



Guide *to*

Procurement



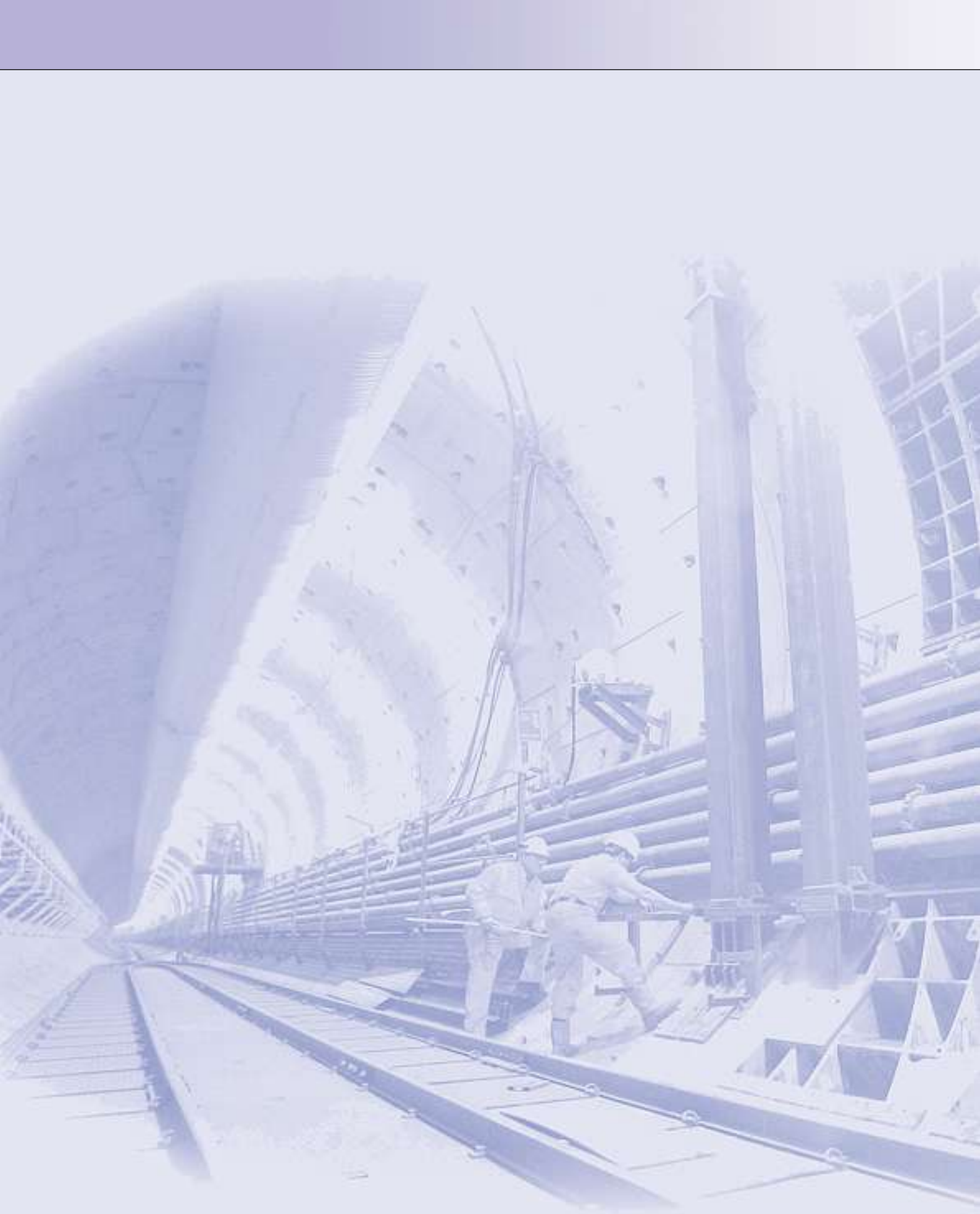


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Introduction

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

This Guide applies specifically to those components of a project identified for Bank’s financing or guarantee.

However, in order to ensure the overall feasibility of the project, the Bank requires that procurement of the other project components does not compromise the project’s technical, economic and financial viability.

The terms “open, restricted and negotiated procedures” are used in this Guide with the meaning defined by Community Directives on procurement (see definitions set out in Annex 1).

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

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1. General Aspects

1.1. Texts Governing the Bank's Policy

A number of texts lay the foundations for the Bank's policy regarding procurement. They derive from, and endorse, the widely accepted principle that sound procurement practices must be an integral part of project implementation, and that wide competition is the proven way to do this.

Article 20, paragraphs 1, 4 and 5 of the Bank's statute state that:

- the Bank "shall ensure that its funds are employed as rationally as possible in the interests of the Community";
- "neither the Bank nor the Member States shall impose conditions requiring funds lent by the Bank to be spent within a specific Member State"; and
- "the Bank may make its loans conditional on international invitations to tender being arranged".

The flexibility provided in this last provision recognises the need for the Bank to be adaptable on matters of procurement, taking into account the specific characteristics of projects and their context. The Bank has, nonetheless, always interpreted this provision in the light of a series of other texts and considerations, in particular:

- the letter and spirit of the treaty of Rome, in which "non-discrimination" and "liberalisation" of markets are fundamental rules;
- the objective of attainment and development of the common market entrusted to the Bank (article 267 of the Treaty establishing the European Community (EC) and article 20.1.b. of the EIB's statute);
- the development of Community law aimed at opening up the award of public contracts within the Union; and

- the advancement of work, deliberations and statements on the part of the various Community bodies, notably with regards to the need to reduce the obstacles to trade and distortions in competition, the opening up of public contracts to competition, the development of worldwide trade, etc.

