

# Guide to procurement for projects financed by the EIB



European  
Investment Bank



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# Introduction

The purpose of this Guide to Procurement is to inform the promoters of projects whose contracts are financed in whole or in part by the European Investment Bank (“the Bank”) — or financed by loans guaranteed by the Bank — of the arrangements for procuring works, goods and services required for the project.

This guide applies specifically to components of a project identified for Bank’s financing. However, 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 procedure”, “restricted procedure”, “negotiated procedure” and “competitive dialogue” are used in this guide with the meaning defined in European Union directives on procurement (see the definitions set out in Annex 1).

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

Version dated March 2024.

# 1 General Aspects

## 1.1 The Bank's policy

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

- 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 are 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, and in Candidate Countries (with which negotiations are already in progress for their accession to the European Union) 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 in **open or restricted procedures** with publication in the *Official Journal of the European Union* (OJEU).
- In all other countries outside the European 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 most economically advantageous offer. Thus, an **open or restricted procedure** with publication in the OJEU and/or on the European Investment Bank (EIB) website is the Bank's preferred method. The actual choice of procurement procedure 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 an open or restricted procedure is not followed, promoters must, to the satisfaction of the Bank, justify their decision to use a different procedure; they must also 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 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.

The Bank will not provide or otherwise make funds available, directly or indirectly, to or for the benefit of an individual or entity that is subject to financial sanctions imposed by the European Union,<sup>1</sup> either autonomously or pursuant to the financial sanctions decided by the United Nations Security Council on the basis of Article 41 of the United Nations Charter.

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

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<sup>1</sup> Pursuant to Chapter 2 of Title V of the Treaty on European Union (EU Treaty) and the objectives of the Common Foreign and Security Policy set out in Article 21 of the EU Treaty and Article 215 of the Treaty on the Functioning of the European Union.



## 1.3 The 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 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 on the proper management of its financing are respected, the procurement process is fair and transparent, and the tender selected is the most economically advantageous. The rights and obligations of the promoter in relation to 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.

## 1.4 Ethical conduct

The Bank requires 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 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 that its operations are free from Prohibited Conduct (including fraud, corruption, collusion, coercion, obstruction, money laundering and terrorist financing).<sup>2</sup>

As set out in the EIB's Anti-Fraud Policy, if it is established to the required standards<sup>3</sup> that a project-related party<sup>4</sup> has engaged in Prohibited Conduct in the course of a procurement process or the implementation of a contract (to be) financed by the Bank, the Bank may:

- seek appropriate remediation of the Prohibited Conduct to its satisfaction;
- declare the project-related party ineligible for the award of the contract; and/or
- withhold the Bank's no objection to contract award<sup>5</sup> and apply appropriate contractual remedies, which may include suspension and cancellation, unless the Prohibited Conduct has been dealt with to the satisfaction of the Bank.

Furthermore, within the framework of its Exclusion Policy, the Bank may declare the project-related party ineligible for the award of a contract under any EIB project or to enter into any relationship with the Bank.

## 1.5 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 related 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 concept of conflict of interest covers any situation where staff members of the promoter (or consultants acting on behalf of the promoter) who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest that might be perceived as compromising their impartiality and independence in the context of the procurement procedure or contract execution.

Promoters must take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures or contracts to avoid any distortion of competition and ensure the impartial and objective exercise of the functions of the promoter and equal treatment of all tenderers or contractors.

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<sup>2</sup> See the EIB's Anti-Fraud Policy for definitions (<http://www.eib.org/en/infocentre/publications/all/anti-fraud-policy.htm>).

<sup>3</sup> In line with the EIB's Investigation Procedures.

<sup>4</sup> See the EIB's Anti-Fraud Policy.

<sup>5</sup> For contracts subject to prior review in operations outside the European Union.

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. The individual or entity in question should declare whether they have any conflict of interest and, if they do, present supporting evidence that might remove or remedy the conflict of interest.

In cases where a conflict of interest cannot be effectively remedied by other less intrusive measures, the Bank requires promoters to exclude from participation in EIB-financed procurement procedures or contracts any tenderer or contractor affected by the conflict of interest.

## 1.6 Transparency of the Bank's activities

The Bank is committed to achieving the highest possible level of transparency. It follows a Transparency Policy,<sup>6</sup> which is an integral part of its corporate responsibility policies. The Transparency Policy sets out the rules under which the public may access information held by the Bank. Although the Bank is committed to a presumption of disclosure under the policy, it also has a duty to respect professional secrecy to comply with the relevant legislation and standards.

## 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 therefore 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 fulfilling the Bank's environmental and social requirements.

In their procurement activities, promoters are encouraged to contribute to protecting the environment, human well-being, human rights and gender equality, combating climate change and promoting sustainable development, while ensuring that they comply with the core policy principles as set out in this guide. Tenderers and (sub)contractors are required to comply with applicable labour laws and national and international standards of health and safety, including those contained in any relevant International Labour Organization (ILO) conventions and international standards and agreements on environmental protection. The Bank's environmental and social policies are available on the Bank's website.<sup>7</sup>

## 1.8 Procurement complaints

Procurement complaints may be either (i) against a promoter's action; or (ii) against Bank's action.

### 1.8.1 Complaints against promoter's action

The Bank requires that promoters review, take the necessary actions to address and respond in a timely manner to complaints addressed to them that are related to the procurement process of an EIB-financed contract and that originate from any person or entity having or having had an interest in obtaining the contract.

Moreover, the EIB generally requires that review procedures for remedies acceptable to the Bank are available to any person or entity having or having had an interest in obtaining the contract and (at risk of being) harmed by an alleged infringement of applicable procurement rules. In the case of public procurement, such review procedures are normally provided through the competent national remedy mechanisms.<sup>8</sup>

### 1.8.2 Complaints against Bank's action

Any member of the public may refer a complaint about an instance of maladministration in the Bank's procurement due diligence to the EIB. The Bank's Procurement Complaints Committee reviews the Bank's position relative to complaints arising from tendering of EIB-financed contracts for goods, works and consultant services in case a complaint against Bank's action has been received.

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<sup>6</sup> <http://www.eib.org/en/infocentre/publications/all/eib-group-transparency-policy.htm>.

<sup>7</sup> <http://www.eib.org/en/infocentre/publications/all/environmental-and-social-principles-and-standards.htm>.

<sup>8</sup> This should be distinguished from the Bank's own due diligence of procurement decisions for projects located outside the European Union, described in this guide.

If the complainant is not satisfied with the Bank's outcome, or response, the complainant is entitled to refer the complaint about alleged maladministration by the Bank to the European Ombudsman.

Further details about the process tenderers should follow to submit a procurement complaint are provided in Annex 7.

## 2 Operations Within the European Union

### 2.1 Operations to which EU directives apply

Within the European Union, procurement is covered by national legislation implementing EU law, in particular EU directives on procurement, as may be amended from time to time.<sup>9</sup> This 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 promoters covered by the EU directives on procurement,<sup>10</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 ensure that it complies with the 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 multischeme operations where the details of all sub-projects are not known at the appraisal stage (in the 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/fund manager (in the case of **multiple beneficiary intermediated loans or funds**), it requires the intermediary institution 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 that the Bank finances are undertaken in accordance with the applicable legal framework.

When the Bank provides a guarantee to an intermediary institution to cover partly either its existing portfolio, to enable the intermediary institution to originate an eligible new portfolio, or provides a guarantee directly to a new portfolio, the Bank requires the intermediary institution to take all the requisite measures to ensure that the procurement procedures carried out by the final beneficiaries under the project financed by the Bank comply with the applicable national legislation implementing EU law.

