

Guidance Note to EIB Promoters

On project procurement in EIB financed operations outside the EU in response to the COVID-19 Outbreak Crisis

March 2020

This guidance note aims at advising EIB promoters about the disruptions in the supply chains across the globe caused by the COVID-19 outbreak and their impact on project procurement financed by EIB in operations outside the EU. **The provisions hereafter are developed exclusively in response to the COVID-19 outbreak crisis and may only be used with prior consultation and agreement of the EIB. This note is merely intended as an informative guidance, which should not be construed as binding legal advice nor as imposing any obligation to the EIB Promoters. Therefore, nothing in this note shall give rise to any liability for the EIB.**

1. Emergency Procurement

Some promoters may need an emergency procurement and supply of works, goods, equipment or services urgently needed to contain the COVID-19 outbreak.

- The promoter should first consider reduced timelines under published Open or Restricted Procedure.
- If the above reduced timescales are not sufficient in tackling the urgency, the Guide to Procurement (Section 3.4.1. of GtP) provides some further flexibilities, including the recourse to the **Negotiated procedure with the list of candidates directly established by the promoter as strictly necessary for the purpose of tackling the COVID-19 pandemic**:
 - The conditions of usage of this procedure are foreseen in the Guide to Procurement and should be complied with.
 - The attention of the Promoter is drawn to the condition of **strict necessity** for reasons of **extreme urgency** brought by **events unforeseeable by the promoter**, which would cause timelines of an otherwise competitive procedure not to be complied with. The Guide to Procurement specifies that the circumstances invoked to justify extreme urgency shall not in any event be attributable to the promoter.
- Outside the EU, promoters may also use **Force Account** (section 3.4.1. of GtP) to recourse to government's own resources to take **prompt action in dealing with the emergency**. These may include emergency construction of field hospitals or installation of additional beds or equipment by the army or other disaster relief services of the government.
- The promoters may tap into **joint procurement** launched by **several contracting authorities** as long as such procurement complies with the Guide to Procurement.

Promoters interested in such solutions should immediately raise the issue to the attention of their EIB counterparts to discuss and agree on the opportunity and modalities for such solutions.

2. Measures to mitigate the effects of the COVID-19 outbreak on project procurement

Promoters are responsible for project procurement and contract implementation. The EIB is not a party to the contract and its responsibility is confined to verifying that the conditions attached to its financing are met. The EIB may however advise or assist the promoter in project procurement (see section 1.3 of GtP). The EIB promoters are invited to take into account the following considerations/solutions in mitigating the impact of the COVID-19 outbreak on EIB financed project procurement:

a. Procurement Stage:

- In case there is a significant likelihood of reduced international competition, the promoters should consider either **postponing the tender procedure or extending periods of tender preparation and submission**. Indeed, the promoters should take into account the tenderers' current increased difficulties in participating in site visits or pre-tender meetings, managing and coordinating inputs of bankers, joint venture partners, suppliers and subcontractors in their tenders and generally speaking, putting together their most economically advantageous responsive tenders.
- Tender documents should be drafted having in mind the realistic outcome and performance expected and allow tenderers to provide solutions/alternatives dealing with the unprecedented challenges created by the outbreak. The documents should also promote **substantial responsiveness**. With regard to documentation required to prove the eligibility, capacity or qualifications of a tenderer, the promoters are reminded that in accordance with the GtP, clarifications must be sought, especially on elements that are of historical nature and cannot be modified by tenderers after the tender submission deadlines. Given the circumstances, self declarations / scanned copies of original documents could be accepted provided the originals are provided by the winning tenderer upon contract signature.
- The promoters may also consider not to require tender securities, as they may be hard to obtain in the current circumstances. These may be replaced by alternative approaches such as exclusion from the future tenders of a tenderer withdrawing its tender prior to the expiration of the tender validity period.
- Tender documents could foresee a more **flexible approach toward delivery timelines** to avoid systematic tender rejections, especially if a tenderer substantiates the need for longer implementation and delivery times due to COVID-19 disruptions in the supply chain or availability of the work force.
- The promoters should verify that the **selection and award criteria are proportionate to the needs and the market conditions caused by the COVID-19 disruptions**. It is likely that in the coming months, tenderers would not always be able to prove access to cash flow or availability of financial resources. Promoters could also consider offering increased advance payments and shorter payment terms.
- The promoters are reminded that tender documents should include a statement to the effect that tenderers should alert the promoter in writing with a copy to the EIB, in case they should consider that certain clauses or technical specifications of the TD might limit international competition or introduce an unfair advantage to some tenderers.
- In cases where a significant risk of contamination, linked to the submission of tender envelopes, is identified, or hand delivery of tender envelopes are not possible or mail/courier services are