1.2. The Bank's Policy

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

- The Bank will ensure that the works, goods and services procured under its financing are of appropriate quality, and acquired at economic prices and in a timely manner. This is generally best achieved through open international competition. It is consistent with the Bank's statute and accords with the interests of Promoters.
- In projects located within the European Union (EU), and in those Accession States that have already incorporated the relevant EC legislation, the Bank requires that the applicable current Community Directives on procurement are complied with, particularly as concerns **open or restricted procedures** with publication in the Official Journal of the European Union (OJEU). The Bank always ensures non-discrimination against either Member States or firms.
- In all other countries outside the Union, the Bank requires that the principles of the EC Directives on procurement be followed, with the necessary procedural adaptations. Thus **open or restricted procedures** with publication in the OJEU is the Bank's preferred method. The actual choice of procurement procedures ultimately has to take into account a range of considerations, relating in particular to the commercial nature and interests of the Promoter; the sector involved; the nature of the works, goods and services to be procured; the technology to be used; the size of individual components; the timetable for



implementation; the number of firms potentially able to undertake the work or provide the supplies or services; the competitiveness of the market; etc. In the case where open or restricted procedures are not followed, Promoters must, to the satisfaction of the Bank, justify their decision to use a different procedure; they must prove that the prices for the works, goods or services are commensurate with those obtained for equivalent investments in the light of market conditions and that, at the very least, any differences in cost can be explained by specific verifiable factors.

1.3. Eligibility of Contractors and Suppliers of Goods and Services

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

In some specific cases of projects outside the Union, the Bank's financing comes from different sources of funds (i.e. risk capital or similar financial resources from the European Commission), or is tied to a joint co-financing arrangement with another institution, and the eligibility of firms to participate in the procurement may then be partly restricted. Details of such restrictions are provided in article 3.2.

1.4. Bank and Promoters: Respective Roles

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

The Bank may advise or assist Promoters in the procurement process, but is not a party to the resulting contracts. The Bank simply has the

right and obligation to ensure that, in the case of projects inside the Union, Community provisions in this field or, in the case of projects outside the Union, the relevant criteria with regard to the proper management of its financing are respected, and that the procurement procedures are fair and transparent and the tender selected is economically the most advantageous. The rights and obligations of the Promoter vis-à-vis the tenderers for works, goods or services to be furnished for a project are governed by the local legislation and tender documents published by the Promoter, and not by this Guide.

A summary of the review by the Bank of procurement decisions for projects located outside the European Union is given in Annex 2.

1.5. Ethical Conduct

It is the Bank's policy to require that Promoters, as well as tenderers, contractors, suppliers and consultants under Bank-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts. The Bank reserves the right, and intends, to take all appropriate action in order to enforce this policy (see article 3.5).

2. Operations within the European Union

2.1. Operations to which Community Directives Apply

Within the Union, procurement is covered by Community Law, in particular EU Directives, and national law implement these Directives. It constitutes the legal framework for procurement in EU Member States. There is no need for any further guidelines from the Bank.

For those Promoters who fall under the Community Directives on procurement⁽¹⁾, whether they are public or private institutions or companies, the Bank will:

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

Furthermore, in the case where a new procurement Directive has been approved but the deadline for incorporating it in the legislation of the Promoter's country or date for entry into force has not yet been reached, thus not making it mandatory, the Bank will endeavour to persuade the Promoter to follow this new Directive.

⁽¹⁾ In particular Council Directives regarding public works contracts (93/37/EEC), public supply contracts (93/36/EEC), and public service contracts (92/50/EEC) as amended by Directive 97/52/EEC; Council Directive (93/38/EEC) regarding entities operating in the water, energy, transport and telecommunications sectors as amended by Directive 98/4/EC; and the Commission interpretative communication on concessions under Community Law, pages 2-13 in the OJEC C 121, dated 29 April 2000. A full list of EU legal instruments concerning procurement can be found at the website: europa.eu.int/comm/internal_market/publicprocurement.

2.2. Operations to which Community Directives do not Apply

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

In their procurement, Promoters (most frequently private) operating in sectors where Community Directives do not apply can satisfy these criteria by recourse to commercial practices other than open or restricted procedures.

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



3. Operations outside the European Union

3.1. General

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

Accession States (Candidate States with which negotiations are already in progress for their accession to the EU) are progressively incorporating EU Directives in their legislation. In this Guide, they fall under chapter 3, Operations outside the European Union, until the deadline when they are committed to applying the EU Directives on procurement as agreed during their negotiations with the Commission to the extent that they have transposed these Directives into their national legislation at that moment. Then they fall under chapter 2, Operations inside the European Union.

3.2. Eligibility of Providers of Works, Goods and Services

3.2.1. Financing from Own Resources

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

3.2.2. Financing from Risk Capital or Similar Resources

Tenders financed by funds made available under the Investment Facility created by the Cotonou Agreement (ACP-EU Partnership

Agreement, signed in Cotonou on 23 June 2000) are open to nationals of all countries.