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<sup>9</sup> In certain autonomous regions of EU Member States, regional procurement law may also apply.

<sup>10</sup> In particular, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; European Parliament and Council Directive 2007/66/EC of 11 December 2007 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 on procurement can be found at [https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en).

When the Bank finances a project developed under a concession or a public-private partnership (PPP) scheme, it requires the concession/PPP award process by the relevant public contracting authority to comply with the applicable legal framework.<sup>11</sup>

## 2.2 Operations to which EU directives do not apply

In all its operations, the Bank aims to use its resources effectively and ensure that the criteria of economy and efficiency are applied consistently.

For public contracts that are not covered by the EU directives (such as public contracts with a value below the threshold set in the directives), the Bank requires promoters to ensure that the procurement process complies with the relevant principles of the Treaty on European Union (EU Treaty) (in particular the principles of transparency, equal treatment and non-discrimination on the basis of nationality) and applicable national legislation.<sup>12</sup>

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

In any event, the Bank satisfies itself that promoters follow suitable procurement procedures, ensuring that 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 be in the project's best interests.

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<sup>11</sup> For further guidance, see in particular Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, the Commission interpretative communication on concessions under Community law, OJEU 2000/C 121/02, 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), 2008/C 91/02, dated 12 April 2008.

<sup>12</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 European Union lay down the conditions under which the Bank can undertake operations, financed by either loans from its own resources (originating mainly from the Bank's borrowings on capital markets) or resources from third parties managed by the Bank on behalf of the European Commission or Member States. In all cases, the Bank requires that the main mechanisms of the EU directives on procurement, as described in section 1.1, are followed, with the necessary procedural adaptations.

Candidate Countries and potential candidate countries are progressively incorporating EU directives into their legislation. In this guide, these countries fall under the current chapter, 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 European Union to the extent that they have transposed these directives into their national legislation, fall under Chapter 2, Operations within the European Union.

### 3.2 Eligibility of providers of works, goods and services

#### 3.2.1 Financing from the Bank's own resources

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

#### 3.2.2 Financing from resources from third parties

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

In cases where a contract is financed by resources from third parties (or 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 the Bank's 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 (the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation), regional development banks such as the European Bank for Reconstruction and Development, the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, bilateral aid agencies of EU countries and various banks from other countries.

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 on 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 co-financier widen its eligibility as much as possible, to include at least to all works, goods and services originating from the European Union and the beneficiary country. In the case of co-financing with EU budgetary instruments, eligibility is generally restricted to that of the EU instrument
- In **parallel co-financing**, each separate project component or contract is financed by a single financier. In this case, the procedure adopted by each co-financier apply to those components or contracts that it finances. The Bank's eligibility rules on 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 the 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 development objective entrusted to the Bank and, specifically, the Bank's fundamental task of contributing, through its operations, to economic progress in the countries concerned, implying not only the 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 providing the goods and services for implementing the project components that the Bank finances.

See Annex 1 for definitions of specific procurement terms.

### 3.3.2 International procurement procedures

These procedures derive from the EU directives on procurement, as may be amended from time to time.

- An **open procedure** allows all interested parties (whether contractors or suppliers) to submit tenders. It involves strict requirements on international notification (including publication in the OJEU and/or on the EIB's website); clear and comprehensive tender documents; and fair and transparent tendering, evaluation and award practices.

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

- A **restricted procedure** provides that only those candidates invited by the promoter may submit tenders. It is similar to an open procedure at the tendering stage (involving clear and comprehensive tender documents, and fair and transparent tendering, evaluation and award practices). The list of candidates is established:
  - either through a formal pre-qualification exercise, including publication in the OJEU and/or on the EIB's website;
  - or through a system of qualification of contractors and suppliers established and maintained through publication in the OJEU and/or on the EIB's website, and respecting the principles of fairness, transparency and non-discrimination; the list should not be closed for long periods and should be revised regularly to allow new candidates to apply for qualification.
- A **competitive dialogue** is a procedure that may be used for particularly complex contracts, where the promoter is not objectively able to prepare formal tender documents as in the open or restricted procedure. The contract notice must be published internationally (including in the OJEU and/or on the EIB's website). The promoter opens a dialogue with selected candidates to define the means best suited to satisfying its needs.
- A **competitive procedure with negotiation** follows a similar sequence of steps to a competitive dialogue. However, unlike a competitive dialogue, minimum specifications and requirements are set, and promoters negotiate with qualified tenderers with the objective of improving the content of the initial and all subsequent tenders, except for the final tenders, which are assessed against the original minimum requirements.
- A **negotiated procedure without publication** allows promoters to consult candidates of their choice and negotiate the terms of the contract with one or more of them. The selection of candidates is established directly by the promoter, who, 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 specific works that, if within the European Union, would not fall under the scope of the EU directives on procurement, other procedures may be more appropriate.

- **National competitive bidding** (with publication only in the local press) follows the normal procedure 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 the promoter 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 involves carrying out the works using the promoter's own workforce and equipment. This may be the only practicable method for constructing certain kinds of works or for providing the appropriate in-house services, such as basic design, and research and development.

## 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:

- all public authorities; and
- in the case of gas, heat, electricity, water and 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 that are not liberalised; and
  - privately owned entities that have been granted special or exclusive rights without a competitive process and operate in markets that are not liberalised.

A precise definition of public authorities is given in Annex 5.

All other operations are considered to fall under the private sector.

To ensure economy, efficiency, non-discrimination and transparency in procurement, the Bank requires that, in all appropriate cases, contracts for public sector operations are procured following an open or restricted procedure, with publication in the OJEU and/or on the EIB's website. 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 procedure adopted must be fully justified by the promoter, acceptable to the Bank, in the best interests of the project, and consistent with the principles detailed in section 3.3.1.

No proposed contract may be split up with the intention of evading the application of this guide. In particular, splitting the works into several small contracts with the sole purpose of favouring domestic contractors is not acceptable to the Bank, unless the promoter can prove that this would result in implementing the project in a more economically advantageous and efficient way.

To this end, the Bank requires promoters operating in the public sector to adopt an appropriate procedure to procure works, goods and services (except consultancy services, for which procurement procedures are described in Chapter 4). The procedures and their principles are listed below.

- An **open procedure** with publication in the OJEU and/or on the EIB's website (and in the international and national press) is the most common form of procurement for public contracts.
- A **restricted procedure** with publication in the OJEU and/or on the EIB's website (and in the international and national press) is 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, advisable to use the two-stage system described in Annex 1.

- A **competitive dialogue** with publication in the OJEU and/or on the EIB's website (and in 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.
- A **competitive procedure with negotiation** and publication in the OJEU and/or on the EIB's website (and in the international and national press) is best suited to cases where negotiations may be necessary to guarantee that works, supplies and services are appropriately adapted to the promoter's specific needs, and 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 use of the selection rules of an open or restricted procedure or a competitive dialogue; or
  - the works are performed solely for the purpose of research, testing or development.
- A **negotiated procedure**, with the list of candidates established directly by the promoter, may be used in the following exceptional cases:
  - where no (suitable)<sup>13</sup> tenders/applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered;
  - where the works, supplies or services can be supplied only by a particular firm; no reasonable alternative or substitute exists; the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement; and:
    - competition is absent for technical reasons; or
    - exclusive rights, including intellectual property rights, are to be protected;
  - insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the promoter, the time limits for the more competitive procedures cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the promoter; or
  - for additional deliveries by the original supplier that are intended either as a partial replacement of supplies or installations or as an extension of existing supplies or installations where a change of supplier would result in incompatibilities or disproportionate technical difficulties in operation and maintenance.
- **National competitive bidding** may be appropriate for contracts that, given 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 an open or restricted procedure are clearly outweighed by the administrative or financial burden involved.
- **Shopping** is an appropriate procedure 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;

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<sup>13</sup> A tender will be considered not suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the promoter's needs and requirements as specified in the procurement documents.



