

# Procurement in projects financed by the EIB

## Projects Directorate – Procurement Office

June 2023

Ignacio Gonzalez - Sonia da Fonseca - Remigijus Traknys

# Agenda:

1. EIB's Project Procurement Policy: Main Mechanisms and Principles
2. EIB Project Procurement: Appraisal Stage
3. EIB Project Procurement: Monitoring Stage  
- ExAnte Review
4. EIB Project Procurement: Monitoring Stage  
- ExPost Review
5. Q&A

## 1. EIB's Project Procurement Policy: Main Mechanisms and Principles

# EUROPEAN INVESTMENT BANK

# The EIB: the EU bank

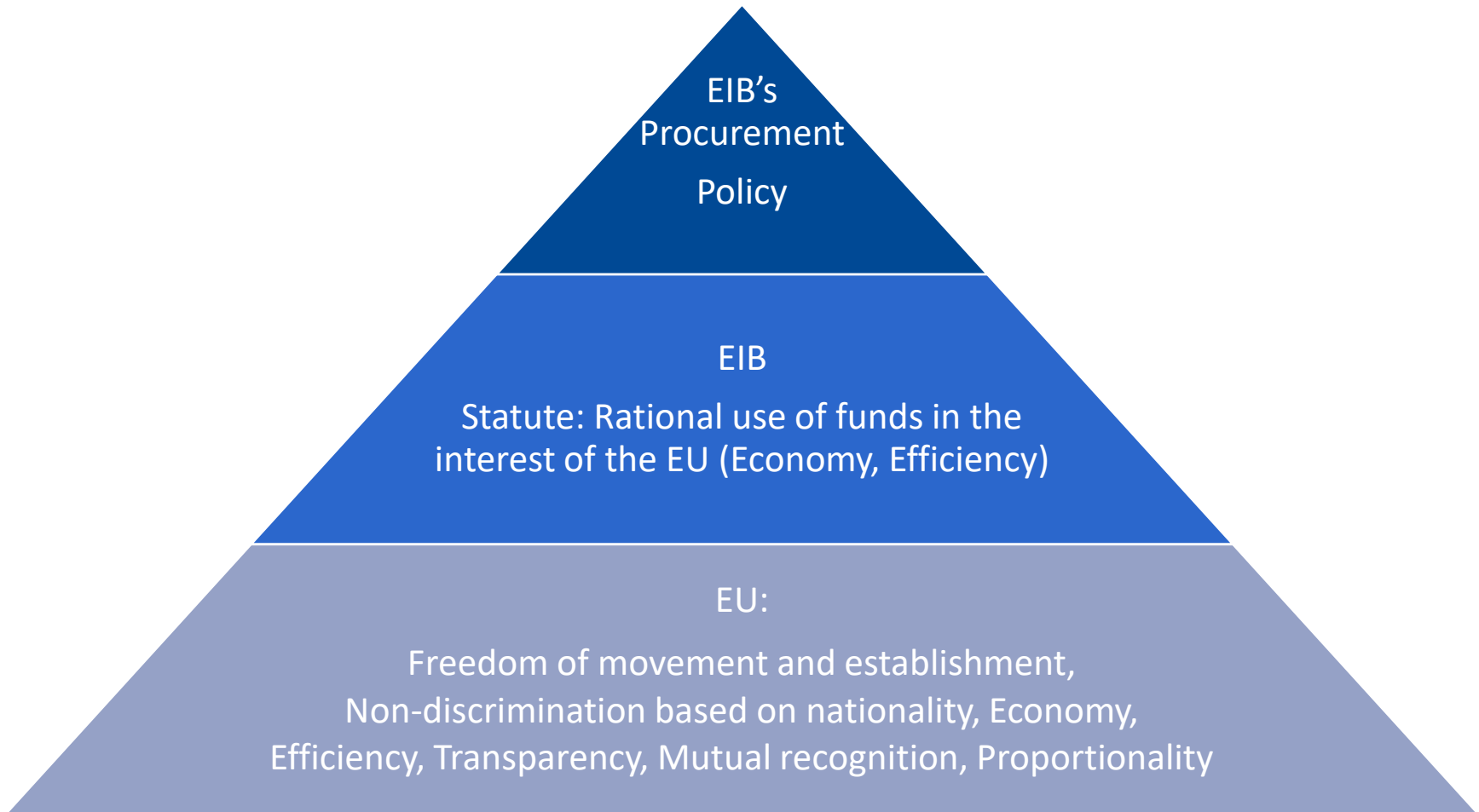


Founded in 1958

Shareholders: 27 EU Member States

EIB is an EU Body, part of the EU's institutional Framework