In the other cases of financing a contract from risk capital or similar resources (or a combination of the Bank's own resources and risk capital or similar resources financing the same contract), the rules laid down in the agreement between the Community and the recipient countries govern the use of these funds, in particular regarding the eligibility of firms as well as that of works, goods and services. These rules are summarised in Annex 4.

3.2.3. Co-financing from Own Resources

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

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

- in **joint co-financing**, two separate financiers, with different eligibility rules with regard to the origin of works, goods and services, agree to finance the same contract. In this case, the Bank will make its participation conditional upon having the other co-financier open its eligibility as much as possible, but at least to all the works, goods and services originating from the European Union and the beneficiary country (the Bank will also need to agree on common procurement procedures with the other co-financier). In the case of a co-financing with EU budgetary instruments, such as ISPA, the eligibility is restricted to that of the EU instrument; and

- in **parallel co-financing**, each separate project component or contract is financed by a single financier. In this case, the procedures adopted by each co-financier apply to those components or contracts that it finances. The Bank's eligibility rules with regard to the origin of works, goods and services would therefore apply only to the Bank-financed components or contracts.

3.3. Description of Procurement Procedures

3.3.1. General

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

The procedures are based on the following:

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

3.3.2. International Procurement Procedures

These procedures derive from the EC Directives:

- **Open procedures** allow all interested parties (contractors or suppliers as the case may be) to

submit tenders. They involve strict requirements for international notification (including publication in the Official Journal of the European Union); clear and comprehensive tender documents; and fair and transparent tendering, evaluation and award procedures.

Specific provisions applicable to open procedures, which reflect best international practices, are described in article 3.6.

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

- either an international notification (including publication in the OJEU) and the list of candidates is prepared through a formal pre-qualification exercise;
- or the list of candidates is established through a system of qualification of contractors and suppliers established and maintained through publication in the OJEU.

- **Negotiated procedures** allow Promoters to consult candidates of their choice and negotiate the terms of the contract with one or more of them. The selection of candidates either follows an international notification (including publication in the OJEU), or is directly established by the Promoter.

3.3.3. National Procurement Procedures

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

- **National competitive bidding** follows the normal procedures of the country of the Promoter. Tender documents are normally in the official language of the country; the national currency is generally used for the purposes of tendering and payments; and tender prices are normally inclusive of all applicable local duties and taxes.

- **Local shopping** and **direct contracting** allow Promoters to negotiate prices and other conditions with several local contractors or suppliers or only one of them.
- **Force account** (also called **direct labour**) is not really a procurement procedure since it consists of the carrying out of works using the Promoter's own workforce and equipment. This may be the only practicable method for constructing some kinds of works, or providing the appropriate in-house services, such as basic design, R&D (research and development), etc.

3.4. Selection of Procurement Procedures

3.4.1. Operations in the Public Sector

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

- in all cases: public authorities;
- in addition, in the case of gas, heat, electricity, water, transport, exploration for or extraction of oil, gas, coal or other solid fuels, ports and airports, and telecommunications: public undertakings and privately-owned entities that have been granted special or exclusive rights and operate in markets which are not liberalised (with some exceptions regarding by-products).

A precise definition of the public sector is given in Annex 5. All other operations are considered to belong to the private sector.

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

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

To these ends, the Bank requires Promoters operating in the public sector to adopt appropriate procurement procedures consistent with the following principles:

- **Open procedures** with publication in the OJEU (and the international press) are the most common form of procurement for public contracts.
- **Restricted procedures** with publication in the OJEU (and the international press) are recommended for large or complex public contracts warranting pre-qualification of contractors or suppliers.
- **Negotiated procedures** with publication in the OJEU (and the international press) may be used when:
 - a particularly complex contract does not allow a full definition of the technical standards;
 - the nature of the works or services or the risks involved do not allow an overall pricing;
 - the intellectual or financial nature of the services do not allow to use the selection rules of open or restricted procedures; or
 - the works are performed solely for purposes of research, testing or development.
- **Negotiated procedures** with the list of candidates directly established by the Promoter may be used in exceptional cases where:
 - there has been an unsatisfactory response to open or restricted tenders carried out in accordance with this Guide;
 - the extension of an existing contract, awarded in accordance with this Guide, for additional works, goods or services of a

similar nature would clearly be economic and efficient and no advantage would be obtained by further competition;

- the extension of an existing contract, awarded in accordance with this Guide, is for procuring additional works, goods or services which cannot be technically or economically separated from the original contract without major inconvenience to the Promoter;
- the complexity or uncertainty associated with the works, goods or services preclude comparable offers or firm reliable prices from the market;
- a product or service can only be provided by a limited number of suppliers because of exclusive capabilities or rights;
- standardisation with existing equipment is determined to be important and justified; or
- it is a case of extreme urgency brought about by unforeseeable events.

In such cases, the Promoter, to the extent possible, should invite at least three qualified candidates from at least two different countries to negotiate.

- **National competitive bidding** may be appropriate for contracts which, by their size, nature or scope, are unlikely to attract foreign competition. These circumstances occur when:
 - the contract values are small;
 - works are scattered geographically or spread over time;
 - works are labour intensive; or
 - the advantages of open or restricted procedures are clearly outweighed by the administrative or financial burden involved.
- **Local shopping** is appropriate for procuring readily available off-the-shelf goods or standard specification commodities that are small in value; as much as possible, offers from at least three suppliers should be requested.
- **Direct contracting** may be justified if only one contractor or supplier can fulfil a contract in a satisfactory manner and at the most advantageous cost.