- 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 position to carry out the works at an attractive price (such as 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 Bank also requires that each tenderer or contract beneficiary signs 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, goods 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 for works and €200 000 for goods and services, except electricity, gas, water and transport, where the threshold should not exceed €400 000, and telecommunications, where it should not exceed €600 000 (all excluding value added tax (VAT) or equivalent direct taxes).

### 3.4.2 Operations in the private sector

Promoters operating in the private sector (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 such promoters to follow the public procurement procedures detailed above. For example, the less rigid, less costly and faster negotiated procedures (generally consisting of an international enquiry among a shortlist 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/or on the EIB's website and adopt an open or restricted procedure, 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 that the works, goods and services selected are of appropriate quality, and acquired at competitive prices and in a timely manner. The offer selected must be the most economically advantageous. Contracts awarded by promoters must be negotiated impartially and be in the project's best interests. In this case, the Bank ensures that, as far as possible and depending on the size of the contract, at least three qualified firms from at least two different countries are consulted. The Bank will also ensure that there is no discrimination on the basis of a tenderer's nationality.

If a company is a shareholder of the promoter (or the promoter is a shareholder of the company, or 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 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 that enjoys special or exclusive rights, or other state concessions such as a recognised 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 adequate international publicity) acceptable to the Bank, and has explicit responsibility for carrying out the works and providing the services under its 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 following three 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 these criteria have been met, 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 finds that some of the above criteria have not been met, the Bank may, on an exceptional basis, still consider supporting the project should it find that the project has sufficient "added value"<sup>14</sup> to outweigh the deviations in the process. In this case:
  - In the areas of gas, heat, electricity, water and 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>15</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 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 and/or on the EIB's website on the part of the concessionaire's investment programme to be carried out outside its own organisation.

In the case of a private initiative in a public-private partnership, also called an "unsolicited proposal" (where 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 benefits 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 multischeme 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. In public sector scheme operations, the Bank, based on its assessment of the schemes and of the technical and organisational capacity of the promoter to meet the requirements of this guide, will determine and agree with the promoter its procurement due diligence, mainly related to procurement plans, and prior and ex post reviews by the Bank.
- **Multiple beneficiary intermediated loans (mid-cap loans and loans for small and medium-sized enterprises).** When the Bank makes a loan to an intermediary institution (usually a financial institution providing loans to small and medium-sized enterprises), it requires the 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 that the Bank finances is the most economically advantageous option, and follows the

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<sup>14</sup> The project's "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's contribution to the project.

<sup>15</sup> As defined in Annex 5.

appropriate procedures in respect of the circumstances and 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 which particular contracts it will finance, and requires that the promoter follow procurement procedures in the same fashion as for the direct financing of projects. However, in the 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.
- **Funds.** When the Bank participates in a fund, it requires the fund to take all requisite measures to ensure that contracts for the implementation of the projects financed by the Bank are procured as follows:
  - **Public sector projects:** the procurement should follow appropriate procedures in line with the principles of the EU directives on (public) procurement. These principles may be summarised as open international competition, non-discrimination of bidders, fairness and transparency of the procedure, and selection of the most economically advantageous offer.
  - **Private sector projects:** procurement should follow fair and transparent procedures that satisfy the criteria of economy and efficiency. This can be achieved by following established commercial practices. Contracts must be negotiated impartially and be in the project's best interests.
  - **Concession projects:** where the fund invests in projects developed under Build, Operate, Transfer (BOT) or similar concession schemes, such as public-private partnerships, or other state concessions, such as recognised monopolies, the procurement of the concession by the relevant public contracting authority should meet the following criteria:
    - the concession was awarded through a transparent process in line with the principles of the EU Treaty, implying that there was adequate advertising to open up the concession to international competition, and that the procedure was fair and non-discriminatory and can be reviewed; and
    - the concession agreement is economically reasonable in terms of price, quality and risk-sharing.In this case, the concessionaire can procure the works, goods and services under the concession using appropriate procurement procedures for private sector projects, as described above.
- **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 loan must be purchased following procedures that ensure the transparency of the procurement process, fairness with regard to the tenderers, and selection of the most economically advantageous offer, in line with the principles set out in sections 3.4.1 and 3.4.2. The Bank may request that the competition be opened up to an adequate number of suppliers of works, goods or services (for example through advertising the procurement notice internationally).

### 3.4.5 Cases 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, namely:

- The co-financing institution widens its eligibility in line with the principles set out in section 3.2.
- Calls for tenders receive adequate publicity to ensure wide international competition.
- Procurement rules conform with internationally accepted practices, respecting the principles of non-discrimination of tenderers and fairness and transparency of the process, and the contract is awarded to the most economically advantageous offer.

In addition, the Bank may decide to entrust the co-financing institution with monitoring the procurement of jointly co-financed contracts on its behalf.

Furthermore, the Bank may decide to entrust the co-financing institution with appraising and/or monitoring the project on its behalf. In this 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 requirements and standards are respected.<sup>16</sup>

## 3.5 The Bank's review of procurement decisions

The Bank, as part of its project appraisal, will assess the project and the technical and organisational capacity of the promoter, and will determine its procurement due diligence.

During the project appraisal stage, the promoter should seek and obtain the Bank's agreement on the procurement plan, covering at least the scope of the project to be financed by the Bank. This should include information such as the choice of procedures appropriate for the project, timetable, technical specifications, publication of procurement notices, and time allowed for the preparation of tenders, etc.

### 3.5.1 Public sector operations

The procurement plan agreed with the promoter should reflect the Bank's review requirements as detailed below.

The promoter should launch a procurement process once the Bank has agreed with the corresponding procurement plan (and any substantial updates). In cases where the Bank has become involved in the project component after the promoter started the tender procedure, the procurement plan would still be reviewed to ensure it meets the requirements of this guide.

**Prior review.** All international procurement procedures are subject to prior review by the Bank. Prior review means that promoters must send the Bank the relevant documentation and seek the Bank's concurrence prior to all major decisions about procurement, that is:

- 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 its information and any comments before being published or given to potential tenderers.
- The pre-qualification of tenderers or the list of candidates established directly by the promoter prior to the notification of candidates (if any), the evaluation of bids (at each evaluation stage) and the proposed decision on the award of contracts must obtain the Bank's non-objection, based on appropriate documents.
- In cases where the procurement procedure foresees negotiations, the minutes of the negotiations and any related amendment to the original technical specifications/terms of reference or conditions of contracts prior to the notification of the proposed award decision must be sent to the Bank.
- After the contract is signed, any contract modification, the cumulative effect of which causes an increase in the original contract price of more than 15% prior to its conclusion, must be sent to the Bank.

In the case of contract termination, the promoter is required to inform the Bank of its intention to terminate the contract and the grounds for the termination. The Bank reserves the right to withdraw its financing of the contract in cases where the contract termination was not justified and/or was conducted in breach of the contractual provisions.

Prior review by the Bank follows a risk-based approach, where high-risk contracts are subject to review by an inter-directorate committee before the non-objection is issued to the promoter.