# Foundations of EIB's Project Procurement Policy



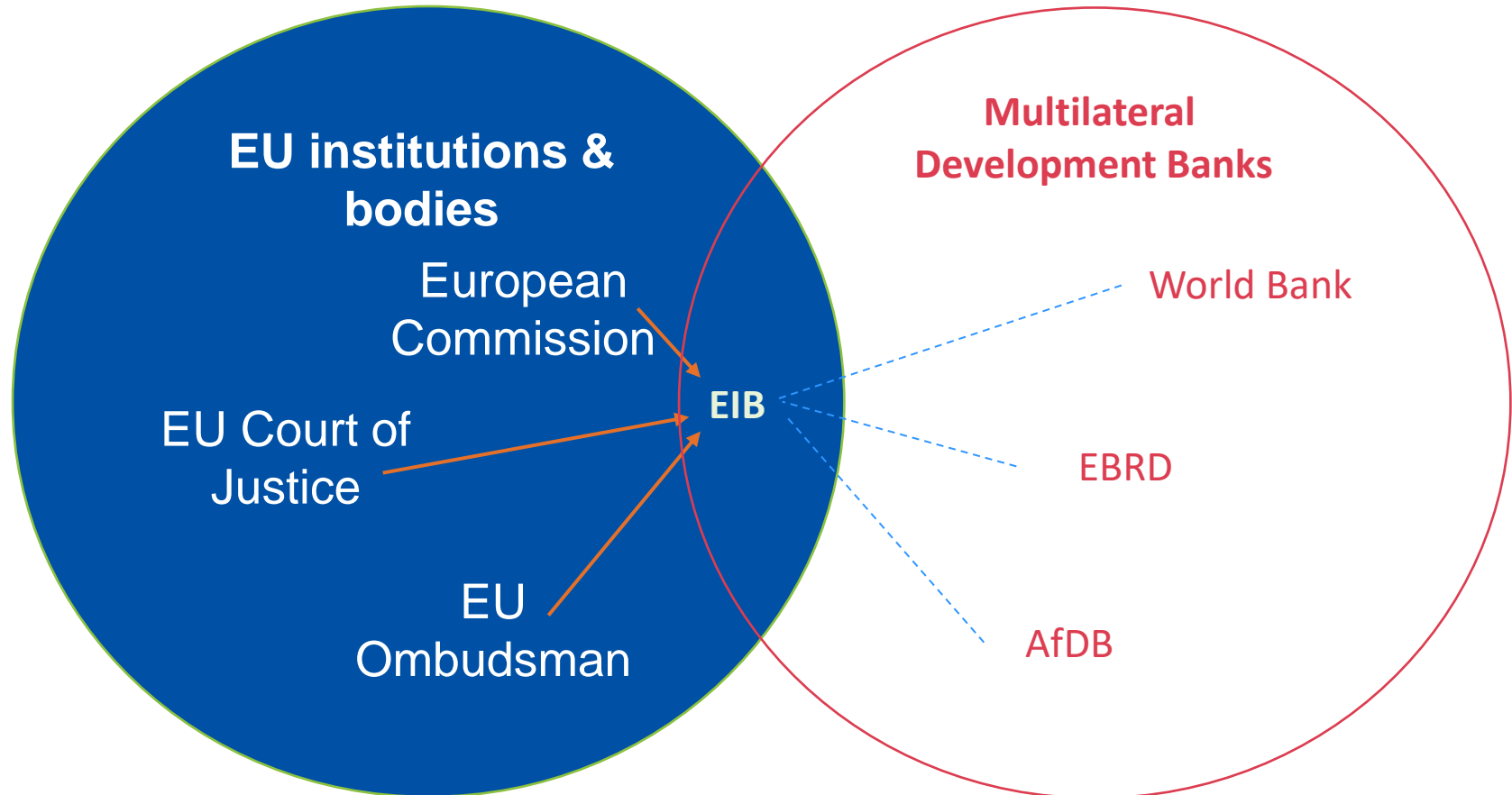
# Projects outside EU: subject to Guide to Procurement

Treaty of the Functioning of EU (TFEU) + related European Court of Justice Case (ECJ) Law

Guide to Procurement

National Legislation & systems

# The EIB procurement model outside EU : a dual approach



EIB, as EU body, must follow EU Treaty principles: EIB procurement rules are based on the EU Public Procurement Directives.

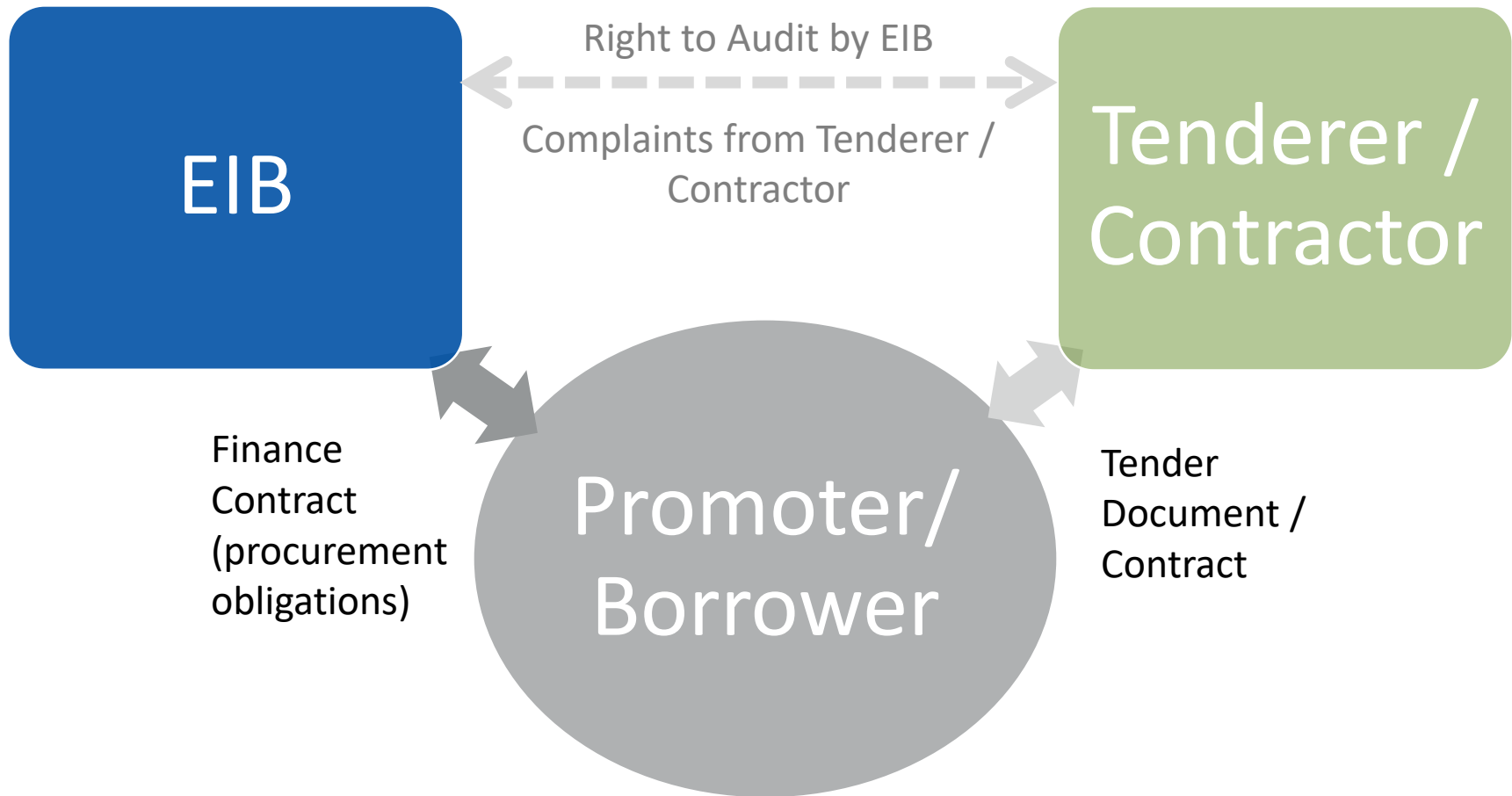
EIB as an MDB, when operating outside the EU, has to harmonise its rules with other MDBs: EIB procurement rules incorporate MDBs' best practice.

