

## **ANNEX 12. Specific rules of awarding contracts under the project – specific rules for Polish partners**

### 1. The competition rule in projects

The Beneficiary shall be obliged to prepare and carry out the procurement procedure in a manner ensuring fair competition and equal treatment of contractors, and to act in a transparent and proportionate manner – in accordance with the procedure set out in this Annex (**competition rule**).

### 2. Exclusion from application of the competition rule

#### 1. The competition rule does not apply to:

- a) contracts whose value does not exceed PLN 50,000 net,
- b) contracts awarded pursuant to the Act of 11 September 2019 Public Procurement Law (Journal of Laws of 2022, item 1719, as amended), hereinafter: Ppl,
- c) contracts with the subject specified in Articles 9–14 Ppl,
- d) performance of public tasks by a public administration body based on Article 5(2)(1) of the Act on public benefit activity and volunteerism,
- e) contracts awarded under legal regulations other than the Ppl, which exclude the application of the Ppl,
- f) expenditures settled by simplified methods and financing not related to costs,
- g) contracts awarded by beneficiaries selected according to the procedure specified in the Act of 19 December 2008 on public-private partnership (Journal of Laws of 2022, item 407, as amended) or in the Act of 21 October 2016 on the concession contract for construction works or services (Journal of Laws of 2021, item 541 as amended) for execution of a hybrid project,
- h) contracts awarded or procurement procedures launched before the submission of the application for project financing for projects that have been awarded a Seal of Excellence as referred to in Article 2(45) of the General Regulation,
- i) contracts, the subject of which are services rendered within the scope of research and development works conducted within the project by natural persons indicated in the approved project funding application, holding the required qualifications that permit them to conduct research and development works in accordance with the application,

#### 2. The competition rule may not be applied:

- a) when, for reasons of extreme urgency (necessity) for the award of the contract not attributable to the contracting authority, which could not have been foreseen, the time limits laid down in paragraph 19, section 1.3 of this Annex cannot be complied with,
- b) when, for reasons of exceptional circumstances not attributable to the contracting authority, which could not have been foreseen (e.g. natural disasters, catastrophes,

breakdowns), immediate performance of the contract is required and the time limits specified in paragraph 19, section 1.3 of this Annex cannot be complied with,

c) for contracts that can only be performed by a sole contractor for any of the following reasons:

- I. lack of competition for technical reasons of an objective nature, where there is only one contractor who alone can perform the contract, or
- II. the subject matter of the contract is protected by exclusive rights, including intellectual property rights, when there is only one contractor who has the exclusive right to dispose of the subject matter of the contract and this right is protected by law,

as long as no reasonable alternative or substitute exists and the lack of competition does not result in artificially narrowing the parameters of the contract,

- d) contracts in the field of creative or artistic activity, which can be executed by only one contractor,
- e) contracts for supplies on particularly favourable terms in connection with the liquidation of the business of another entity, execution proceedings or bankruptcy,
- f) supply orders placed on a commodity market in the understanding of the regulations on commodity market, including commodity markets of other member states of the European Economic Area,
- g) contracts awarded by a foreign service post within the meaning of the foreign service regulations,
- h) contracts awarded for the exclusive needs of a military unit within the meaning of the regulations on the use or stay of the Polish Armed Forces outside the country's borders,
- i) cases specified in Article 214(1)(11–14) Ppl in relation to entities indicated in this provision,
- j) contracts awarded to the contractor selected in accordance with the competition rules for additional supplies concerning the partial replacement of products or installations supplied or the extension of current supplies or existing installations, and a change of contractor would result in the acquisition of materials having different technical characteristics which would cause technical incompatibility or disproportionate technical difficulties in the operation and maintenance of those products or installations (the duration of the contract for the procurement of additional supplies must not exceed 3 years),
- k) where the award to the contractor selected in accordance with the competition rules for supply contracts consisting in the partial replacement of products or installations supplied or in the extension of current supplies or existing installations, where a change of contractor would result in the acquisition of material having different technical characteristics which would result in technical incompatibility or disproportionate technical difficulties in the operation and maintenance of those products or installations.

3. The reasons for meeting the prerequisites of item 2 must be proven in writing.

4. If, following a correct application of the competition rule, no tender was submitted, or all submitted tenders were rejected, or no contractor fulfilled the conditions for participation in the procedure, provided that the contracting authority imposed such conditions on contractors, conclusion of the contract without applying the competition principle is possible if the original terms of the contract were not changed.