**Ex post review.** All contracts not subject to international procurement procedures are subject to ex post review by the Bank, as set out in the procurement plan. This means that promoters may conduct procurement without the prior involvement of the Bank. The promoter will regularly provide the Bank with an updated procurement plan completed with information about the contract's award decision, signature and level of competition. The promoter will retain the full documentation for each contract and make it available to the Bank upon request as

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<sup>16</sup> In the specific case of projects outside the EU under the Mutual Reliance Initiative between the EIB, Agence Française de Développement and Kreditanstalt für Wiederaufbau, one of the three co-financing partners, called the lead institution, is entrusted by the other two to appraise and/or monitor the project on their behalf. In this case, the lead institution is fully in charge of overseeing project procurement and applies its own rules as agreed with the EIB.

part of ex post reviews to be conducted by the Bank or its auditors. The Bank reserves the right to withdraw its financing of contracts in cases where the ex post review reveals a breach of this guide.

During project implementation, the Bank will monitor procurement by the promoter and may adjust its due diligence based on the promoter's performance.

### **3.5.2 Private sector operations**

In private procurement, the promoter should ensure that the procurement practices, award decisions and contracts are in line with the provisions of this guide that are applicable to operations in the private sector (section 3.4.2.). The Bank will satisfy itself that the works, goods and services to be financed are appropriate for the project and are, or will be, procured at fair market prices in line with the principles of economy and efficiency, and under contracting conditions that are reasonable in the context of prevailing market practice.

### **3.5.3 Concession operations**

When the promoter is the public authority in charge of the selection of the concessionaire, the Bank's procurement review of concession and public-private partnership selection processes will be the same as for public sector operations (section 3.5.1.).

The Bank's due diligence of the procurement performed by the concessionaire will be conducted in accordance with the type of operation (public or private), as detailed in section 3.4.3.

In cases where the promoter is a tenderer (or a special-purpose vehicle (to be) created by the tenderer upon award of the concession contract) participating in the concession selection process run by public authorities, it is advisable that the public authorities ensure early involvement of the Bank in the public-private partnership to allow the Bank to verify that the conditions attached to its financing as described in this guide are met. In principle, the Bank makes itself available to all interested tenderers on a non-exclusive basis, without any obligation on the part of the tenderers to include the Bank in their tender structures (unless they are required to do so in the procurement documents). In such cases, the Bank commits to restricting access to information made available to it as part of its review of the concession award process, in full respect of the principle of confidentiality, and to putting in place adequate measures, including confidentiality undertakings, as needed.

The requirements covering the Bank's review of procurement decisions are outlined in Annex 2.

## **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 fraud, corruption, collusion, coercion, obstruction and money laundering and terrorist financing). In particular, in countries outside the EU, the Bank, as a general rule, requires that promoters:

- require any tenderer for works, goods or services, as a condition of eligibility, to execute and attach to its tender a Covenant of Integrity in the form indicated in Annex 3; and
- insert in tender documents and contracts a clause that 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 to inspect and copy the books and records of the tenderer, contractor, supplier or consultant in connection with any Bank-financed contract.

The Bank reserves the right not to finance any contract in which tenderers/contractors have not issued to the promoter the Covenant of Integrity signed by a duly authorised person.

For contracts awarded prior to the Bank's involvement in the project, the promoters are encouraged to include the Covenant of Integrity.

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 Anti-Fraud Policy.

## 3.7 International procurement procedures

### 3.7.1 General aspects

As a general rule, the Bank requires public contracts to be awarded following an open or restricted procedure with publication of a procurement notice in the OJEU and/or on the EIB's website. Any exception must be justified by the promoter and approved by the Bank.

The 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/or on the EIB's website 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/or on the EIB's website; and
- implementation of the contract.

When following an open or restricted procedure, 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 and/or on the EIB's website. If necessary, the Bank will assist in arranging the publication of the notice on behalf of the promoter.

In the case of a direct call for tenders without prior pre-qualification, the notice must mention at least:

- the promoter's title and the project's name, and a reference to the Bank's potential financing;
- a description of the works or nature of the supplies or services to be furnished;
- a projected timetable;
- the list of tender evaluation criteria in decreasing order of importance;
- the place where tender documents can be obtained;
- the final date for receipt of tenders; and
- the 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, and preferably at the same time as, their publication in the OJEU and/or on the EIB's website, and with the same conditions and wording.

Should the promoter have already started the tender procedure for a project component before the Bank's involvement, the Bank may still agree to finance this component despite the notice not having been published in the OJEU and/or on the EIB's website, provided the promoter can demonstrate that the tender has been sufficiently publicised to foster wide international competition.

### 3.7.3 Pre-qualification in restricted procedures

In a restricted procedure, the promoter has to select the 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 and/or on the EIB's website. Such a 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 candidate's:

- experience and past performance on previous contracts;
- capabilities in terms of 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 the decision.

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

### **3.7.4 Tender documents**

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.

Promoters may use tender documents and conditions of contracts originating from their country's legislation, provided that they are drafted in such a way as to permit wide international competition and are compatible with the provisions of this guide. Alternatively, promoters may consider using internationally recognised standard procurement documentation and conditions of contract, such as those prepared by multilateral development banks or the International Federation of Consulting Engineers, provided that they are revised to be compatible with the provisions of this guide, as set out in Chapter 1 and section 3.7.

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

If any modifications are made to the tender documents during the tendering period, the promoter must send the modified documents 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 where appropriate.

The time allowed for the preparation of tenders should depend on the size 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 cases, 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 one 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, if they 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 English or French).

In specific cases, the original tender documents may be drawn up in the language of the country (which may 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 EU or international standards and specifications, such as those issued by the International Organization for Standardization, wherever these are applicable and appropriate, and apply them consistently across the tender documents. If particular standards, national or otherwise, are adopted, the tender documents must state that standards with a guaranteed 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 works, goods 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 on the basis of "EXW" (ex-works, ex-factory, or off the shelf) for locally available or manufactured or assembled goods, including those previously imported. The evaluation of 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 in this case the selected contractor is responsible for all duties, taxes and levies in the execution of the contract.

### 3.7.8 Currency

Promoters may wish, with the agreement of the Bank, to restrict 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 will 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 will be those specified by the tenderer in the tender, 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 for a date selected in advance and specified in the tender documents, provided that the date is not earlier than 30 days prior to the date specified for the opening of the tender.<sup>17</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. A comparison is then made between the price (net of taxes and duties at the place of delivery) of the imported goods increased by 15% and the price (net of the value added

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<sup>17</sup> The date should not normally be later than the original date prescribed in the tender documents for the expiry of the period of the tender's validity. However, where the payment provisions in the contract entail a few significant payments at specific predictable dates in the future (such as 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, to hedge the risk of currency fluctuations. The forward dates and the currency exchange market to be used must be clearly specified in the tender documents.



tax or similar taxes) at the place of delivery of the locally manufactured goods. The Bank does not allow preference to be given to works (even if they include the supply of goods) or services originating in the beneficiary country.

### **3.7.10 Tender evaluation criteria**

The tender evaluation may be based on:

- 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, such as 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.

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 full, without omission or addition, in the evaluation of tenders. In the case where no criteria are indicated, the lowest price only will apply.

In exceptional cases, the tender documents may specifically request the tenderers to submit financing proposals. In such cases, the documents should include a clear methodology to evaluate the proposals. 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 its representative must scrutinise the tenders for compliance and responsiveness, and correct all arithmetical errors. The promoter or its representative 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 recommended that the evaluation proceed in two steps (technical then financial); this is called the two-envelope system and is described in Annex 1.