# The EIB Guide to Procurement

- ▶ The Guide to Procurement is the main reference document regarding EIB Procurement Policy.
- ▶ Sets the requirements for the procurement of the project to be acceptable to the Bank.
- ▶ Referenced in the Finance Contract.
- ▶ Current version: 2018
  - ▶ Official and published version, available on the EIB website:

<https://www.eib.org/en/publications/guide-to-procurement>

# Legal relationship between parties



# Universal Eligibility:

Open access to nationals of all countries, except:

- ▶ Conflict of interest
- ▶ Restrictions imposed by third party financing  
e.g. EC financial instruments managed by EIB
  - at least, open to EU + parties to or beneficiaries of such agreement (see specific instruments rules)
- ▶ Firms excluded by EIB because of:
  - Prohibited Conduct,
  - EU/UN Sanctions List ([https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions\\_en](https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions_en)),



Restrictions other than above imposed by Promoters or their governments not acceptable!

# Local Preference

- ▶ World Trade Organization (WTO) – Government Procurement Agreement (GPA):
  - ▶ Free Trade, no barriers to entry
- ➔ EU & candidate countries take part in WTO-GPA: No local preference
- ➔ Outside EU:
  - ▶ Local preference: margin of preference on price of up to 15% for goods only
  - ▶ No mandatory local content!
- ▶ Many other different forms & shapes:
  - ▶ Mandatory local shareholding of concessionaire.
  - ▶ Mandatory minimum share of local labour.
  - ▶ Restriction to local providers of certain specific activities.
  - ▶ Indirect financial incentives (through tariff regulations, grants, higher advance payments, etc.).