### 3. Procurement procedure

1. The calculation of the estimated contract value for the project shall be based on the contractor's total estimated remuneration, excluding value-added tax, as determined with due diligence. The estimate is documented in a manner that ensures a proper audit trail (e.g., in the approved Application Form or note to the calculation of the estimated value.).
2. Entities that are the contracting authorities within the meaning of the Ppl first estimate the contract value according to the provisions of this act, and after confirming that the estimated contract value determined under the Ppl does not exceed the value from which the application of Ppl is obligatory, they determine the value of the procurement under the project.
3. The method used to calculate the estimated contract value must not be chosen with the intention of excluding the contract from the scope of the competition rule. It is prohibited to understate the estimated value of the contract, or to subdivide the contract resulting in an understatement of its estimated value.
4. When calculating the estimated value of the contract, the need to meet the three prerequisites (identities) together must be considered:
  - a) services, supplies and construction works are identical in kind or function (subject identity), while the material identity of the supplies includes similar supplies,
  - b) it is possible to award the contract at the same time (time identity),<sup>1</sup>
  - c) it is possible for the contract to be performed by a single contractor (contract identity).

The identities should be understood following the interpretation of the provisions of the Ppl regarding estimation of the contract value.

5. If the contract is awarded in parts for specific economic, organisational or purpose-related reasons, the contract value is determined as the total value of its individual parts. Where the aggregate value of the parts exceeds the threshold specified in section 1.2(1)(a) of this Annex, the competition rule shall apply to the award of each part.
6. Appropriate measures must be taken to effectively prevent, identify and remedy conflicts of interest, where they arise in connection with the conduct of a procurement procedure or during the performance of a contract, to prevent distortion of competition and to ensure the equal treatment of contractors. A conflict of interest is any situation in which persons involved in the

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<sup>1</sup> For projects concerning the organisation of economic missions and fairs, the value of a contract for hotel services or the supply of airline tickets may be estimated separately for each event if it is justified by the nature of these projects.

preparation or conduct of the procurement procedure or likely to influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest that may be perceived as prejudicing their impartiality and independence in relation to the procurement procedure.

7. To avoid a conflict of interest, for a beneficiary who is not a contracting authority within the meaning of the Ppl, contracts may not be awarded to entities related to them personally or by capital, except for sector contracts and contracts defined in section 1.2(2)(i).
8. Activities associated with the preparation and conduct of the procurement procedure are performed by persons who ensure impartiality and objectivity. These persons shall submit a statement in writing or in electronic form (within the meaning of Article 78 and Article 78<sup>1</sup> of the Civil Code, respectively) that they have no personal or capital ties with the contractors, or that they exist but do not affect the impartiality of the proceedings, consisting of:
  - a) participating in the company as a partner in a civil partnership or partnership,
  - b) owning at least 10% of shares (unless a lower threshold results from legal regulations),
  - c) acting as a member of the supervisory or managing body, proxy, attorney-in-fact,
  - d) being married, in a relationship of kinship or affinity in a straight line, kinship or affinity in a collateral line to the second degree, or in a relationship by adoption, custody or guardianship, or having a common life with the contractor, its legal substitute or members of managing or supervisory bodies of the contractors competing for the contract,
  - e) remaining with the contractor in such a legal or factual relationship that there is a reasonable doubt about their impartiality or independence in connection with the procurement procedure.
9. The subject matter of the contract shall be described in an unambiguous and exhaustive manner, with the use of precise and comprehensible terms, considering all requirements and circumstances which may affect the preparation of the tender. The subject matter of the contract cannot be described in a way that might hinder fair competition.
10. Unless justified by the subject matter of the contract, its description shall not contain references to trademarks or patents, or an origin, source or specific process that characterises the products or services provided by a particular contractor if this would have the effect of favouring or eliminating certain contractors or products. In exceptional cases, such references shall be permitted where it is not possible to describe the subject of the contract in a sufficiently precise and intelligible manner in accordance with the first sentence. If the contracting authority uses the possibility of referring to technical specifications or standards appropriate for the European Economic Area, they cannot reject a tender as incompatible with the request for quotation if the contractor proves in their tender that the proposed solutions satisfy the requirements specified in the request for quotation to an equivalent extent.  
Such references should be accompanied by the words 'or equivalent'.
11. Due to the need to protect business confidentiality as defined by the Act of 16 April 1993 *on combating unfair competition* (Journal of Laws of 2022, item 1233, as amended), it is permissible to limit the scope of the description of the subject matter of the contract with the requirement that the supplement to the excluded description of the subject matter of the contract be made

available to the contractor who has undertaken to maintain confidentiality with respect to the information provided, in time to prepare and submit a tender.

