promoter must set out his needs and requirements, and define the award criteria allowing choosing the most economically advantageous tender. A contract notice is first published in the OJEU. The promoter then selects qualified tenderers among the candidates, and opens a dialogue with them in order to define the means best suited to satisfy his needs. He must ensure equality of treatment of the tenderers, and cannot communicate confidential information of one tenderer to the others. The procedure may take several stages. After informing the tenderers that the dialogue is concluded, the promoter will ask them to submit their final tenders on the basis of the solutions presented and specified during the dialogue.
4. “**Negotiated procedures**” are those procedures whereby the promoter consults companies of its choice and negotiates the terms of the contract with one or more of them. The selection of candidates either follows an international notification published at least in the OJEU, or is directly established by the promoter. Outside the EU, in the latter case, these procedures are often referred to as **Limited International Bidding (LIB)**, or **Selective Tendering**.

## **National Procedures**

5. “**National competitive bidding**” follows the normal procedures of the country of the promoter. It is advertised only in the local press. Tender documents are normally in the official language of the country; the national currency is generally used for the purposes of the tendering and payments; and tender prices are normally inclusive of all applicable local duties and taxes.
6. “**Shopping**” and “**direct contracting**” allow promoters to negotiate prices and other conditions with several local contractors or suppliers or only one of them.
7. “**Force account**” (also called “**direct labour**”) is not really a procurement procedure since it consists of the carrying out of works using the promoter’s own workforce and equipment. This may be the only practicable method for constructing some kinds of works, or providing the appropriate in-house services, such as basic design, R&D (research and development), etc.

## **Specific Practices under Open or Restricted Procedures**

8. For large or complex contracts, it is advisable for the evaluation to proceed in two steps (technical then financial). Tenders are requested according to the “**two-envelope system**”, in which both the technical and financial offers are submitted together, but in separate envelopes. In the first step, only administrative and technical documents are opened in public. After review of conformity by the promoter (which may include minimal qualification criteria defined in the tender documents), in a second step the financial offers of only those tenderers that have presented satisfactory documents or have exceeded a pre-determined threshold score in the technical evaluation are opened and read in public.
9. When a technical dialogue between the promoter and the tenderers is useful, a “**two-stage system**” can be followed, whereby the first submission of the tenderers, based on preliminary specifications from the promoter, contains only the technical offers. After a detailed evaluation of technical offers, the promoter amends the initial tender specifications and requests priced tenders only from those tenderers determined to be qualified and technically responsive. The main difference with the “competitive dialogue” is that all final tenders must fulfil the same specifications, thus facilitating tender evaluation.
10. Tendering for “**design-and-build contracts**” is usually a restricted procedure, featuring very general technical requirements, usually stating only the capacities and performance. Tenderers are thus at liberty to put forward the technical solution that appears to them to be the most economical or appropriate, and the evaluation is then carried out on the basis of technical and economic considerations. This type of invitation reduces the work involved in drawing up the initial design used for the tender documents, but calls for far more effort, experience and calculation for the tenderer when it comes to preparing tenders and, for the promoter, to evaluate and compare tenders, and make the final choice of contractor or supplier.
11. Invitations to tender may be issued in respect of an entire project (e.g. construction of a factory or power plant) including testing and commissioning, or for only part of the same. In the first case, the term used is “**turnkey**” contract, which give the promoter more technical guarantees but which are often more expensive. In the second case, splitting the project into a number of separate contract packages (or lots) is quite complex and it usually takes considerable experience and in-house capacity to coordinate their implementation. Substantial lower costs can, however, be achieved, but responsibility for the technical interface between the various components and the risks of delays, cost overruns and poor overall technical performance is carried by the promoter.

## ANNEX 2

### **REVIEW BY THE BANK OF PROCUREMENT DECISIONS for projects located outside the European Union**

As explained in this Guide, the Bank has a policy to leave the entire responsibility of the procurement procedures to the promoter. The Bank limits its intervention to ensuring that its funds are used in the most economic, transparent and efficient way possible. Consequently, the Bank limits its review of the promoters' procurement decisions to the essential steps.

During project appraisal or at loan negotiations, the Bank will discuss and agree with the promoter under which procedures the various project components financed by the Bank will be procured. The following steps will then need to be respected.