# Covenant of Integrity (Outside EU)

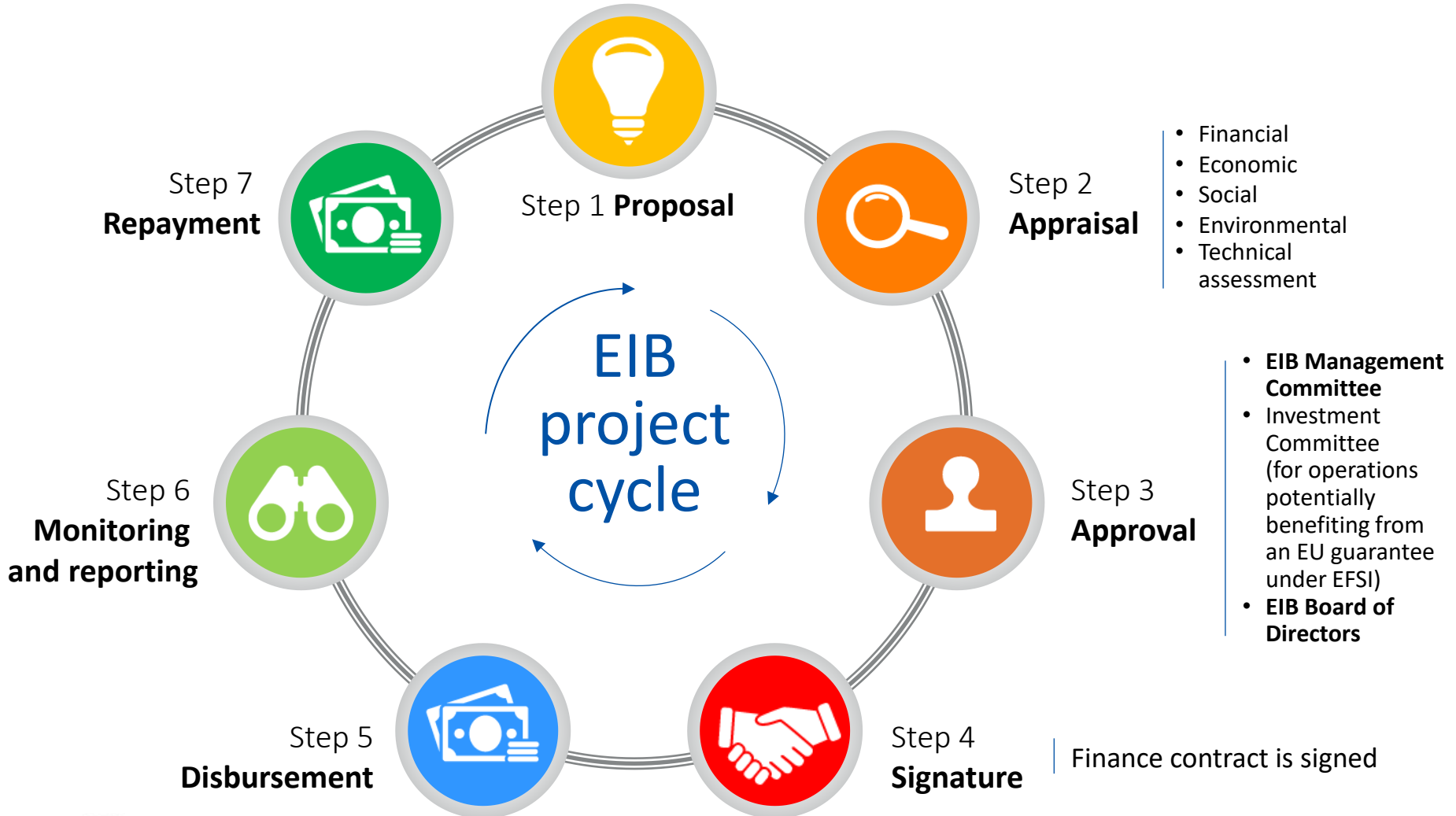
- ▶ Model Covenant to be attached to tender documents & be filled in all tenders & provided to EIB with signed contract (only those subject to prior review)
- ▶ Declare not being subject to EU/UN sanctions
- ▶ Declare not having engaged into PC for this contract & provide details of:
  - ▶ Any PC in the past 5 years, if any
  - ▶ Any dismissals/ resignations on PC's grounds, if any
  - ▶ Exclusions/sanctions by EU institutions or MDBs for PC, if any
- ▶ If PC or exclusion for PC occurred → Give details of measures taken to ensure PC does not happen in this contract.
- ▶ Clarify Exclusion means ineligibility by EIB
- ▶ the Tenderer/Contractor commits to:
  - ▶ Appoint a compliance officer;
  - ▶ Grant the right to inspect to EIB & EU institutions having competence;
  - ▶ Preserve records for 6 years from date of substantial performance of contract
- ▶ Applicable to all contracts
  - ▶ Except private promoters having implemented equivalent anti-fraud standards.

## 2. Appraisal Stage

# EIB PROJECT PROCUREMENT

# EIB project cycle

We support sound and sustainable projects



# EIB Thresholds as per GtP – International or National

- ▶ International procurement procedures > GtP thresholds

Nature of the Contract	GtP Threshold (€)
Works	> 5 million
Goods and Services except Consultancy services:	
In General	> 200,000
Electricity, Gas, Water and Transport	> 400,000
Telecommunications	> 600,000
Consultancy services	> 200,000

- ▶ National procurement procedures: < GtP thresholds

# EIB Thresholds as per GtP – Special Case of Consulting Services

**>200,000 Euros** -> *Open or Restricted* International Procedure with OJEU Publication

**<200,000 Euros** -> *Negotiated procedures* with the list of a **maximum of seven candidates** and with the participation of at **least three candidates** of at **least two different nationalities**

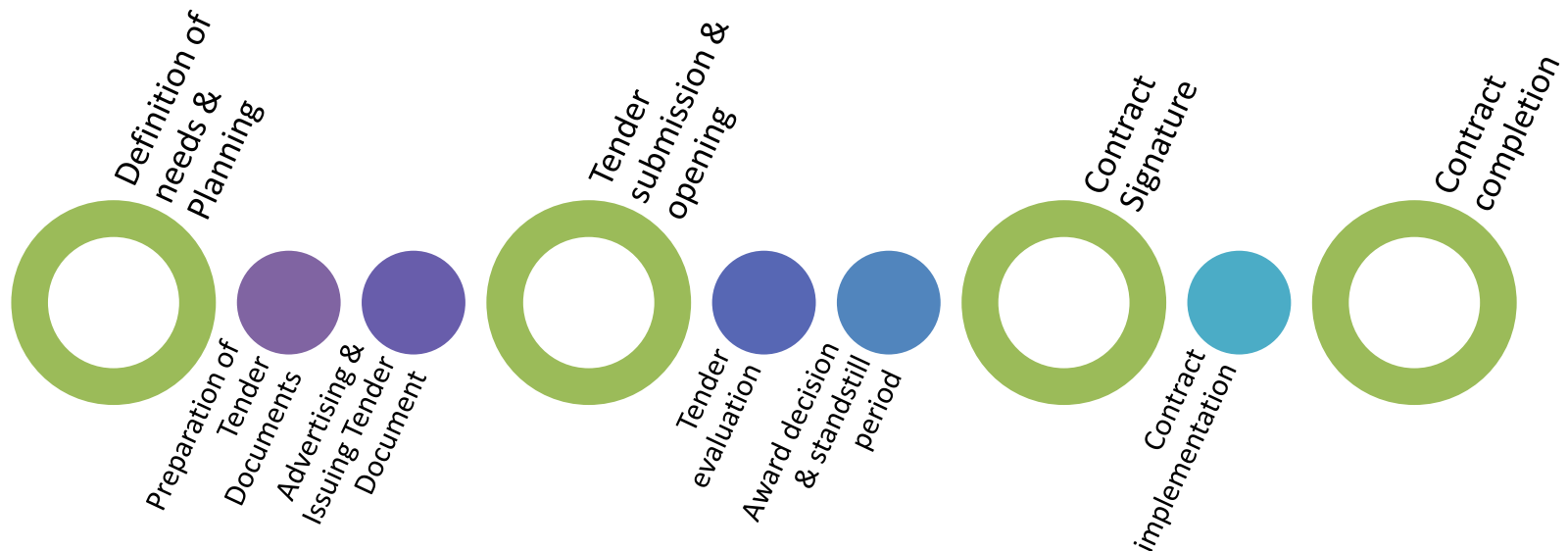
**<50,000 Euros** -> Bank may accept a contract negotiated with only one company or individual in order to speed up project preparation or implementation.