12. The description of the subject matter of the contract shall be performed using the names and codes laid down in the Common Procurement Vocabulary referred to in Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (Official Journal of the European Union L 295 of 13 November 2002). Journal EC L 340 of 15.04.2011, page 1, as amended). Journal EU Polish special edition Ch. 6, vol. 5, p. 3).
13. The contracting authority may require the contractors to meet conditions for participation in the procurement procedure. These conditions shall be determined by the contracting authority in a manner that ensures fair competition and equal treatment of contractors. The conditions of participation and the description of the manner of assessing their fulfilment must be related and proportionate to the subject matter of the contract and make it possible to assess the contractor's ability to properly perform the contract. The contracting authority may not formulate conditions that exceed the requirements sufficient for the proper performance of the contract.
14. With regard to the economic or financial standing of contractors, the contracting authority may require in particular that contractors have a certain minimum annual revenue, including a minimum annual revenue in respect of the subject matter of the contract. The minimum annual revenue required by the contracting authority should not exceed twice the estimated contract value, except in duly justified cases.
15. With regard to technical or professional capacity, the contracting authority may define conditions regarding the necessary education, professional qualifications, experience, and/or technical potential of the contractor or persons managed by the contractor to perform the contract, enabling the execution of the contract at an appropriate level of quality. In particular, the contracting authority may require that the contractors comply with the requirements of relevant quality management standards, including accessibility for persons with disabilities, and environmental management systems or standards, as specified by the contracting authority in the request for proposals.
16. Tender evaluation criteria shall be formulated in a manner that ensures fair competition and equal treatment of contractors, whereby:
  - a) each tender evaluation criterion must be related to the subject matter of the contract,
  - b) each criterion and the description of its application must be formulated in a clear and understandable manner,
  - c) the weights of the individual criteria should be determined in such a way as to enable the selection of the most advantageous tender.
17. In addition to price or cost, the criteria for evaluating tenders may include:
  - a) quality, including technical performance, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovation aspects,
  - b) organisation, professional qualifications and experience of persons assigned to perform the contract, if they can have a significant influence on the quality of the contract performance;

- c) after-sales service and technical assistance, delivery terms such as delivery date, delivery method and delivery time or lead time.
18. The criteria for tender evaluation may not relate to the characteristics of the contractor, in particular its economic, technical or financial credibility and experience.
19. The minimum deadline for submitting tenders is:
- a) 7 days – for supplies and services,
  - b) 14 days – for construction works,
- with the provision that the deadline for the submission of tenders should consider the complexity of the contract and the time required for drawing up the tenders. For contracts whose estimated value equals or exceeds EUR 5,382,000 for construction works and EUR 750,000 for supplies and services,<sup>2</sup> the minimum deadline for the submission of tenders shall be 30 days. The deadline for the submission of tenders begins on the day following the date of publication of the request for quotation and ends on the last day (Article 115 of the Civil Code shall apply). The timely submission of a tender shall be determined by the date the tender is submitted through BK2021.
20. The contracting authority shall select the most advantageous tender complying with the description of the subject matter of the contract, submitted by a contractor meeting the conditions for participation in the procedure (if the contracting authority has imposed such conditions), based on the evaluation criteria established in the request for proposals, from among the tenders submitted in accordance with section 1.4 of this Annex. The contracting authority shall examine the content of the tenders after the deadline for their submission.
21. If the proposed price or cost seems to be abnormally low in relation to the subject matter of the contract, i.e. it differs by more than 30% from the arithmetic mean of the prices of all valid tenders not subject to rejection or raises doubts in the contracting authority as to the possibility of executing the subject matter of the contract in accordance with the requirements specified in the request for quotation or resulting from separate regulations, the contracting authority shall request the contractor to submit explanations within a specified time limit, including submission of evidence regarding the calculation of the price or cost. The contracting authority shall evaluate these explanations in consultation with the contractor and may reject that tender only if the explanations submitted with evidence do not justify the price or cost quoted in that tender.
22. The selection of the most advantageous tender shall be documented in writing by means of a record of the procurement process, including at a minimum:
- a) a list of all tenders received in response to the request for quotation (in particular, the name and surname or the name of the contractor, its registered office and the price),
  - b) the conflicts of interest detected, and the measures taken in relation thereto, or information on the absence of conflicts of interest,