#### **International Procurement Procedures<sup>11</sup>**

1. The promoter should send the Procurement Notice and tender documents (as well as the pre-qualification documents if any) to the Bank at least twenty days before the expected date of publication of the Notice.
2. As a matter of policy, the Bank does not make a comprehensive review of the tender or pre-qualification documents, which are the entire responsibility of the promoter. However, the Bank may review the main administrative clauses of these documents and make some comments, in particular regarding the pre-qualification factors and the tender evaluation criteria. In any case, this will not constitute an approval of the full content of these documents.
3. If necessary, the Bank will review, and organize publication of, the Procurement Notice in the Official Journal of the European Union (OJEU) on behalf of the promoter.
4. In case of a pre-qualification, the promoter must send to the Bank, for its "non-objection", the pre-qualification report and proposed list of pre-qualified candidates.
5. During the tender preparation period, the promoter must immediately inform the Bank of any written complaint that he may receive from a tenderer.
6. After analysis of the tenders, the promoter must send to the Bank his evaluation report making a clear recommendation for contract award. The Bank will provide its "non-objection" or appropriate comments.
7. Immediately after the contract is signed, the promoter must send to the Bank the Award Notice to be published in the OJEU by the Bank on behalf of the promoter if necessary.
8. Finally, the promoter must send to the Bank a copy of the signed contract (and the Covenant of Integrity, see Annex 3) prior to his first request for disbursement under the contract.

#### **Other Procurement Procedures**

For contracts not subject to international procurement procedures, the promoter will send a copy of the main elements of the contract together with an evaluation or justification report to the Bank prior to his request for disbursement.

<sup>11</sup> As defined in article 3.3.2.

## **Specific Case of Contracts for Consulting Services**

The Bank reviews the scope of the services and the terms of reference proposed (including procedure selected), the short-listing report explaining how the recommended short-list of consultants has been prepared, the request for proposals, the evaluation report justifying the proposed selection, and the draft consultant's contract, to ensure that it can finance the corresponding services.

1. The promoter must send the terms of reference, the proposed short-list of consultants and a short-listing report (or the Procurement Notice in case an open or restricted procedure is selected), and the request for proposals to the Bank.
2. The Bank will send its "non-objection" or comments on the proposal. In addition, the Bank may review the main administrative clauses of the request for proposals and make some comments, in particular regarding the tender evaluation criteria. In any case, this will not constitute an approval of the full content of these documents.
3. In the case of an open or restricted procedure, the Bank will organize publication of the Procurement Notice in the OJEU on behalf of the promoter as necessary.
4. In case of a restricted procedure, the promoter must send a pre-qualification report to the Bank for "non-objection".
5. After analysis of the offers, the promoter must send to the Bank his evaluation report making a clear recommendation for contract award, and the draft consultant contract. The Bank will provide its "non-objection" or appropriate comments.
6. In case of an open or restricted procedure, immediately after the contract is signed, the promoter must send to the Bank the Award Notice to be published in the OJEU by the Bank on behalf of the promoter as necessary.
7. Finally, the promoter must send to the Bank a copy of the signed contract (and the Covenant of Integrity, see Annex 3, for an international procedure) prior to his first request for disbursement under the contract.

**Remark:** The non-objection or comments sent by the Bank to the promoter in the course of the procurement process are based on the information provided by the promoter and do not relieve the promoter of his entire responsibility regarding procurement. In particular, the Bank may review its position in the light of new information which might come to its knowledge after it has given its opinion on a specific aspect of the process.

## ANNEX 3

### **COVENANT OF INTEGRITY to the Promoter from a Tenderer, Contractor, Supplier or Consultant to be attached to its Tender (or to the Contract in the case of a negotiated procedure)**

"We declare and covenant that neither we nor anyone, including any of our directors, employees, agents, joint venture partners or sub-contractors, where these exist, acting on our behalf with due authority or with our knowledge or consent, or facilitated by us, has engaged, or will engage, in any Prohibited Conduct (as defined below) in connection with the tendering process or in the execution or supply of any works, goods or services for [specify the contract or tender invitation] (the "Contract") and covenant to so inform you if any instance of any such Prohibited Conduct shall come to the attention of any person in our organisation having responsibility for ensuring compliance with this Covenant.

We shall, for the duration of the tender process and, if we are successful in our tender, for the duration of the Contract, appoint and maintain in office an officer, who shall be a person reasonably satisfactory to you and to whom you shall have full and immediate access, having the duty, and the necessary powers, to ensure compliance with this Covenant.

If (i) we have been, or any such director, employee, agent or joint venture partner, where this exists, acting as aforesaid has been, convicted in any court of any offence involving a Prohibited Conduct in connection with any tendering process or provision of works, goods or services during the five years immediately preceding the date of this Covenant, or (ii) any such director, employee, agent or a representative of a joint venture partner, where this exists, has been dismissed or has resigned from any employment on the grounds of being implicated in any Prohibited Conduct, or (iii) we have been, or any of our directors, employees, agents or joint venture partners, where these exist, acting as aforesaid has been excluded by the EU Institutions or any major Multi-lateral Development Bank (including World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank or Inter-American Development Bank) from participation in a tendering procedure on the grounds of Prohibited Conduct, we give details of that conviction, dismissal or resignation, or exclusion below, together with details of the measures that we have taken, or shall take, to ensure that neither this company nor any of our directors, employees or agents commits any Prohibited Conduct in connection with the Contract [give details if necessary].