• **Force account** may be justified where:

- services involve the intellectual property of the Promoter;
- quantities of work involved cannot be defined in advance;
- works are small and scattered or in remote locations;
- works are required to be carried out without disrupting ongoing operations;
- the Promoter is clearly in a favourable situation to carry out the works at an attractive price (e.g. railway track laying); or
- there are emergencies requiring prompt action.

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

3.4.2. Operations in the Private Sector

Promoters operating in the private sector (i.e. outside the operations defined in Annex 5) normally satisfy the objectives of economy and efficiency by following established commercial practices. The Bank thus does not require that they follow the above procedures. For example, the less rigid, less costly and faster negotiated procedures (generally consisting of an international enquiry among a short-list of suppliers followed by negotiations) often prove to be

more effective. Nevertheless, wherever appropriate, the Bank will encourage such Promoters to publish a tender notice in the OJEU and adopt open or restricted procedures, particularly for large contracts. In such cases it may be necessary to introduce appropriate safeguards to ensure that the legitimate confidentiality interests of the Promoter and other commercial contracting parties are fully respected in the procurement process.

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

If a company is a shareholder of the Promoter (or the Promoter is a shareholder of a company) and a contract is awarded by the Promoter to this company under a Bank-financed project, the Bank verifies that contract costs are in line with the initial estimates and with current market prices, and that the contractual conditions are fair and reasonable. A company in which a Promoter has a controlling interest would not be allowed to participate in a tender launched by this Promoter.

3.4.3. Specific Operations

- **Global loans:** when the Bank makes a global loan to an intermediary institution (usually a financial institution providing loans to small and medium-scale enterprises), it requires such intermediary to take all the requisite measures to ensure that the procurement of works, goods and services relating to the sub-projects which the Bank finances is the most economically-advantageous option, following appropriate procedures in the light of the circumstances and taking account of quality and efficiency. When open or restricted procedures are involved, these must be undertaken in line with the provisions of this Guide.
 - **Concession operations:** where the Bank is participating in financing the cost of a project developed under a BOT (Build, Operate, Transfer) or similar concession scheme which enjoys special or exclusive rights, or other state concession such as a recognized monopoly, either of the following procurement procedures must be used:
 - The concessionaire has been selected following a tendering procedure (which may include several stages but has been open to wide international competition) acceptable to the Bank, and has explicit responsibility for carrying out the works and providing the services under his concession. The said concessionaire is free to procure the works, goods and services covered by the Bank's financing using his own procedures. However, the Bank encourages the concessionaire to publish a General Notice in the OJEU regarding the part of his investment programme to be carried out outside his own organisation.
- In the case of a Private Initiative in a Public-Private Partnership, also called "unsolicited proposal" (a private investor bears the entire cost of preparing a project which will then be put to international tender by the public Promoter), the Bank may accept that this private investor benefit from limited compensation incentives in the tender procedure, provided that these incentives do not affect the transparency, fairness and competitiveness of the tender process.
- If the concessionaire has not been selected as described above, the works, goods and services covered by the Bank's financing are considered by the Bank as operations in the public sector and must be procured according to the provisions of this Guide.

- **Share capital operations:** in certain regions outside the EU, the Bank may finance the share capital of a public or private company. In this case, the Bank agrees with the Promoter on which particular contracts its financing will be disbursed, and requires that the Promoter follow procurement procedures in the same fashion as for the direct financing of projects. However, in case of a purely financial assistance (such as the strengthening of a company's capital), where there is no directly associated procurement of works, goods and services, the above does not apply.

- **Loans guaranteed under the Investment Facility (Cotonou Agreement):** If the Bank guarantees the repayment of a loan made by another lender, the works, goods and services financed under the said loan must be purchased following procedures which ensure transparency of the procurement process, fairness with regard to the tenderers, and selection of the most advantageous offer (i.e. competitive price, satisfactory quality and timely delivery). The Bank may request that the competition be opened to an adequate number of suppliers of works, goods or services (for example through an international advertisement of tenders).

3.4.4. Bank Review of Procurement Decisions

During the project appraisal stage, the Promoter must provide the Bank with detailed information about the procurement procedures (choice of procedures appropriate for the project, timetable, technical specifications, publication of Procurement Notices, time allowed for the preparation of tenders, etc.). The Bank requests Promoters to seek its concurrence for all major decisions regarding procurement. In all cases, the Bank monitors these procedures as follows:

- the Procurement Notice, the documents relating to the pre-qualification procedure (if this takes place), and the tender documents must be sent to the Bank for information and possible comments before being published or given to potential tenderers; and

- the pre-qualification of tenderers (if any), the evaluation of bids and the proposed decision on the award of contracts must obtain the non-objection from the Bank based on appropriate documents.