# International Procurement Procedures

## Open Procedure

Preferred method for traditional works, supplies or services  
(e.g. road construction)

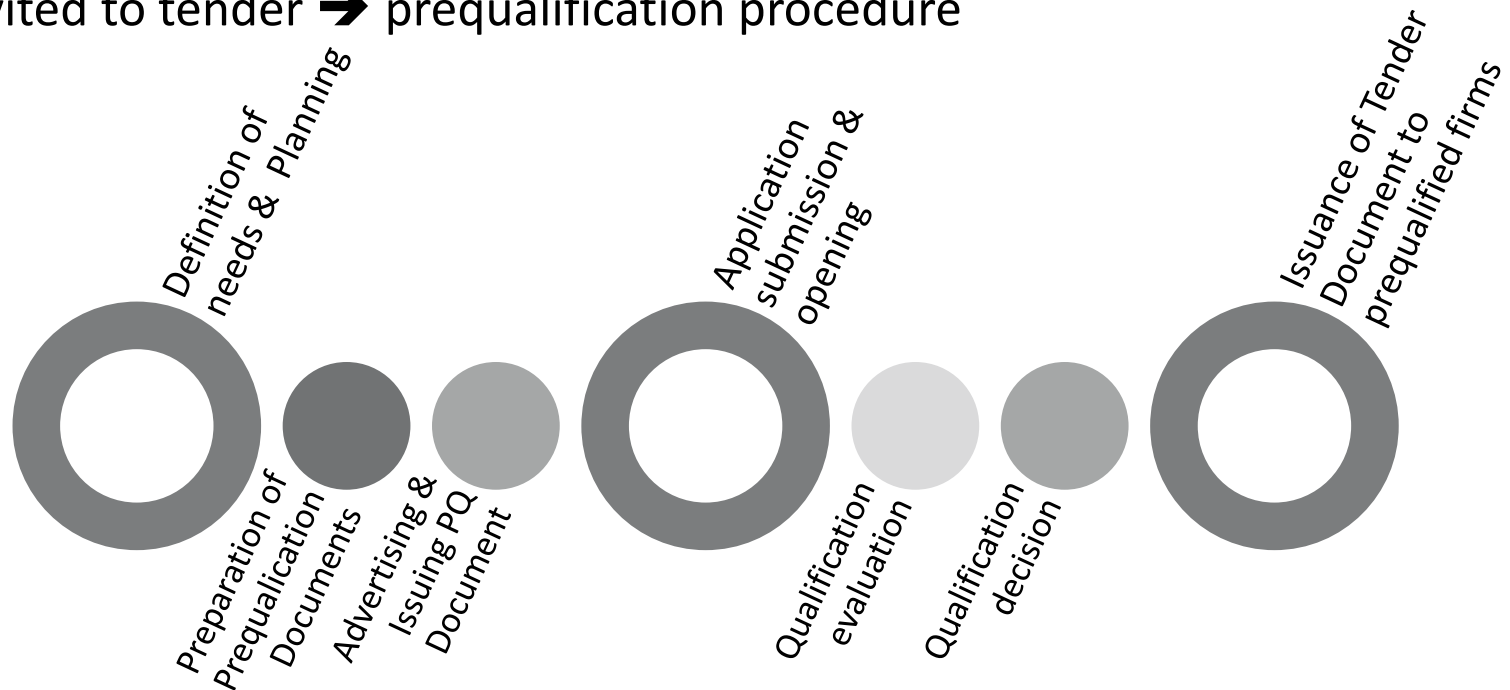
Typically Qualification could be verified ex-post (post-qualification) mainly  
for the tenderer(s) most likely to be awarded the contract!



# International Procurement Procedures

## Restricted Procedure: 1. Prequalification

- Preferred method for large / complex public contract warranting prequalification
  - Purpose: Since Tender evaluation and preparation are complex and resource consuming; make sure only those who are qualified are invited to tender → prequalification procedure



# International Procurement Procedures

## Restricted Procedure: 2. Tendering

- 2 options:
  - Single Stage (e.g. construction of a concrete dam) See open procedure + prequalification, or
  - Two Stage: when preparing complete technical specifications is undesirable or impractical (e.g. construction of a solar power plant)
    - Functional and performance requirements cannot change at the 2<sup>nd</sup> stage!

Issuance of 1<sup>st</sup> stage TD

Submission of 1<sup>st</sup> stage unpriced tenders  
 1<sup>st</sup> stage tender evaluation  
 1-1 clarification meetings with tenderers  
 Issuance of minutes of clarification meetings

Issuance of 2<sup>nd</sup> stage TD

Submission of 2<sup>nd</sup> stage (priced) tenders  
 2<sup>nd</sup> stage tender evaluation

Award decision &  
 Contract signature

Contract implementation  
 Contract completion

# Questionnaire

- At Appraisal Stage EIB will send to promoters a Questionnaire which will also include Procurement Questions. Promoters shall answer those in detail and providing all information available.