In the event that we are awarded the Contract, we grant the Project Owner, the European Investment Bank (EIB) and auditors appointed by either of them, as well as any authority or European Union institution or body having competence under European Union law, the right of inspection of our records and those of all our sub-contractors under the Contract. We accept to preserve these records generally in accordance with applicable law but in any case for at least six years from the date of substantial performance of the Contract."

For the purpose of this Covenant, Prohibited Conduct includes<sup>12</sup>,

- **Corrupt Practice** is the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party.
- **Fraudulent Practice** is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.
- **Coercive Practice** is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of any party to influence improperly the actions of a party.
- **Collusive Practice** is an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party
- **Obstructive Practice** is (a) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or (b) acts intended to materially impede the exercise of the EIB's contractual rights of audit or access to information or the rights that any banking, regulatory or examining authority or other equivalent body of the European Union or of its Member States may have in accordance with any law,

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<sup>12</sup> Most definitions are those of the IFI Anti Corruption Task Force's Uniform Framework of September 2006.

- regulation or treaty or pursuant to any agreement into which the EIB has entered in order to implement such law, regulation or treaty;
- **Money Laundering** is defined in the Bank's Anti-Fraud Policy
  - **Terrorist Financing** is defined in the Bank's Anti-Fraud Policy
  - **Project Owner** means the person designated as such in the tender documents or the Contract.

Note: This Covenant must be sent to the Bank together with the contract in the case of an international procurement procedure (as defined in article 3.3.2). In other cases, it must be kept by the promoter and available upon request from the Bank. The Covenant is not mandatory for contracts awarded prior to Bank involvement in the project. Nevertheless, promoters who are seeking or may seek EIB involvement in a project are advised to include it in order to promote integrity among the tenderers/contractors. This is particularly relevant in the case of a promoter who has already implemented a number of previous Bank-financed projects and is considering further EIB financing.

## ANNEX 4

# **ELIGIBILITY FOR OPERATIONS FINANCED UNDER RESOURCES FROM THIRD PARTIES**

In some projects outside the Union, the Bank's financing comes from different sources, such as resources deployed under External Mandates of the EU and Trust Funds.

The **general rules** are that:

1. Tenders financed by funds made available under the Investment Facility created by the Cotonou Agreement are open to nationals of all countries.
2. In other cases tenders financed from resources made available by third parties (or from a combination of EIB's own resources and resources from third parties), eligibility of tenderers, goods and services is governed by the rules contained in the respective legal instruments (Facility for Euro-Mediterranean Investment and Partnership (FEMIP); etc...). In such case, tendering should generally be open to firms, goods and services originating at least from:
  - o countries of the European Union; and
  - o countries party to, or beneficiary from, the Agreement or Convention concerned.

A firm is deemed to originate in a EU or beneficiary country if it has been formed under the law of an EU or beneficiary country and has its office, central administration or principal place of business in an EU or beneficiary country. If it has only its statutory office there, it must at least be engaged in activities that have an effect on, and continuous links with, the economy of EU or beneficiary countries.

At the request of the beneficiary country, firms located in third countries may be authorized by the Bank to participate under derogations admissible pursuant to the Agreement or Convention concerned. Such authorization must be expressly provided for in the documents for the corresponding tender and must be mentioned in any publication relating thereto.

## ANNEX 5

### **DEFINITION OF PUBLIC SECTOR OPERATIONS OUTSIDE THE EUROPEAN UNION**

- 1. In general**, public sector operations are those carried out by “public authorities”, meaning State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A “body governed by public law” shall be understood to mean any body which:

- is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - has legal personality; and
  - is financed in most part by public authorities or is subject to management supervision by public authorities, or has an administrative, managerial or supervisory board in which more than half of the members are appointed by public authorities.
- 2. In addition, in the specific case of gas; heat; electricity; water; transport; exploration for, or extraction of, oil, gas, coal or other solid fuels; ports and airports; telecommunications; and postal services**, public sector operations are those carried out by:
    - public undertakings operating in markets which are not liberalised, and
    - privately-owned entities that have been granted special or exclusive rights and operate in markets which are not liberalised.

If this is not the case, the public authorities, public undertakings and privately-owned entities are considered to operate in the private sector.

A “public undertaking” is any undertaking over which public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it (e.g. holding the majority of the subscribed capital), their financial participation therein (e.g. controlling the majority of the votes attached to shares), or the rules which govern it (e.g. appointing more than half of the administrative, management or supervisory board).