suspended due to the COVID-19 travel restrictions and confinement rules, promoters may consider **electronic procurement options and acceptance of electronic tender files**. It is stressed that this option must ensure that tenders received are not capable of being opened by the promoter before the deadline for tender opening.

- In case public opening sessions (as prescribed under 3.7.11 of the Guide for projects outside the EU) are not recommended because of a significant risk of contamination, promoters may use **electronic means to proceed with virtual public opening sessions** (videoconference, livestreaming etc.).

b. Contract Stage:

The following are some advice promoters may find useful in dealing with the COVID-19 outbreak crisis and its impact on implementation of contracts already awarded/procured:

- Face to face signature ceremonies may no more be possible. In such cases, Promoters may recourse to **digital or electronic contract signature** in line with the applicable law in their jurisdiction or **exchange signed versions by mail or courier**.
- In case of contractors' duly justified requests for **delayed commencement of works** caused by the COVID-19 outbreak, the promoters should take action in line with the contractual provisions of the contract.
- During implementation, promoters may receive claims invoking **force majeure provisions** of the contract. Such claims should be resolved in accordance with the contract provisions.
- Given the current shortage of cash flow, in duly justified cases, the contractors may need an advance payment beyond original contractual provisions. The promoter may want to give due consideration to such requests taking into account the impact of the COVID-19 outbreak on contract implementation, the applicable contractual provisions and project's best interest. The promoter may also consider revising the payment terms to help contractors overcome cash flow shortage and meet their obligations.
- The promoter should promptly react to any request for **amendment to contracts** deemed necessary to allow the contractor to better prepare and protect the workforce and any other person required to be on project site against the COVID-19 threat.

3. Increased risk of Prohibited Conduct

The promoters' attention is drawn to the fact that crisis and emergency circumstances are known to increase significantly the risk of Prohibited Conduct in tendering and contract implementation, especially when further flexibilities are used in response to emergency needs. It is therefore important to give due consideration to justifications provided for further flexibilities, to consult the EIB and to document adequately the decisions taken. Any suspicion of Prohibited Conduct shall be reported by the promoters to the EIB's Fraud Investigations Division. Promoters can reach out to the Fraud Investigations Division directly (investigations@eib.org) or through their usual EIB contact.

4. EIB's due diligence adapted to the crisis:

- Upon promoters' request, EIB will provide timely support for publication in the Official Journal of the European Union of any extension/revision of procurement notices.
- EIB will conduct its due diligence on project procurement and contract amendments in line with the Guide to Procurement and strive to provide timely response to promoters' requests.
- Promoters should raise promptly any need in terms of project procurement stemming from the COVID-19 outbreak to the attention of EIB:
 - **The promoters must request EIB's prior agreement to any update of the procurement**, especially if particular provisions of the Guide to Procurement related to emergency situations are expected to be used.
 - The promoters should keep EIB informed of requests for clarifications during the tender preparation stage, especially if they are linked to specific difficulties faced by tenderers in relation to the COVID-19 outbreak.
 - The promoters should seek EIB's non objection for any contract amendment that affects the balance of risks in the contract between the parties in a significant way, even if the impact on price increase is below 15% of the contract price as indicated in the Guide to Procurement.
- Considering the exceptional circumstances due to the COVID-19 outbreak, EIB will provide non-objection and no-further comment letters with electronic signatures. Paper versions with wet-inked signatures will follow soon once the EIB is back to normal business. In the meantime, promoters may consider the electronically signed letters as valid.