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

3.5. Prohibited Practice

In pursuance of the Bank's policy as set out in article 1.5, and in respect of the procurement and execution of works, goods, and services funded by the Bank, the Bank:

- will decline to accept a Promoter's preferred choice for award of a contract, if it determines that there are indications that the preferred contractor, supplier, consultant or any representative of any one of them, or any representative of the Promoter, has engaged in any "prohibited practice" (as defined in Annex 3) in the course of the procurement process;

- will cancel all or part of the Bank financing allocated to a contract for works, goods or services if it at any time determines that there are indications that a contractor, supplier, consultant or any representative of any one of them, or any representative of the Promoter, has engaged in any prohibited practice during the procurement process or during the execution of the contract, without the Promoter having taken action satisfactory to the Bank to investigate and/or terminate the prohibited practice or, as the case may be, remedy the damage; and

- will, as a general rule, in connection with the international procurement procedures defined in article 3.3.2, require that the Promoter insert in the tender documents (or in the contract in the case of a negotiated procedure) a clause that:

- requires any tenderer for works, goods or services, as a condition of admission to eligibility, to execute and attach to its tender a Covenant of Integrity in the form indicated in Annex 3; and

- grants the Promoter, the Bank and auditors appointed by either of them the right of inspection of the records of the contractor, supplier or consultant in connection with any Bank-financed contract.

3.6. Open or Restricted Procedures

3.6.1. General Aspects

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

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

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

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

3.6.2. Publication of the Procurement Notice

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

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

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

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

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

3.6.3. Pre-qualification in Restricted Procedures

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

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

- experience and past performance on previous contracts;

- capabilities with respect to personnel, equipment and construction or manufacturing facilities; and
- financial position.

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

3.6.4. Tender Documents

Promoters may use the conditions of contracts originating from their country's legislation, but they are encouraged to use internationally-recognised standard procurement documentation such as the Master Procurement Documents and User's Guides prepared through the joint efforts of the Multilateral Development Banks and International Financial Institutions and available on the World Bank's website (www.worldbank.org), and the FIDIC (Fédération Internationale des Ingénieurs-Conseils) documents that can be ordered at the FIDIC website (www.fidic.org), provided that these are compatible with the provisions of this Guide.

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

- Invitation for Tenders;
- Instructions to Tenderers;
- Forms of Tender and Tender Security;
- General Conditions of Contract;
- Conditions of Particular Application;
- Technical Specifications;
- Bill of Quantities (as necessary); and
- Technical Drawings (as necessary).

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

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

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

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

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

3.6.5. Language

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

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

must use the EU language utilised for translating the tender documents. Tenderers should be allowed to tender in this EU language.

3.6.6. Technical Specifications

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

3.6.7. Tender Price for Goods

When a public Promoter (or a private Promoter exempted from import duties) calls a tender for the supply of goods, tender prices should be requested on the basis of CIF (port of destination), or CIP (place of destination) for all goods offered from abroad, and EXW (ex works, ex factory, or off-the-shelf) for locally available or manufactured or assembled goods, including those previously imported. The evaluation for the supply of goods should exclude import duties and taxes payable on imported goods and on directly imported components to be incorporated in locally supplied goods, but should include all costs associated with the supply, delivery, handling and insurance of the goods to the final destination.

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

3.6.8. Currency

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

For the purpose of tender evaluation and comparison, tender prices will be converted to a single currency, selected by the Promoter, using the selling (exchange) rates for the currencies of the tender price quoted on an internationally-recognised currency exchange market (e.g. published in the Financial Times) for a date selected in advance and specified in the tender documents, provided that such date should not be earlier than 30 days prior to the date specified for the opening of the tenders⁽²⁾.

⁽²⁾ The date should normally not be later than the original date prescribed in the tender documents for the expiry of the period of tender validity. However, where the payment provisions in the contract entail a few significant payments at specific predictable dates in the future (e.g. CIF supply contracts), the Promoter may wish to specify the use of quoted forward exchange rates for the estimated dates of the payments for the evaluation, and enter into forward currency contracts for these payments at the time of award, in order to hedge the risks of currency fluctuations. The forward dates and the currency exchange market to be used must be clearly specified in the tender documents.

3.6.9. Local Preference

As a general rule, the Bank does not allow for preference to be given to works, goods or services originating in the beneficiary country, unless this is provided for in the convention or agreement associating that country with the European Union.

For operations financed under risk capital or similar resources, specific provisions encourage the participation of firms from the recipient states in works and supply contracts. Details are provided in Annex 7.

3.6.10. Tender Evaluation Criteria

The tender evaluation may be based on:

- either the lowest price of the compliant and technically responsive tenders; or
- the most economically advantageous tender, applying a number of criteria adapted to the contract in question: e.g. price, payment terms, construction or delivery period, technical performance, technical expertise and capability of the tenderer, technical compatibility with other equipment, availability of service and spare parts, operating costs, maintenance costs, etc.

Financing proposals can only be considered if the tender documents specifically request such proposals and include a clear methodology to evaluate them, for example the Export Credit Loan Arrangement Technique developed by the EBRD and posted on its website (www.ebrd.org).

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

3.6.11. Opening and Evaluation 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.

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

For large or complex contracts, it is advisable for the evaluation to proceed in two steps (called the two-envelope procedure), each with a public opening. In the first step, only administrative and technical documents are opened. After review of conformity by the Promoter (which may include minimal qualification criteria defined in the tender documents), in a second step the financial offers of only those tenderers that have presented satisfactory documents or have exceeded a pre-determined threshold score in the technical evaluation are opened and read. In cases where a technical dialogue between the Promoter and tenderers is useful, it is advisable to use the two-stage system described in Annex 1.

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

3.6.12. Award Notice

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

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

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

4. Consultancy Services financed by the Bank

This chapter covers work undertaken by consultants in a project financed by the Bank, either through a loan or a grant.

4.1. Projects Located Within the European Union

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

4.2. Projects Located Outside the European Union

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

The procedures for selecting consultants/experts and drawing up contracts governing their services must be flexible and transparent, and they must also ensure that the work is carried out in the most economically advantageous fashion, i.e. that the highest quality of service is provided at the best price and within a reasonable amount of time.