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

### **3.7.13 Award and signing of the contract**

The promoter should inform all tenderers of the contract award decision, including a summary of the relevant reasons for the 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 — the standstill period — from the date the contract award decision was sent to the tenderers.

### **3.7.14 Award notice**

Immediately after the contract is signed, the promoter must publish an award notice in the OJEU and/or on the EIB's website. If necessary, the Bank will assist in arranging its 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 to the Bank's financing;
- contract value (only when price is the evaluation criterion);
- date of award of contract;
- number of tenders received; and
- name and address of successful tenderer.

### **3.8 Environmental and Social Covenant**

The Bank requires, as a general rule when financing operations outside the EU, that the promoter insert in the procurement documents and contract the requirement for tenderers and contractors to fill in and submit an "Environmental and Social Covenant", the template for which is provided in Annex 6. The Bank reserves the right not to finance any contract in which the tenderer/contractor has not issued to the promoter the Environmental and Social Covenant signed by a duly authorised person.

For contracts awarded prior to the Bank's involvement in the project, the promoter is encouraged to include the Environmental and Social Covenant.

## 4 Consultancy Services Financed by the Bank

This chapter covers work undertaken by consultants in a project financed by the Bank, through either a loan or a grant. Section 3.6 — Prohibited Conduct — Covenant of Integrity — fully applies to this chapter as well. Regarding Candidate Countries and potential candidate countries, the second paragraph of section 3.1 of this guide defines whether their operations are considered within or outside the European Union.

### 4.1 Projects located within the European Union

The rules applicable to the Bank's activities within the European Union are those contained in the relevant EU directives.

### 4.2 Projects located outside the European Union

The provisions set out below are valid only for Bank operations in the public sector. The general provisions of section 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 (that the services are of appropriate quality, are acquired at competitive prices and are performed in a timely manner).

The rules on the selection of consultants that apply to Bank activities outside the European Union are always guided by the spirit of the EU directive applicable to similar services within the Union, with the required adjustments to take account of the specific conditions of the Bank's operations outside the Union.

#### 4.2.1 Description of procedures

The various procurement procedures are described below.

- **Open procedure:** an international call is made for proposals (at a minimum via publication in the OJEU and/or on the EIB's website; in addition via the press and other media), allowing any consultant or expert interested to submit a proposal for the services required.
- **Restricted procedure:** a call is made for proposals using a list that contains only those 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 a minimum in the OJEU and/or on the EIB's website. The Bank finds that this procedure is more efficient than the open procedure.
- **Negotiated procedure,** with the list of candidates established directly by the promoter: proposals (technical and financial) from consultants/experts selected by the promoter are analysed and final conditions are negotiated with one or several of these. Promoters can establish a list of potential candidates (shortlist) by using their experience, contacts and/or a register of consultants.

#### 4.2.2 Selection of procedures

The procurement procedure selected must conform to the following provisions.

- For an estimated amount of €200 000 or above (excluding VAT; the contractual value taken into account is the supplier's total remuneration), the applicable procedure is:
  - an open procedure with publication in the OJEU and/or on the EIB's website; or
  - a restricted procedure with an international call for expression of interest in the OJEU and/or on the EIB's website.
- For an estimated amount below €200 000 (excluding VAT), the applicable procedure is a negotiated procedure, with a 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.

There are exceptions to the above procedures. Promoters may find it necessary to contact fewer candidates or only one candidate for one or more of the following reasons:

- The expertise sought is such that there are 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.
- 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 a competitive procedure; this is one of the most common reasons, and provisions for such an exception 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 exceptions must always be clearly justified by the promoter and have received a prior non-objection from the Bank.

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

### **4.2.3 Evaluation of the consultant's proposals**

Proposals are evaluated based on a series of factors that must be specified, with their respective weights, in the request for proposals issued to consultants. These factors may include:

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

Depending on the characteristics of the task to be performed, price may be considered a factor, but it should have less weight than the other factors as a whole. In certain circumstances, the most efficient way of integrating the price factor into the tender is to indicate the budget available for the services in the request for proposals and to require that this budget 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

## Procurement terms and practices

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

### International procedures

The terms “open procedure”, “restricted procedure”, “negotiated procedure” and “competitive dialogue” are used in this guide as defined in EU directives on procurement, as may be amended from time to time.

- 1.** An **open procedure** is a formal procedure whereby all interested companies may submit tenders. It must be advertised at a minimum in the OJEU and/or on the EIB’s website. It involves clear and comprehensive tender documents and fair and transparent tendering, evaluation and award practices. Outside the European Union, this procedure is often referred to as **international competitive bidding** or **open tendering**.
- 2.** A **restricted procedure** is a formal procedure whereby only those companies invited by the promoter may submit tenders. It must be preceded by a pre-qualification exercise open to all interested companies and advertised at a minimum in the OJEU and/or on the EIB’s website, 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 and/or on the EIB’s website). It is similar to an open procedure at the tendering stage (involving clear and comprehensive tender documents, and fair and transparent tendering, evaluation and award practices). Outside the European Union, this procedure is also referred to as **international competitive bidding (including a pre-qualification phase)**.
- 3.** A **competitive dialogue** is a procedure designed for particularly complex contracts where the promoter is not objectively able to define the technical requirements necessary to satisfy the project’s needs or objectives, or is not able to specify the legal or financial make-up of the project, and where the promoter considers that direct use of a restricted procedure will not allow the contract to be awarded to the tenderer offering best value for money. The promoter must set out its needs and requirements, and define the award criteria to enable the selection of the most economically advantageous tender. A contract notice is first published in the OJEU and/or on the EIB’s website. The promoter then selects qualified tenderers from the candidates, and opens a dialogue with them to define the requirements best suited to satisfying the promoter’s needs. The promoter must ensure that tenderers are treated equally, and may not communicate confidential information related to one tenderer to another. The procedure may involve 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.** A **competitive procedure with negotiation** follows a similar sequence of steps to a competitive dialogue. However, unlike a competitive dialogue, it requires the promoter to specify its requirements in advance of inviting submissions from tenderers. This means that its starting point, which is the pre-qualification stage, is a call for competition via a contract notice and the publication of documents including the award criteria, specifications and minimum requirements, which can be physical, functional or legal. Promoters negotiate with qualified tenderers the initial tender and all subsequent tenders submitted by them, except the final tenders, to improve their content. Where the promoter intends to conclude the negotiations, it should inform the remaining tenderers and set a common deadline for submitting any new or revised tenders. The promoter should verify that the final tenders meet the minimum requirements; assess the final tenders on the basis of which is the most economically advantageous; and award the contract. The promoter must ensure that tenderers are treated equally, and may not communicate confidential information related to one tenderer to another.
- 5.** A **negotiated procedure without publication** is a procedure 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 is established directly by the promoter. Outside the European Union, this procedure is often referred to as **limited international bidding** or **selective tendering**.

## National procedures

6. **National competitive bidding** follows the normal procedure of the country of the promoter. The tender 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 tendering and payments; and tender prices are normally inclusive of all applicable local duties and taxes.
7. **Shopping** and **direct contracting** allow the promoter to negotiate prices and other conditions with several local contractors or suppliers or with only one of them.
8. **Force account** (also called **direct labour**) is not really a procurement procedure, since it involves carrying out the works using the promoter's own workforce and equipment. This may be the only practicable method for carrying out certain kinds of works or for providing appropriate in-house services, such as basic design, research and development.