## 1) Existence of National Remedy Mechanism

Promoter will be asked about the availability of national review mechanism, before which procurement complaints may be lodged



## 2) Domestic Preference/Local Content

Promoter to provide details if national legislative procurement framework includes provisions of domestic preference or local content

# Questionnaire - ctd



3) Details about the Project Implementation Unit

Experience of the Project Implementation Unit in similar projects, how the procurement function will be organized



4) In case of already awarded Contracts

For contracts already awarded, but for which is intended EIB financing, details about how the procurement was carried out will be required, to ensure alignment with GtP

# Procurement Plan (1): GtP requirements

- ▶ During the project appraisal stage → seek and obtain the Bank's agreement on the procurement plan (PP)
- ▶ PP should cover at least:
  - ▶ the scope of the project to be financed by the Bank
  - ▶ choice of procedures appropriate for the project
  - ▶ timetable for tender specifications, publication of Procurement Notices, time allowed for the preparation of tenders, etc.
- ▶ For public sector operations → PP agreed with the promoter should reflect the Bank's review requirements
- ▶ The promoter may proceed with launching procurement processes, once the Bank has agreed with the corresponding PP (and any substantial updates)
- ▶ The time for the preparation of tenders should depend on the magnitude and complexity of the contract → at least six weeks from the availability of TD to potential tenderers.

# Procurement Plan (2)

- The Bank will take into account:
  - The experience/capacity of the promoter,
  - Market analysis, risks, packaging and procurement options
- The Bank will check:
  - PP shall be consistent with the project objectives, technical description and cost estimates,
  - all necessary procurements (contracts) are listed,
  - planned contract values → without Value Added Tax (VAT) or equivalent direct taxes,
  - planned procurements timetable is realistic and in line with the project implementation period,
  - proper justification for the selected procurement procedure (e.g. no 'salami-slicing' of contracts to avoid the application of thresholds; no unjustifiable direct awards or negotiated procedures; no unacceptable 'emergency' procedures),
  - there is a reference to sources of financing.

# Procurement Plan (3)

- ▶ Maxim: *Failing to plan is planning to fail*
- ▶ Example of the draft EIB Procurement Plan for Operations Outside EU explaining how to fill each field

# Procurement Plan (4)

- The Bank would insist on:
  - importance of proper planning, market assessment, reasonable timelines and critical path,
- Factors when considering the timeline:
  - national requirements regarding permits/licenses/authorizations;
  - timetable for developing tender specifications/documents, publication of Procurement Notices, time allowed for the preparation of PQ application/tenders, etc.;
  - The need of Bank's "no-further-comments" to Procurement Notices, Pre-qualification/Tender documents;
  - Time allowed for tender submission should be appropriate to the magnitude/complexity of the contract (normally, at least 6 weeks);
  - The need of Bank's "non-objections" to all Pre-qualification/tender evaluation reports (at each evaluation stage);
  - Standstill period(s)

3. Monitoring stage – Contracts subject to Ex- Ante review

# EIB PROJECT PROCUREMENT

# Review by the EIB: Prior / Post Review

- ▶ Prior review on all international procurement procedures (> GtP Thresholds):
  - ▶ Prior to procurement decision:
    - ▶ “No-further comment” letter to tender documents
    - ▶ **“Non-objection” letter to promoter’s decisions**
- ▶ Post Review on all contracts not subject to prior review (< GtP thresholds):
  - ▶ After procurement decisions
    - ▶ Procurement Plan to be sent to the Bank. Bank conducts regular expost reviews.
    - ▶ Frequency: based on Project specificity,
    - ▶ samples: based on quantity of contracts, Project risk level, contract risk level, promoter’s capacity, detection of any pattern (e.g. collusion), etc.
- ▶ Procurement of a contract should not start until such contract is included in an acceptable procurement plan by the Bank.

# Tender Documents

- ▶ No Mandatory Standard Tender Documents @ EIB
- ▶ Promoters may use (inter)national TD templates provided that they permit wide international competition & comply w. GtP: Chapter 1 & section 3.7.
- ▶ Agreement on which kind of TDs will be used at the beginning of implementing a project is useful, instead of case by case discussions.
- ▶ There will normally be a need to adapt TDs to comply with the Guide, the Bank can help you with the adaptations.
- ▶ Key points would include:
  - ▶ Anti Fraud Policy (Covenant of Integrity), E&S Covenant, no local content/preference, standstill period, remedy mechanism, etc.

# Selecting Tender Documents

- ▶ Selecting the correct templates for the contract is essential for good implementation
  - ▶ What documents does the promoter know well?
  - ▶ What documents fit for what is being procured?
  - ▶ What documents work for the market?
- ▶ Many templates exist and are used:
  - ▶ Other MDBs (World Bank, EBRD, ADB, AfDB, etc)
    - ▶ Works, Goods, Small Works, Plant design supply and installation, etc.
  - ▶ EC (PRAG)
  - ▶ National documents

# Completing Tender Documents

- TD shall furnish all information necessary for a prospective tenderer to prepare a responsive tender for the works, services and supplies to be provided.
- Must allow for wide competition.
- Must be in line with the provisions of the GtP.
- Once EIB has reviewed TDs, we will either
  - Provide comments if we find room for improvement
  - Provide no further comments letter if we find no problems
- They still remain the responsibility of the Promoter.