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

4.2.1. Description of Procedures

The various procurement procedures are described below:

- Open procedures: international call for proposals (at least via the OJEU, and additionally the press and other media), allowing any consultant or expert interested to submit a proposal for the services required.

- Restricted procedures: call for proposals on the basis of a list that allows only consultants/experts invited by the Promoter to submit a bid. The list of pre-qualified candidates must be drawn up by means of an international call for expression of interest open to all consultants and advertised at least in the OJEU. The Bank finds that this procedure is more efficient than the open procedure above.

- Negotiated procedures without publication in the OJEU: enquiries amongst consultants/experts selected by the Promoter and direct negotiation of conditions with one or several of these. Promoters can establish a list of potential candidates by using their past experience and network of professional contacts, as well as the registers of consultants/experts compiled by professional associations.

4.2.2. Selection of Procedures

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

- For an estimated amount of 400,000 euro (excluding VAT) or above (the contractual value taken into account is the supplier's total remuneration), the procedures applicable are:
 - either open procedures with publication in the OJEU; or
 - restricted procedures including an international call for expression of interest in the OJEU.
- For an estimated amount below 400,000 euro (excluding VAT), negotiated procedures with the list of a maximum of seven candidates drawn up on the basis of registers/research/recommendation and with the participation of:
 - for an estimated amount of 100,000 euro and above, at least five candidates of at least three different nationalities; and
 - for an estimated amount below 100,000 euro, at least three candidates of at least two different nationalities.

- Derogations from the above procedures:

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

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

A single reason or a combination of reasons are possible but must always be clearly justified by the Promoter and approved by the Bank in advance.

4.2.3. Evaluation of Consultants' Proposals

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

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

Depending on the characteristics of the task to be performed, price may be considered as a factor, but it should have a lower weight than the other factors as a whole. In certain circumstances, the most efficient way of integrating the price factor in the tender is to indicate the available budget for the services in the request for consultant's proposals, and require that this budget should not be exceeded if the consultant's offer is to be considered.

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

4.2.4. Management of the Contract

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

Annex 1: Specific Procurement Terms

International Procedures

The terms open, restricted and negotiated procedures are used here in the sense defined by EC Directives.

1. **“Open procedures”** are formal procedures whereby all interested companies may submit tenders. They must be advertised at least in the Official Journal of the European Union (OJEU). Outside of the EU these procedures are often referred to as **International Competitive Bidding (ICB)** or **Open Tendering**.
2. **“Restricted procedures”** are formal procedures whereby only those companies invited by the Promoter may submit tenders. They must be preceded by a pre-qualification exercise open to all interested companies and advertised at least in the OJEU, in order to select the companies to be invited (or the list of candidates is established through a system of qualification of contractors and suppliers established and maintained through publication in the OJEU). Outside of the EU, these procedures are often referred to as **ICB following pre-qualification**.
3. **“Negotiated procedures”** are those procedures whereby the Promoter consults companies of its choice and negotiates the terms of the contract with one or more of them. The selection of candidates either follows an international notification published at least in the OJEU, or is directly established by the Promoter. Outside the EU, in the latter case, these procedures are often referred to as **Limited International Bidding (LIB)**, or **Selective Tendering**, or **International Shopping**, or **Single Tendering**.
4. A company which submits an offer called a **“tender”** or **“bid”** is designed by the term **“tenderer”** or **“bidder”**, and one which has sought an invitation to take part in a restricted or negotiated procedure by the term **“candidate”**.
5. A **“pre-qualification procedure”** must be used by the Promoter to prepare the list of qualified candidates to be invited to submit tenders under restricted procedures. The Promoter first publishes a Procurement Notice in the OJEU and other international press requesting contractors or suppliers that are interested to furnish references, balance sheets, information on their capabilities and experience, etc. Candidates who fulfil the conditions detailed in the pre-qualification documents are then pre-qualified. The tender documents are only forwarded to those candidates that have been selected by the Promoter. Thereafter the same rules apply as for open procedures. Pre-qualification may be carried out for each individual project or for all projects of a given body, at regular intervals.
6. **“Tendering for design-and-build contracts”** is usually a restricted procedure, featuring very general technical requirements, usually stating only the capacities and performance. Tenderers are thus at liberty to put forward the technical solution that appears to them to be the most economical or appropriate, and the contract is then placed on grounds of technical and economic considerations. This type of invitation reduces the work involved in drawing up the tender documents, but calls for far more effort, experience and calculation when it comes to preparing tenders and, for the Promoter, to evaluate and compare tenders, and make the final choice of contractor or supplier. Tenders can be made according to the **“two-envelope”** procedure, in which both the technical and financial offers are submitted together, but in separate envelopes. The technical offers are opened first and evaluated for compliance.

The financial envelopes of the technically responsive tenders only are then opened. In some cases, a **“two-stage”** system is followed, whereby the first submission contains only the technical offers. After a detailed evaluation and negotiation of technical offers, priced tenders are requested only from those tenderers determined to be qualified, and technically and commercially responsive.