## Specific practices under an open or restricted procedure

9. For large or complex contracts, it is recommended that the evaluation is carried out in two steps (technical offers then financial offers). Tenders are requested using the **"two-envelope" system**, in which the technical and financial offers are submitted together, but in separate envelopes. In the first step, only the administrative and technical documents are opened in public. In the second step, after review of conformity by the promoter (which may include meeting minimal qualification criteria defined in the tender documents), 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.
10. When a technical dialogue between the promoter and the tenderers may be 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 offer. After a detailed evaluation of the technical offers, the promoter amends the initial tender specifications and requests priced tenders only from those tenderers that are deemed to be qualified and meet the technical requirements. The main difference between this and a competitive dialogue is that all final tenders must fulfil the same requirements, thus facilitating tender evaluation.
11. 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 an evaluation is then carried out considering technical and economic factors. 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 calculations on the part of the tenderer when it comes to preparing tenders, and on the part of the promoter when it comes to evaluating and comparing tenders, and making the final choice of contractor or supplier.
12. Invitations to tender may be issued for an entire project (such as the construction of a factory or power plant), including testing and commissioning, or for only part of the project. In the first case, the term used is a **"turnkey"** contract, which gives the promoter more technical guarantees but is 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. Substantially lower costs can be achieved; however, responsibility for the technical interface between the various project components and the risks of delays, cost overruns and poor overall technical performance is borne by the promoter.

# Annex 2

## The bank's review of procurement decisions in public sector operations located outside the European Union

As explained in this guide, the Bank has a policy of leaving the entire responsibility of the procurement procedures to the promoter. The Bank limits its intervention to ensure that its funds are used in the most cost-effective, transparent and efficient way possible. Consequently, the Bank limits its review of the promoter's procurement decisions to the essential steps.

During project appraisal or 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 steps listed below for each procedure then need to be respected.

### International procurement procedures

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 20 days before the expected date of publication of the procurement notice.
2. As a matter of policy, the Bank does not undertake 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 about the (pre-)qualification factors and the tender evaluation criteria. In any case, this does not constitute approval of the full content of these documents.
3. If necessary, the Bank will review, and organise publication of, the procurement notice in the OJEU and/or on the EIB's website on behalf of the promoter.
4. In the 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. In the case of a negotiated procedure without publication, the promoter must send to the Bank for its non-objection the list of candidates to be invited to submit a tender, including a note of justification.
5. During the tendering process, the promoter must immediately inform the Bank of any written complaint that it receives from a tenderer.
6. After analysis of the tenders, the promoter must send to the Bank its evaluation report(s), making a clear recommendation for the next tendering stage (if any) or the 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 and/or on the EIB's website 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 its first request for disbursement under the contract.

### Other procurement procedures

For contracts not subject to international procurement procedures, the promoter will regularly provide the Bank with an updated procurement plan completed with information about the contract's award decision, signature and level of competition. The promoter will keep the full documentation for each contract and make it available to the Bank upon request as part of ex post reviews to be conducted by the Bank or its auditors. The Bank reserves the right to withdraw its financing of contracts in cases where the ex post review reveals a breach of this guide.

### Specific case of contracts for consulting services

The Bank reviews the scope of the services and the terms of reference proposed (including the procedure selected), the shortlisting report explaining how the recommended shortlist 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 to the Bank the terms of reference, the proposed shortlist of consultants and a shortlisting report (or the procurement notice in case an open or restricted procedure is selected), and the request for proposals.
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 about the tender evaluation criteria. In any case, this does not constitute approval of the full content of these documents.
3. In the case of an open or restricted procedure, the Bank will organise publication of the procurement notice in the OJEU and/or on the EIB's website on behalf of the promoter, as necessary.
4. In the case of a restricted procedure, the promoter must send a pre-qualification report to the Bank for its non-objection.
5. After analysis of the offers, the promoter must send to the Bank its evaluation report, making a clear recommendation for the contract award, and the draft consultant contract. The Bank will provide its non-objection or appropriate comments.
6. In the 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 and/or on the EIB's website 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 for an international procedure; see Annex 3) prior to its 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 its full responsibility regarding procurement. In particular, the Bank may review its position in the light of new information that comes to its knowledge after it has given its opinion on a specific aspect of the process.



# Annex 3

## Covenant of Integrity template

[Name of lead tenderer] hereby declare and covenant, on our behalf and on that of our joint venture partners, if any, for [name of the contract] managed by [name of promoter] (the “Contract”), that neither we nor anyone, including any of our directors, employees, agents or subcontractors for the Contract, acting on our behalf with due authority or with our knowledge or consent or facilitated by us (together, the “Associated Entities and Persons”), nor any of our parent, subsidiary or affiliate companies,

- (i) have engaged in any Prohibited Conduct<sup>18</sup> in connection with the tendering process, nor will we or the Associated Entities and Persons engage in such Prohibited Conduct during the execution of the Contract;
- (ii) are listed or otherwise subject to EU/United Nations sanctions;<sup>19</sup>
- (iii) are the subject of a current decision of exclusion by the European Investment Bank;
- (iv) during the 5 (five) years immediately preceding the date of this Covenant, have been convicted in any court or sanctioned<sup>20</sup> by any authority (irrespective of whether such conviction or sanction is still in force) of any offence on grounds comparable to Prohibited Conduct in connection with a tendering process or any provision of works, goods or services; or
- (v) are excluded or subject to enforcement actions or otherwise sanctioned<sup>21</sup> by the EU institutions or bodies, or any multilateral development bank,<sup>22</sup> on grounds comparable to Prohibited Conduct, or have been under such exclusion, enforcement action or sanction the effectiveness of which ceased no more than 5 (five) years immediately preceding the date of this Covenant.

We will immediately inform you if any instance described under (i) to (v) above in respect of us or any of the Associated Entities and Persons comes to the attention of any person in our organisation having responsibility for ensuring compliance with this Covenant at any time during the tendering process and, if successful, during the Contract.

We further declare and covenant that, if successful, neither us nor any of the Associated Entities and Persons will act in contravention of EU/United Nations sanctions during the execution of the Contract.

If applicable, we provide below the details of all convictions, exclusions or other sanctions, exclusion/sanctions proceedings, and/or enforcement actions, listed above under paragraphs (i) to (v), in respect of us or any of the Associated Entities and Persons, together with details of the measures taken, or to be taken, to ensure that no Prohibited Conduct is committed in connection with the tendering process or with the execution of the Contract (if not applicable, please indicate not applicable in the table below):

Name of entity	Details of disclosure	Measures taken or to be taken

<sup>18</sup> Corruption, fraud, collusion, coercion, obstruction, theft at EIB Group premises, misuse of EIB Group resources or assets, money laundering or financing of terrorism, all as defined in the EIB Group Anti-Fraud Policy, available at <https://www.eib.org/en/publications/anti-fraud-policy> and as amended from time to time.

<sup>19</sup> EU sanctions or restrictive measures pursuant to Chapter 2 of Title V of the EU Treaty and the objectives of the Common Foreign and Security Policy set out in Article 21 of the EU Treaty and Article 215 of the Treaty on the Functioning of the EU, either autonomously or pursuant to the sanctions decided by the United Nations Security Council on the basis of Article 41 of the United Nations Charter.

<sup>20</sup> Including a fine or any other financial penalty, irrespective of whether paid yet or not.

<sup>21</sup> Including any decision having an effect similar to conditional non-exclusion, temporary suspension, letters of reprimand, or self-restraint.

<sup>22</sup> Including the World Bank Group, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank and the Inter-American Development Bank.