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<sup>2</sup> The average PLN exchange rate in relation to the EUR, which constitutes the basis for converting contract values, is announced by the President of the Public Procurement Office in the Official Journal of the Republic of Poland, 'Monitor Polski', and published on the website of the Public Procurement Office.

- c) information about meeting the conditions of participation by contractors, if such conditions were set,
- d) information about the point or percentage weights assigned to each of the evaluation criteria and the score awarded to each contractor for meeting each criterion,
- e) justification for not allowing partial tenders (if applicable),
- f) the reasons for rejecting tenders, including tenders found to be abnormally low (if applicable),
- g) indication of the selected tender (first and last name or name of the contractor) together with the justification of the choice or the reasons why the contracting authority decided not to award the contract,
- h) first names and last names of the persons who performed activities in the conducted procedure,
- i) the date the protocol was prepared,
- j) the following attachments:
  - I. document referred to in point 1, unless the estimation of the contract value results from the approved Application Form,
  - II. declarations referred to in item 8,
  - III. evidence of the announcement of the request for proposal in accordance with Section 1.4(2 and 3) of this Annex (and amendments thereto, if any), together with the tenders submitted, and the exchange of information between the contracting authority and the contractor.

The protocol shall be made available to the contractor on request.

#### 4. Announcements

1. Communication in the procurement procedure, including the announcement of the request for proposals, submission of tenders, exchange of information between the contracting authority and the contractor, and transfer of documents and declarations shall be made in writing via BK2021, subject to items 2 and 3.
2. Exceptionally, the communication specified in paragraph 1 may be waived and the contracting authority shall inform the contractors in the request for proposals published in BK2021 if:
  - a) the nature of the procurement requires the use of tools, equipment, or file formats that are not supported by BK2021, or
  - b) the software applications that are suitable for the preparation of the tenders or competition entries use file formats that cannot be supported by any other open source or publicly available applications, or are licensed and cannot be made available for download or remote use by the awarding authority, or
  - c) the contracting authority requires the submission of a physical model, scale model, or sample that cannot be submitted through BK2021, or

- d) this is necessary because of the need to protect sensitive information that cannot be adequately guaranteed using BK2021.

If the communication specified in item 1 is waived, (and it is only acceptable to the extent that it is not possible to comply with the method of communication in BK2021) the contracting authority shall specify in the request for proposals the method of communication in the procurement procedure (resulting from the scope of waive from communication in BK2021).

3. In case of suspension of BK2021 activity confirmed by an appropriate announcement on the BK2021, the contracting authority shall address a request for quotation to at least three potential contractors, if there are three potential contractors for the contract on the market and announce the request for proposals at a minimum on their website, if they have such a website. In this case, the contracting authority shall specify in the request for proposals the method of communication in the procurement procedure.
4. If the applicant starts the project at their own risk before signing the subsidy contract, they shall make the request for proposals public in the manner specified in item 1.
5. The request for proposals shall specifically include:
  - a) description of the subject matter of the contract,
  - b) conditions for participation in the procedure and a description of the method used to evaluate their fulfilment, if such conditions are required by the contracting authority,
  - c) tender evaluation criteria, information about the point or percentage weightings assigned to each tender evaluation criteria and the description of the method for awarding scores for satisfying each tender evaluation criterion,
  - d) deadline for the submission of tenders,
  - e) deadline for the performance of the contract,
  - f) information on the prohibition of conflict of interest,
  - g) definition of the terms of material amendments to the agreement concluded as a result of the conducted procurement procedure, if the contracting authority provides for the possibility to amend the agreement,
  - h) description of the part of the contract, if the contracting authority allows tenders in parts, and the number of parts for which the contractor may submit a tender, or the maximum number of parts for which the contract may be awarded to the same contractor, as well as the criteria or rules applicable for determining which parts will be awarded to one contractor if their tender is selected for more than the maximum number of parts,
  - i) when the contracting authority awards a contract in parts, information that a given procedure covers only a part of the contract, together with the scope or value of the entire contract and information on the other parts of the contract,
  - j) information on variant solutions if the contracting authority requires or accepts their submission, including a description of the manner of presenting the variant solutions and the minimum conditions to be met by the variant solutions, together with selected evaluation criteria and information on whether a variant solution should be submitted together with a tender or instead of a tender.