7. Invitations to tender may be issued in respect of an entire project (e.g. construction of a factory or power plant) including testing and commissioning, or for only part of the same. In the first case, the term used is **“turnkey”** tenders, which give the promoter more technical guarantees but which are often more expensive. In the second case, splitting the project into a number of separate contract packages (or lots) is quite complex and it usually takes considerable experience and in-house capacity to coordinate their implementation. Substantial lower costs can, however, be achieved, but responsibility for the technical interface between the various components and the risks of delays, cost overruns and poor overall technical performance is carried by the Promoter.

National Procedures

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

Annex 2: Review by the Bank of Procurement Decisions for projects located outside the European Union

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

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

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

Other Procurement Procedures

For contracts not subject to open or restricted procedures, the Promoter will send a copy of the contract (and the Covenant of Integrity, see Annex 3, for an international procedure) together with an evaluation or justification report to the Bank prior to his request for disbursement.

Specific Case of Contracts for Consulting Services

The Bank reviews the scope of the services and the terms of reference proposed (including the type of procedure selected), the recommended short list of consultants, the evaluation report justifying the proposed selection, and the draft consultant's contract, to ensure that it can finance the corresponding services.

1. The Promoter must send the terms of reference and the proposed short-list of consultants (or the Procurement Notice in case an open or restricted procedure is selected) to the Bank.
2. The Bank will send its "non-objection" or comments on the proposal. In the case of an

open or restricted procedure, the Bank will organize publication of the Procurement Notice in the OJEU on behalf of the Promoter as necessary.

3. In case of a restricted procedure, the Promoter must send a pre-qualification report to the Bank for "non-objection".

4. After analysis of the offers, the Promoter must send to the Bank his evaluation report making a clear recommendation for contract award, and the draft consultant contract. The Bank will provide its "non-objection" or appropriate comments.

5. In case of an open or restricted procedure, immediately after the contract is signed, the Promoter must send to the Bank the Award Notice to be published in the OJEU by the Bank on behalf of the Promoter as necessary.

6. Finally, the Promoter must send to the Bank a copy of the signed contract (and the Covenant of Integrity, see Annex 3, for an international procedure) prior to his first request for disbursement under the contract.

Annex 3: Covenant of Integrity

to the Promoter from a Contractor, Supplier or Consultant to be attached to its Tender (or to the Contract in the case of a negotiated procedure)

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

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

If (i) we have been, or any such director, employee or agent acting as aforesaid has been, convicted in any court of any offence involving a Prohibited Practice in connection with any tendering process or provision of works, goods or services during the five years immediately preceding the date of this Covenant, or (ii) any such director, employee or agent has been dismissed or has resigned from any employment on the grounds of being implicated in any Prohibited Practice, we give details of that conviction, dismissal or resignation below, together with details of the measures that we have taken, or shall take, to ensure that neither this company nor any of our directors, employees or agents commits any Prohibited Practice in connection with the Contract [give details if necessary].

In the event that we are awarded the Contract, we grant the Project Owner, the European Investment Bank (EIB) and auditors appointed by either of them, as well as any authority having competence under European Union law, the right of inspection of our records.

We accept to preserve these records generally in accordance with applicable law but in any case for at least six years from the date of substantial performance of the Contract."

For the purpose of this Covenant,

- **"Corrupt Practice"** means the offering, giving or promising of any improper advantage to influence the action of a Public Official, or the threatening of injury to his person, employment, property, rights or reputation, in connection with any procurement process or in the execution of any contract in order that any person may obtain or retain business improperly or obtain any other improper advantage in the conduct of business.
- **"Fraudulent Practice"** means a dishonest statement or act of concealment which is intended to, or tends to, influence improperly the procurement process or the execution of a contract to the detriment of the Project Owner, or is designed to establish tender prices at non-competitive levels and to deprive the Project Owner of the benefits of fair and open competition, and includes collusive practices (whether before or after tender submission) among tenderers or between a tenderer and a consultant or a representative of the Project Owner.
- **"Project Owner"** means the person designated as such in the tender documents or the Contract.
- **"Public Official"** means any person holding a legislative, administrative, managerial, political or judicial post in any country, or exercising any public function in any country; or a director or employee of a public authority or of a legal person controlled by a public authority of any country; or a director or official of a public international organisation.
- **"Prohibited Practice"** means an act that is a Corrupt Practice or a Fraudulent Practice.

Annex 4: Eligibility for Operations Financed under Risk Capital or Similar Resources

A- The **general rules** are that:

1. Tenders financed by funds made available under the Investment Facility created by the Cotonou Agreement are open to nationals of all countries.
2. In other cases, tendering is generally open to firms, goods and services originating from:
 - countries of the European Union; and
 - countries party to the Agreement or Convention concerned.

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

Specific cases contained in respective legal instruments may apply (Euro-Mediterranean Partnership Mandate and Facilities (FEMIP); Sixth, Seventh and Eighth European Development Fund (EDF); etc...).

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

B- In the **case of the Lomé Convention**, the following provisions of the Lomé IV (bis) Convention are in force:

1. In order to ensure the optimum cost-effectiveness of the system, natural or legal

persons from non-ACP developing countries may be authorized to participate in contracts financed by the Bank at the request of the ACP States concerned. The ACP States concerned shall, on each occasion, provide the Bank with the information needed for it to decide on such derogations, particular attention being given to:

- the geographical location of the ACP State concerned;
- the competitiveness of contractors, suppliers and consultants from the Community and the ACP States;
- the need to avoid excessive increases in the cost of performance of the contract;
- transport difficulties or delays due to delivery times or other similar problems; and
- technology that is the most appropriate and best suited to local conditions.