## b) Preparing Tender Documents ( Ignacio)

- (on Session II schedule for July 12<sup>th</sup> we would have intervention from Georgia sharing their experience – 15 mns allocated)

# Publication of Procurement notices in OJEU

**Once EIB provides no-further comments to Tender Documents, the next step is the procurement notice publication in OJEU**

- Guide to Procurement – Annex 6: No more valid;
- Promoters prepare the Procurement Notice (EIB provides templates) and forward to EIB;
- EIB requests publication on behalf of the promoters and indicate the date when will be published;
- Publication on national media at the same time or after OJEU publication –not before!
- National publications includes same details as OJEU



# Tenders Preparation Stage - attention

- ✓ 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;
- ✓ Questions and Answers (without name of the company which raised those) shall be timely distributed to all interested bidders;
- ✓ In case of Addendum's, which change the initial tender conditions for which EIB provided no-further comments, EIB needs to be consulted and further no-further comments obtained;
- ✓ In case of extension of tender submission deadline or other changes to the published OJEU notice, a corrigendum needs to be published



**If the change is material, may lead to the need of a new procurement procedure!**

# Tender Opening Session

- ✓ Date and at a place needs to be indicated in the Procurement Notice and tender documents;
- ✓ The tender opening shall be public in presence of representatives of the bidders who wish to attend;
- ✓ Late tenders shall not be opened and returned to the respective tenderers -  
 > make sure such language is included in the tender documents!
- ✓ Minutes of the tender opening shall be drafted and shall include the name of the tenderers and the amount of each tender, including special conditions, discounts and variants if permitted (must be read out aloud!)

experience of delegating procurement supervision to this IFI.



**A copy of these minutes must be appended to the tender evaluation report sent to the Bank.**

# Principles of tender evaluation process

The evaluation of tenders must be carried out :

- ▶ By a suitably competent evaluation panel (either the relevant unit of the line organisation of the Promoter or a specifically established evaluation panel/tender committee);
- ▶ In accordance with TFEU principles (equal treatment, non-discrimination, transparency);
- ▶ Preserving the confidentiality of the information acquired by those involved in the evaluation process;
- ▶ The tenders are evaluated and scored in a consistent manner;
- ▶ The pre-announced award criteria are applied as they are. They cannot be changed or waived during the process of evaluation of tenders
- ▶ Each stage of the evaluation process is duly recorded in writing.

# Tender evaluation report (1)

- ▶ GtP, § 3.5.1 → Pre-qualification and tender evaluation reports (at each evaluation stage) and the contract award decisions must obtain the EIB's non-objection.
- ▶ The completed TER should be sent to EIB for review, we may make comments and suggestions.
- ▶ Promoters should be aware and take into account any national/local authorisations to be obtained, such as from the national procurement authorities, before submitting their TERs to EIB for the non-objection.
- ▶ Once EIB is satisfied with the evaluation report, we will provide a non-objection to TER.

# Tender evaluation report (2)

- ▶ Scope of TER (at least):
  - ▶ Annexed Minutes of Tender opening session
  - ▶ Each step of the completed evaluation duly recorded in writing, all such steps to follow the sequence and scope of checks/verifications/decisions defined by the PQ/TD;
  - ▶ TER to contain a track record of all clarifications sought from the tenderers:  
→ clear indication of whether all responses are satisfactory → no substantial modification of the tenders → not having any discriminatory effect, unequal treatment of tenderers;
  - ▶ Results/scores of each tender adequately marked and justified against the relevant criteria/requirements of the TD, detailed evaluation sheets annexed;
  - ▶ The list of rejected tenders with all specific reasons for their non-compliance with criteria and other substantive requirements shall be explained and documented in the TER;
  - ▶ Clear recommendation(s) for the next tendering stage/contract award with adequate justifications;
  - ▶ TER shall not in any way implicate the Bank as a party involved in the evaluation process.

# Signing of the contract

- Once the evaluation is completed and a non-objection is issued by EIB, the next step is to notify bidders of the result.
- All bidders should be notified, including a summary of the relevant reasons for the decision.
- Before signature of the contract, a standstill period should be respected for bidders to raise their complaints if any.
- If a complaint is received in that period, it should be addressed and responded before proceeding to the signature of the contract.
- If the EIB receives a complaint we will temporarily suspend our non-objection until we have reviewed the complaint.
- A separate body inside EIB will review the complaint (Procurement Complaints Committee).
- Once the standstill period has elapsed with no complaints, the promoter may proceed to the signature of the contract.
- The signed contract and the Covenant of Integrity and E&S Covenant should be sent to the Bank for contracts subject to prior review.
- An award notice should be published in the OJEU, similar procedure as for contract notice.

# Contract Modifications - Guide to Procurement

## § 3.5.1. Public sector operations

“**Prior review**: All International Procurement Procedures are subject to prior review by the Bank. **Prior review means that Promoters must send to the Bank the relevant documentation and seek the Bank’s concurrence prior to all major decisions regarding procurement, as follows:**

...