6. The request for proposal may be amended prior to the deadline for submission of tenders. The contracting authority shall communicate the scope of the changes in the request for proposal. The contracting authority shall extend the deadline for submission of tenders by the time necessary to introduce changes in the tenders, if this is necessary due to the scope of the introduced changes.
7. Information on the result of the proceedings shall be announced in the same way that the request for proposals was made public. This information shall include the name of the selected contractor, their registered office (town) and the price of the most advantageous tender.

## 5. Procurement contract

1. A procurement contract shall be concluded in writing or in the electronic form referred to in Article 78 and Article 78<sup>1</sup> of the Civil Code.
2. If the contracting authority allows for partial tenders, the procedure may end with concluding a contract partially.
3. If the selected contractor withdraws from concluding the procurement contract, the contracting authority may conclude a contract with the contractor who obtained the next highest number of points in the properly conducted procurement procedure.
4. It is not possible to make significant changes to the provisions of the agreement concluded in relation to the content of the tender through which the contractor was selected, unless:
  - a) the changes have been provided for in the request for proposal as unambiguous contractual provisions that define their scope and nature and the conditions for introducing the changes,
  - b) the changes concern the realisation of additional supplies, services or works from the current contractor, not included in the basic contract, if they became necessary, and if all the following conditions are fulfilled:
    - I. the change of the contractor cannot be made for economic or technical reasons, in particular regarding the interchangeability or interoperability of equipment, services or installations ordered under the basic contract,
    - II. changing the contractor would cause significant inconvenience or increase the costs for the contracting authority,
    - III. the value of the changes does not exceed 50% of the value of the contract originally specified therein,
  - c) the change does not lead to a change in the general nature of the contract and the following conditions are all met:
    - I. the need to amend the contract is due to circumstances that the contracting authority, acting with due diligence, could not foresee,
    - II. the value of the changes does not exceed 50% of the value of the contract originally specified therein,
  - d) the contractor to whom the contracting authority awarded the contract is to be replaced by a new contractor:

- I. as a result of succession, assuming the rights and obligations of the contractor, following a takeover, merger, division, transformation, bankruptcy, restructuring, inheritance or the acquisition of the current contractor or their enterprise, provided that the new contractor meets the conditions for participation in the procedure and this does not entail other significant changes to the contract and is not intended to avoid the application of the principle of competition, or
  - II. as a result of the contracting authority's assumption of the contractor's obligations towards their subcontractor – with a change of subcontractor, the contracting authority may conclude an agreement with a new subcontractor without changing the terms of the contract, considering the payments made on account of the work completed to date,
- e) the change does not lead to changes in the general nature of the contract, and the total value of the change is lower than EUR 5,382,000 for construction works and EUR 140,000 for supplies and services<sup>3</sup> and at the same time it is less than 10% of the value originally defined in the contract for service or supply contracts, or for construction works contracts, it is less than 15% of the value originally defined in the contract.

A change to a procurement contract is material if it causes the nature of the contract to change materially from the original contract, particularly if the change:

- introduces conditions which, had they been applied in the procurement procedure, would or could have resulted in the participation of another contractor or in the acceptance of tenders of a different content;
- disturbs the economic balance of the parties to the contract in favour of the contractor in a way not envisioned in the original contract;
- significantly expands or reduces the scope of benefits and obligations under the contract;
- consists in replacing the contractor to whom the contracting authority awarded the contract with a new contractor in cases other than those indicated in letter d.

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<sup>3</sup> The average PLN exchange rate in relation to the EUR, which constitutes the basis for converting contract values, is announced by the President of the Public Procurement Office in the Official Journal of the Republic of Poland, 'Monitor Polski', and published on the website of the Public Procurement Office.