“Special or exclusive rights” mean rights which arise from a grant made by a competent authority of the country by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities defined in paragraphs 2.1 to 2.9 below to one or more entities, and to substantially affect the ability of other entities to carry out such activities on the same territory under substantially equivalent conditions. Rights granted on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling these criteria to enjoy these rights should not be considered special or exclusive rights..

A market is considered “liberalised” when, in the country in which the activity is to be performed, such activity is directly exposed to competition and there is free access for new operators; an independent body should monitor such competition and access. The Bank will determine whether an activity is directly exposed to competition on the basis of criteria such as the nature of the goods or services concerned, the existence of alternative goods or services, the level of prices, and the actual or potential presence of more than one supplier of the goods or services in question. The promoter should demonstrate that access to the market is free de jure and de facto. The number of suppliers of goods or

services concerned may be limited in certain cases by the monitoring body (provided that, in any event, there are at least two suppliers of the goods or services in question) considering the size of the market and the economies of scale involved.

**The operations referred to under 2 above are:**

**2.1** As far as gas and heat are concerned:

- the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat; or
- the supply of gas or heat to such networks.

**2.2** As far as electricity is concerned:

- the provision or operation of fixed networks serving to provide a service to the public in connection with the production, transport or distribution of electricity; or
- the supply of electricity to such networks.

**2.3** As far as water is concerned:

- the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or
- the supply of drinking water to such networks.

**2.4** Contracts or design contests awarded or organised by promoters, which pursue an activity, referred to in paragraph 2.3 and which:

- are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations; or
- are connected with the disposal or treatment of sewage.

**2.5** The supply of gas or heat, or of electricity, or of drinking water to networks which provide a service to the public by a promoter other than a public authority shall not be considered an activity within the meaning of paragraphs 2.1, 2.2 and 2.3 where:

- the production of this good by the promoter concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraph 2.1, 2.2 and 2.3; and
- the supply to the public network depends only on the promoter's own consumption and has not exceeded or will not exceed 25% of the promoter's total production of this good, having regard to the average for the last three years.

**2.6** Activities relating to the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent promoter,

such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

**2.7** Activities seeking to exploit a geographical area for the purpose of:

- exploring for, or extracting, oil, gas, coal or other solid fuels; or
- the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

**2.8** The provision or operation of public telecommunications networks or services.

**2.9** The provision or operation of postal services.

**ANNEX 6****STANDARD FORM OF THE PROCUREMENT NOTICE  
IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION (OJEU)****INTERNATIONAL INVITATION FOR TENDERS**

(The necessary adaptations should be made in case of a pre-qualification)

**[PROJECT NAME]****[NAME OF PROMOTER]**

The [Name of promoter] (hereinafter referred to as "the Borrower") has received (or applied for) a loan from the European Investment Bank – EIB (hereinafter referred to as "the Bank") – towards the cost of the [Name of Project]. This International Invitation for Tenders relates to the contract for [Name of the Project Component].

This contract will include: [description of the main contract features in a few lines].

This contract is expected to be implemented from [date of start of services] to [date of end of services].

The criteria to be used in the tender evaluation are, in decreasing order of importance: [list of the evaluation criteria].

All firms are invited to participate in the tender.

**OR**

All firms registered in countries eligible to the Bank under the above financing ([give list of countries]) are invited to participate in the tender.

Interested eligible Bidders may obtain further information from, and inspect the Bidding Documents at: [Name, full address, telephone and fax numbers, and e-mail of the place where the bidding documents are available].

A complete set of Bidding Documents may be purchased on the submission of an application to the above address, and upon payment of a non-refundable fee of [amount and currency] to [Name and full address of the commercial bank, and number of account] bearing the name of the project. On request, against a faxed copy of the evidence of the remittance, the Bidding Documents may be sent by courier service if the transport is previously ordered by the Bidder in his country. The Borrower bears no responsibility for the delivery in such a case.

A Bid Security of [amount and currency] fulfilling the conditions indicated in the Bidding Documents must accompany all bids.

All bids must be delivered in closed envelopes bearing the mention "Bid for [Name of the Project Component]" not later than [time and date] at the following address: [precise Name and Place where bids will be received]. Bids will be opened immediately in the presence of Bidders' representatives who choose to attend.



The EU Bank



## Contacts

For general information:

### Information Desk

Corporate Responsibility and  
Communication Department

- 📞 (+352) 43 79 - 22000
- 📠 (+352) 43 79 - 62000
- ✉️ [info@eib.org](mailto:info@eib.org)

**European Investment Bank**  
98-100, boulevard Konrad Adenauer  
L-2950 Luxembourg  
📞 (+352) 43 79 - 1  
📠 (+352) 43 77 04  
[www.eib.org](http://www.eib.org)



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