After the contract signature, **any contract modification the cumulative effect of which causes an increase from the original contract price by more than 15% prior to its conclusion must be sent to the Bank.**”



**Prior review** = non-objection

**Ex-post review\*** = non-objection not needed

# Common reasons for contract modifications



Unforeseen  
Circumstances



Incorrect  
Building Plans



Inspection  
Requirements  
/ Change in law



Additional  
Features



Delays



Inaccurate  
Budgets

Particular attention to contract modifications that:

- If included in the original tender, would have **allowed/attracted more tenderers** and/or could potentially **change the award decision** (e.g. **decreased scope**, applicants not passing the PQ phase could have been qualified or **increased scope**, larger players on the market could have been interested)
- Would change the **economic balance** of the contract in favour of the contractor (e.g. granting additional profit to the contractor by for example increasing the unit prices in discrepancy with market prices or reducing the contractor's risk of incurring penalty payments)
- Would **considerably extend the scope** of the contract (e.g. new works/services/supplies that could easily be procured separately)
- **Replacement of the original contractor** - even if allowed (e.g. in cases or reorganisation – merger, takeover, acquisition...), the new contractor must fulfil original selection criteria)



## Variation orders/change orders/variations...

There must be precise terms in contracts introducing the variation orders with **clear identification what is and is not included** and with **clear price indication or price calculation method**.

Variation orders cumulatively **increasing the contract value by more than 15%** should be reviewed as contract amendments.

Once the number and scope of variation orders becomes substantial, it is **good practice to sign an amendment** to cover all previous variations and have a clean overview over modifications.

# Review of contract modifications

- EIB reviews the modification before its signature
- A non-objection from EIB is applicable

*Original contract price increased more than 15%*



- EIB Ex-post reviews the modification
- No non-objection is needed, simple email if needed

*Original contract price increased less than 15%*





## Recommendations and Tips

**15%  
threshold**

Remember to submit the contract modifications cumulatively above 15% of original price for the EIB prior review before its signature

**Material  
modifications**

The Promoter is encouraged to submit material modifications for the prior review even if below the 15% threshold (non-objection not needed)



Poor or inadequate design may lead to the need of substantial contract modifications. Explore to improve design or use the design-build type of contract



When extensions/extra deliveries are highly possible, may be advisable to include grounds for amending the contract (scope, conditions and nature with clear prices and prices calculation methods) in the original tender (e.g. works supervision linked with the duration of works contract)



Contract modifications are a common practice, but should not be used to circumvent the requirements of a public procurement!

# Current Situation – High Inflation



## Recent Crises and Costs Increases

### Background:

- Effects of inflation caused by the COVID-19 pandemic and amplified by the war in Ukraine - contractors are finding it difficult to fulfil their contracts, especially in the public construction, with some having even ceased all construction activity.
- Some contracts do not include price indexation formulas;
- Promoters facing difficulties with ongoing contracts - contractors requesting significant price revisions, abandoning sites;
- EIB Teams are requested to review contract modifications which insert price indexation formulas during contract implementation.

## No 'one-size-fits-all'

### Promoter should consider:

- ✓ **Contract termination and retendering** – if both contract parties in agreement (e.g. other market circumstances such as shortage of resources, contractor under bankruptcy may make the contract non-implementable)
- ✓ **Budget constraints** - not only one-off; introducing the formula may lead to multiple contract modifications
- ✓ **Whether price increases could have been foreseen** within the normal market behaviour
- ✓ **Are the particular components that had increased prices identifiable and have objective, adequate and verifiable price indexes to feed-in the formula**
- ✓ **To which period** a price indexation formula should be applied

Introducing a price indexation formula should not serve to bypass the procurement rules and should not be at the detriment of tenderers who have not won the contract!



**No right** to get the indexation formula if not originally included in the tender.

# Recommendations :

Moving Forward, promoters are recommended to include Price Indexation Formulas in the Initial Procurement Documents.

While the promoters may intend to assign the inflation risk to the contractors, this may lead to overall higher risk as:

- a) contractors will include in the price contingencies for price increases which will result in higher average prices being offered.
- b) the bidder which takes the higher financial risk, will be better positioned to win the tender, significantly increasing the risk of nonperformance and default in case of sharp prices increase.

- ❖ The longer the contract implementation period, the bigger risk that the market prices will change.

The Inclusion of price indexation formulas is even more critical in contracts which implementation period is above 18 months.

- ❖ In case of contracts with several currencies, price adjustment formulas for each currency shall be included;
- ❖ “Provisional Sum for Price Contingency” can be included as part of the contract.
- ❖ Promoters may want to cap the % resulting from the indexation formula;
- ❖ If the resulting increase is above the country inflation, may be a red flag.



4. Monitoring stage – Contracts subject to Ex- Post review

# EIB PROJECT PROCUREMENT

# Ex-Post Reviews

- ✓ All contracts not subject to international procurement procedure are subject to ex-post review by the Bank as set out in the procurement plan.
- ✓ The procurement plan agreed with the promoter should reflect the Bank's review requirements (Ex-ante or ex-post)

Attention! The promoter can launch a procurement process, only once the Bank has agreed with the corresponding procurement plan

- ✓ Promoters may conduct procurement without the prior involvement of the Bank.
- ✓ The promoter must regularly provide the Bank with an updated procurement plan completed with information about the contracts' award decision, signature and level of competition.

Attention! The promoter must retain the full documentation for each such contract and make it available to the Bank upon request as part of ex-post reviews (to be conducted by the Bank or its auditors/consultants).

# Ex-Post Reviews in practice



- Remember to include the Covenant of Integrity and the Environmental and Social Covenant in all contracts!!
- Remember to keep and store all the procurement documentation

- ✓ Will be reviewed a sample of the contracts subject to ex-post review -> size depends on the number of contracts;
- ✓ Will be reviewed all procurement documents from advertisement to contract signature and contract amendments / variation orders, and any further contract execution reports and related invoices and payments;
- ✓ The final report with recommendations will be shared with the promoter for its review and answer within a reasonable deadline;
- ✓ Some contracts may not be considered eligible for EIB financing if in breach of GtP

THANK YOU



European  
Investment Bank



European  
Investment Bank