We, or any of the Associated Entities and Persons, have paid, or will pay, the following commissions, gratuities or fees with respect to the tendering process or execution of the Contract *[insert complete name of each recipient, its full address, the reason for which each commission, gratuity or fee was paid, or will be paid, and the amount and currency of each such commission, gratuity or fee]*:

Name of recipient	Address	Reason	Amount

For the duration of the tendering process and, if we are successful, for the duration of the Contract, we will 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.

We grant the *[name of promoter]*, the European Investment Bank, and any persons appointed by it and/or any authority or European Union institution or body having competence under European Union law, the right to (i) visit the sites, installations and works, (ii) interview our representatives and any other relevant person and (iii) inspect and copy our books and records in connection with the tendering process or the Contract, and we shall require our Associated Entities and Persons with knowledge of the Contract to respond to questions from the European Investment Bank and to provide to it any information or documents necessary for the investigation of allegations of Prohibited Conduct.

We agree to preserve our books and records and ensure that the books and records of the Associated Entities are preserved generally in accordance with applicable law but in any case for at least 6 (six) years from the date of tender submission and, in the event we are awarded the Contract, at least 6 (six) years following the date of substantial performance of the Contract. We shall ensure that in any agreements with Associated Entities concerning the execution of the Contract provisions to the effect of this paragraph are included.

We acknowledge that any failure to comply with the obligations under this Covenant of Integrity (including any omission or misrepresentation, made knowingly or recklessly, of a past conviction, exclusion, other sanction or enforcement action), or any unauthorised amendment to the Covenant, may be considered a breach of the EIB Group Anti-Fraud Policy and thus result in the rejection of our tender for the Contract and/or cause the initiation of exclusion proceedings by the EIB against us and/or any of the Associated Entities and Persons.

**SIGNED by a duly authorised representative with the requisite power and authority to sign on behalf of its company and, in the case of a joint venture bid, on behalf of each member thereof:**

- Date:
- Name of company:
- Name of signatory:
- Position of signatory:
- Signature:

**Note:** This Covenant must be sent to the Bank together with the contract in the case of an international procurement procedure (as defined in section 3.3.2). In other cases, it must be kept by the promoter and be made available, upon request, to the Bank.

## Annex 4

### Eligibility for operations financed by resources from third parties

In some projects outside the European Union, the Bank's financing comes from different sources, such as resources deployed under external mandates of the European Union and trust funds.

The **general rules** are as follows:

- Tenders financed by funds made available under the Investment Facility created by the Cotonou Agreement are open to nationals of all countries.
- In cases where tenders are financed by resources made available by third parties (or a combination of the EIB's own resources and resources from third parties), eligibility of tenderers, goods and services is governed by the rules of the respective legal instruments (such as the Facility for Euro-Mediterranean Investment and Partnership). In such cases, tendering should generally be open to firms, goods and services originating from:
  - countries of the European Union; and
  - countries party to, or beneficiaries of, the agreement or convention concerned.

A firm is deemed to originate from an 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 have continuous links with, the economies of EU or beneficiary countries.

At the request of the beneficiary country, firms located in third countries may be authorised by the Bank to participate under derogations admissible under the agreement or convention concerned. Such authorisation must be expressly provided for in the documents for the corresponding tender and must be mentioned in any associated publications.

# 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” is understood to mean any body that:

- 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 for the most part by public authorities or is subject to management supervision by public authorities, or has an administrative, managerial or supervisory board of which more than half the members are appointed by public authorities.
2. **In addition, in the specific case of gas, heat, electricity, water and 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 that are not liberalised; and
    - privately owned entities that have been granted special or exclusive rights and operate in markets that are not liberalised.

If this is not the case, the public authorities, public undertakings and privately owned entities are considered to fall under 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 (such as holding the majority of the subscribed capital), their financial participation therein (for example, controlling the majority of the votes attached to shares), or the rules that govern it (such as appointing more than half of the administrative, management or supervisory board).

“Special or exclusive rights” are rights that 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), depending on the size of the market and the economies of scale involved.

**The operations referred to under paragraph 2 above are as follows:**

- 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 intended 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, electricity or drinking water to networks that provide a service to the public by a promoter other than a public authority will 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 paragraphs 2.1, 2.2 and 2.3.
  - 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 is 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

## Environmental and Social Covenant Template

We, [*name of lead tenderer*], shall, and shall ensure that all of our joint venture members and subcontractors, if any, for [*name of the contract*] managed by [*name of the Contracting Authority*] (the “Contract”), comply with all labour and health and safety laws and regulations applicable in the country of implementation of the Contract, as well as all national legislation and regulations and any obligation in the relevant international conventions and multilateral agreements on the environment that are applicable, ratified and in force in the country of implementation of the Contract.

### *Labour standards*

We commit to adhere to the principles of the Fundamental Conventions of the International Labour Organization,<sup>23</sup> and, in particular, we explicitly pledge not to employ child labour or forced labour, in line with Standard 8 of the EIB’s Environmental and Social Standards.<sup>24</sup>

We will require our subcontractors not to employ child labour or forced labour [*and to cascade these requirements throughout their respective supply chains*].<sup>25</sup> We shall:

- (i) pay rates of wages and benefits and observe conditions of work (including working time) that are fair and not lower than those established for the trade or industry where the work is carried out and ensure that wages are paid promptly and regularly; and
- (ii) keep complete and accurate records of employment of workers at the site.

[*for works contracts, insert:*

### *“Workers relations*

We shall, in line with Standard 8 of the EIB’s Environmental and Social Standards, [*insert “have in place”/“develop and implement”*] labour management policy and procedures commensurate to the size and workforce that will be applicable to the project (including a grievance mechanism in line with good international practice to address both labour and occupational health and safety considerations). We will regularly monitor and report on implementation of the grievance mechanism to [*name of the Contracting Authority*], including on any corrective measures deemed necessary.”]

### *Occupational and public health, and safety and security*

We shall:

- (i) comply with all applicable occupational health and safety laws in the country of implementation of the Contract;
- (ii) develop and implement the necessary health and safety management plans and systems commensurate with the project risks and impacts, in accordance with [*in the case of goods, non-consulting services and works, insert “the measures defined in the Project’s environmental and social management plans or equivalent and/or in the relevant studies and”*] International Labour Organization guidelines on occupational safety and management systems;<sup>26</sup>
- (iii) provide workers employed in relation to the Contract access to adequate, safe and healthy facilities as well as living quarters for workers living on-site, if relevant, in line with the EIB’s Environmental and Social Standards;

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<sup>23</sup> <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

<sup>24</sup> <https://www.eib.org/en/publications/eib-environmental-and-social-standards>.

<sup>25</sup> Text between brackets to be added in case the Bank’s risk assessment identifies the presence or a significant risk of child labour, forced labour or sexual exploitation or abuse at the primary supplier, or when risks are known or have been reported in lower tiers of the supply chain.

<sup>26</sup> [http://www.ilo.org/safework/info/standards-and-instruments/WCMS\\_107727/lang--en/index.htm](http://www.ilo.org/safework/info/standards-and-instruments/WCMS_107727/lang--en/index.htm).