2. Participation by third countries in Bank-financed contracts may also be authorized:

- where the Bank participates in the financing of regional or inter-regional schemes involving such countries;
- in the case of co-financing projects and programmes; or
- in the case of emergency assistance.

3. In exceptional cases and in agreement with the Bank, consultancy firms which, or experts who, are nationals of third countries may participate in service contracts.

Annex 5: Definition of Public Sector Operations Outside the European Union

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

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

- is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- has legal personality; and
- is financed in most part by public authorities or is subject to management supervision by public authorities, or has an administrative, managerial or supervisory board in which more than half of the members are appointed by public authorities.

2. **In the specific case of gas; heat; electricity; water; transport; exploration for, or extraction of, oil, gas, coal or other solid fuels; ports and airports; and telecommunications**, public sector operations are those carried out by public authorities, or public undertakings and privately-owned entities that:

- have been granted special or exclusive rights pursuing one of the activities referred to in paragraphs 2.1 to 2.11 below; and
- are operating in markets, which are not liberalised.

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

“Special or exclusive rights” mean rights which arise from a grant made by a com-

petent 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 2.11 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.

A market is considered “liberalised” when, in the country in which the activity is to be performed, such activity is directly exposed to competition and there is free access for new operators; an independent body should monitor such competition and access. The Bank will determine whether an activity is directly exposed to competition on the basis of criteria such as the nature of the goods or services concerned, the existence of alternative goods or services, the level of prices, and the actual or potential presence of more than one supplier of the goods or services in question. The Promoter should demonstrate that access to the market is free de jure and de facto. The number of suppliers of goods or services concerned may be limited in certain cases by the monitoring body (provided that, in any event, there are at least two suppliers of the goods or services in question) considering the size of the market and the economies of scale involved.

The operations referred to under 2. above are:

2.1. As far as gas and heat are concerned:

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

2.2. The supply of gas or heat to networks which provide a service to the public by a Promoter other than a public authority shall not be considered an activity within the

meaning of paragraph 2.1 where:

- the production of gas and heat by the Promoter concerned is the unavoidable consequence of carrying on an activity other than those referred to in paragraphs 2.1, 2.3, 2.5, 2.6, 2.8, 2.10 and 2.11; or
- supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the Promoter's turnover having regard to the average for the preceding three years, including the current year.

2.3. As far as electricity is concerned:

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

2.4. The supply of electricity to networks which provide a service to the public by a Promoter other than a public authority shall not be considered an activity within the meaning of paragraph 2.3 where:

- the production of electricity 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, 2.3, 2.5; 2.6, 2.8, 2.10 and 2.11; and
- supply to the public network depends only on the Promoter's own consumption and has not exceeded 30% of the entity's total production of energy, having regard to the average for the preceding three years, including the current year.

2.5. 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.

2.6. Contracts or design contests awarded or organised by Promoters, which pursue an activity, referred to in paragraph 2.5 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.

2.7. The supply of drinking water to networks which provide a service to the public by a Promoter other than a public authority shall not be considered an activity within the meaning of paragraph 2.5 where:

- the production of drinking water by the Promoter concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraph 2.1, 2.3, 2.5, 2.6, 2.8, 2.10 and 2.11; and
- supply to the public network depends only on the Promoter's own consumption and has not exceeded 30% of the Promoter's total production of drinking water, having regard to the average for the last three years, including the current year.

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

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent Promoter, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2.9. The provision of bus transport services to the public shall not be considered an activity for the purposes of paragraph 2.8 where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the Promoter.

2.10. 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.

2.11. The provision or operation of public telecommunications networks or services.

Annex 6: Standard Form of the Procurement Notice in the Official Journal of the European Union (OJEU)

International Invitation for Tenders

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

[PROJECT NAME]

[Name of Promoter]

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

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

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

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

All firms are invited to participate in the tender.
OR

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

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

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

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

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

Annex 7: Local Preference

In the specific case of the Lomé Convention, the provisions to be applied are those contained in Article 303 (Preferences) of the Convention, as indicated below:

Measures shall be taken to encourage the widest participation of the natural and legal persons of ACP States in the performance of contracts financed through the Bank as agent of the European Development Fund (EDF) in order to permit the optimisation of the physical and human resources of these States. To this end:

1. for works contracts of a value of less than 5 million euro, tenderers of the ACP States, provided that at least one quarter of the capital stock and management staff originates from one or more ACP States, shall be accorded a 10% price preference where tenders of an equivalent economic, technical and administrative quality are compared;
2. for supply contracts, irrespective of the value of the supplies, tenderers of the ACP States who offer supplies of at least 50% in contract value of ACP origin shall be accorded a 15% price preference where tenders of equivalent economic, technical and administrative quality are compared;

3. in respect of service contracts, given the required competence, preference shall be given to experts, institutions or consultancy companies or firms from ACP States where tenders of equivalent economic and technical quality are compared;
4. where subcontracting is envisaged, preference shall be given by the successful tenderer to natural persons, companies and firms of ACP States capable of performing the contract required on similar terms; and
5. the ACP State may, in the invitation to tender, propose to the prospective tenderers the assistance of other ACP States' companies or firms or national experts or consultants selected by mutual agreement. This cooperation may take the form either of a joint venture, or of a subcontract, or of on-the-job training of trainees.

The definition of the concept of "originating products" is given in Protocol 1 of the Convention.



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