- (iv) communicate all occupational health and safety rules, instructions and signage in a language understood by the workforce;
- (v) provide qualified [emergency response/]first aid arrangements at all times;
- (vi) develop and implement a code of conduct and adopt specific measures to prevent and address inter alia gender-based violence, sexual exploitation and human trafficking for all workers, including those of our subcontractors;
- (vii) use security management arrangements that are consistent with international human rights standards and principles<sup>27</sup> where such arrangements are required for the delivery of the Contract;
- (viii) establish procedures and systems for investigating, recording and reporting any type of accident and incident (whether they happen on-site or within the Contract influence area) that occurs as a direct consequence of the implementation works or Contract activities;
- (ix) report, investigate, document and analyse any environmental and health and safety incidents, accidents or circumstances and their impact or the effect arising or likely to arise from them, including permanent disabilities, ill health or fatalities occurring in relation to the Contract, and take due actions to address and prevent any future similar event, keep the EIB informed of the ongoing implementation of these measures and, where required by national law, notify the relevant authorities of such occurrences and cooperate with them in this respect.

#### *Protection of the environment*

We shall take all reasonable steps to protect the environment, biodiversity and ecosystems on and off the site and to limit the nuisance to people and property resulting from pollution, noise, traffic and other outcomes of the operations. [*in the case of **goods, non-consulting services and works**, insert “To this end, emissions, discharges to the surface, ground and marine environments and effluent from our activities will comply with the limits, specifications or stipulations as defined in [*insert name of the relevant document*]<sup>28</sup> and the international and national legislation and regulations applicable in the country of implementation of the Contract.”*]

#### *Environmental and social performance*

We shall comply with the measures prescribed to us in the Contract and any corrective or preventative actions in the annual environmental and social monitoring report or other environmental and social action plan required by the Contract, if any [*in the case of **works**, insert “and submit [*insert the periodicity as indicated in the Contract, if any*] environmental and social monitoring reports to [*insert name of the Contracting Authority*]”*]. [*in the case of **contracts above the thresholds**,<sup>29</sup> insert “To this end, we shall develop and implement an environmental and social management system commensurate to the size and complexity of the Contract and provide [*insert name of the Contracting Authority*] with the details of the (i) plans and procedures, (ii) roles and responsibilities and (iii) relevant monitoring and review reports. We further commit to fully cooperate with the staff of the supervision consultant, where applicable.”*]

Our tender price as offered for the Contract includes all costs related to our environmental and social performance obligations under the Contract. We shall:

- (i) reassess, in consultation with [*insert name of the Contracting Authority*], any changes that may potentially cause negative environmental or social impacts;
- (ii) provide [*insert name of the Contracting Authority*] with a written notice and in a timely manner of any unanticipated environmental or social risks or impacts that arise during the implementation of the Contract previously not taken into account; and

<sup>27</sup> For example, the United Nations Voluntary Principles on Security and Human Rights (<https://www.voluntaryprinciples.org/>), the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (<https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>), the United Nations Code of Conduct for Law Enforcement Officials (<https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>) and the International Code of Conduct for Private Security Providers ([https://www.icoca.ch/en/the\\_icoc](https://www.icoca.ch/en/the_icoc)).

<sup>28</sup> For instance an environmental and social impact assessment and respective permits.

<sup>29</sup> See section 3.4.1 of the guide for the thresholds.

- (iii) in consultation with *[insert name of the Contracting Authority]*, adjust environmental and social monitoring and mitigation and/or compensatory and/or remedy measures as necessary to assure compliance with our environmental and social obligations.

*[in the case of goods, non-consulting services and works, insert:*

*“Environmental and social staff*

We shall facilitate *[insert name of the Contracting Authority]*’s ongoing monitoring and supervision of our compliance with the environmental and social obligations described above.”]

*[in the case of contracts above the thresholds for goods, non-consulting services and works, insert:*

*“Environmental and social management team*

For this purpose, we shall appoint and maintain in office until the completion of the Contract an environmental and social management team (scaled to the size and complexity of the Contract) that shall be reasonably satisfactory to *[insert name of the Contracting Authority]* and to whom *[insert name of the Contracting Authority]* shall have full and immediate access, having the duty and the necessary powers to ensure compliance with this Environmental and Social Covenant.”]

We accord *[insert name of the Contracting Authority]* and the EIB, and auditors appointed by either of them, the right to inspect all our accounts, records, electronic data and documents related to the environmental and social aspects of the current Contract, as well as all those of our joint venture members and subcontractors.

**SIGNED by a duly authorised representative with the requisite power and authority to sign on behalf of its company and, in the case of a joint venture, on behalf of each member thereof:**

Date:

Name of company:

Name of signatory:

Position of signatory:

Signature:

**Note to the promoter:** This Environmental and Social Covenant must be sent to the Bank together with the contract in the case of an international procurement procedure (as defined in section 3.3.2). In other cases, it must be kept by the promoter and made available, upon request, to the Bank.



# Annex 7

## Procurement Complaints Procedure

### A. Complaints against promoter's action

Responsibility for addressing such complaints and resolving them lies with the promoter. While the Bank is committed to ensuring that only contracts procured in line with its Guide to Procurement will be eligible for financing by its loans, the role of the Bank is limited to verifying whether the conditions attached to its financing are met. In the event that the Bank determines that the procurement process has not complied with its Guide to Procurement, it may decide to withdraw its financing and apply any other appropriate contractual remedies.

Complainants who wish to challenge a promoter's action or decision should address their concerns to the promoter and/or the relevant review bodies (normally national remedy mechanisms), as appropriate. Tenderers are encouraged to make use of these recourses to raise their concerns in a timely manner, and may copy the Bank in when submitting a complaint.

### B. Requirements for complaints against the Bank's action

#### 1. Who can complain?

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 of the Guide to Procurement may submit a procurement complaint to the Bank's Procurement Complaints Committee (PCC).<sup>30</sup> This normally includes any tenderer or potential tenderer.

#### 2. What can be complained about?

Complainants may challenge the Bank's decision on whether the procurement process complies with the Guide to Procurement. Allegations of Prohibited Conduct related to a procurement process will be handled by the competent EIB services, in line with the Bank's Anti-Fraud Policy.

#### 3. How to complain

Complaints should be submitted by post or email ([procurementcomplaints@eib.org](mailto:procurementcomplaints@eib.org)). Complaints addressed to the Bank using other means will be redirected to the Procurement Complaints Committee.

#### 4. When to complain

Complainants are encouraged to submit complaints before the expiry of the standstill period. Tenderers should note that submitting a complaint after the standstill period has expired may result in a situation where the procurement process can no longer be redressed.

### C. Process

Once the Bank has received a complaint, the Bank will acknowledge receipt of the complaint and inform the promoter, but will not enter into discussion or correspondence with any tenderer about the details of a complaint during the review process.

- (a) Complaints submitted before the Bank has issued its non-objection to the contract award will be treated by the Bank's services through the Bank's standard due diligence. The substance of the complaint will be considered when the Bank decides whether or not to provide its non-objection to the contract award.
- Complaints submitted after the Bank has provided its non-objection to the contract award and during the standstill period are reviewed by the Procurement Complaints Committee, which reviews the Bank's position on whether to confirm or withdraw its non-objection. The Bank suspends its non-objection until the Procurement Complaints Committee has completed its review. The Bank's decision will be taken within 30 calendar days of the complaint being submitted. In complex cases this deadline may be extended to up to 60 calendar days.

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<sup>30</sup> Complaints about an action by the Bank submitted by any other member of the public will be addressed by the EIB's Complaints Mechanism, in line with its policy.

- If complaints are received after the standstill period has expired, the procurement process can no longer be redressed. However the Procurement Complaints Committee will still examine the case to decide whether the Bank will confirm or withdraw its financing of the contract.

Once a final decision is taken, the Bank will inform the promoter. The Bank will also send a substantiated response to the complainant.



# Guide to procurement for projects financed by the EIB

