

- ▶ **EUROPEAN PARLIAMENT**
 - DEVE Committee, Chair, Mr. Tomas Tobé
 - BUDG Committee, Chair, Mr. Johan Van Overtveldt

- ▶ **EUROPEAN COMMISSION**
 - DG INTPA, Director General, Mr. Koen Doens

- ▶ **EUROPEAN COURT OF AUDITOR**
 - ECA, Director, Mr. Martin Weber

Subject: FINANCING REGULATION APPLICABLE TO EXTERNAL AID OF THE EUROPEAN UNION

Brussels, 30 March 2021

Dear Sirs,

The European Union and its Members States are the world's leading donor of Official Development Assistance with €75.2 billion in 2019. The EU General Budget and the European Development Fund (EDF) are the current main financial instruments for Development Aid. In the new Multiannual Financial Framework for the 2021-2027 period, the geographic instruments have been replaced by the **Neighbourhood, Development, and International Cooperation Instrument (NDICI)**, with an estimated budget of €79.5 billion. NDICI is also complemented with the **Instrument for Pre-accession Assistance (IPA)** that aims to prepare candidate and potential candidate countries for EU membership with a financial envelope of about €13 billion for 2021-2027.

Annex 1 to the Financing Regulation¹ sets up special provisions for **procurement in the field of external actions**. The European Commission has edited a **Practical Guide²** (PRAG) that explains these provisions. It is used by the European Commission services responsible for the management of projects and programmes financed under the external financing instruments. The PRAG provides users with the necessary information to undertake procurement of services, works and supplies as well as grants, with annexes that cover both the award and the implementation of contracts. It also describes the procedures to be used in direct, indirect and shared management with partner countries or other institutions.

Following the last PRAG revision of August 1st 2020, **our Federations wish to express their serious concern** on issues deriving from the Financing Regulation that we believe are being restrictively interpreted. We consider that some changes in the PRAG affect the **principles of proportionality** and **competition**, decreases **transparency** in the procurement process and will **negatively impact** the European firms from participating to EU external aid programmes.

It is indeed the responsibility of our Federations to draw your attention to the **administrative and financial difficulties and unnecessary constraints** caused by these changes in a specific market which is already challenging for European SMEs to access.

¹ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union

² <https://ec.europa.eu/europeaid/prag/>

We appreciate that the recent development of digital tools such as OPSYS (Management Information System developed by the European Commission for External Actions) and the desire to harmonise internal procurement methods may lead to some changes in the procurement process.

However, it is to be emphasized that delivering services in low and middle-income countries is entirely different from operating within the EU, and **it requires specific rules** that guarantees an early information to tenders, restricted tender procedures, and quality-based selection and award criteria, among other requirements.

For more than 25 years, the members of both our Federations are key implementing actors of service contracts financed by the European Union in the framework of external aid. In a context where partnership with the private sector is advocated as the future of development aid, **we can only regret not being consulted more systematically**, prior to their entry into force, for changes affecting contract procurement in which we are direct stakeholders.

We are attaching to this letter details of the areas of our concerns following the latest changes in the PRAG. This also includes the elements that we consider most essential and that we believe should be clearly addressed in the Financing Regulation to make contract opportunities **accessible, transparent, business friendly, green, fair, and financially viable** to EU firms, in particular SMEs.

In particular we urge:

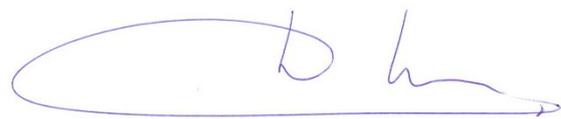
- to increase the references period for technical capacity from 3 to 5 years,
- to reintroduce the pre-information notice (PIN) as mandatory,
- to use restricted procedures only in service tenders,
- to publish short lists notices for restricted procedures in service tenders,
- to use a best price quality ratio (BPQR) of at least 80/20 for knowledge-based service tenders,
- to increase transparency on the applicable tax regime with EU External Aid,
- to address security issues in the procurement process,
- to go 100% digital and green.

We thank you in advance for your attention and consideration, and our Federations remain of course open to constructive exchanges on these important subjects.

Yours Sincerely,



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ANNEX: Recent changes in PRAG and issues deriving from the Financing Regulations

*The **European Federation of Engineering Consultancy Associations (EFCA)** has member associations in 29 countries, and is the sole European Federation representing the engineering and related services industry. EFCA also represents FIDIC (The International Federation of Consulting Engineers) in Europe. The EFCA's European External Aid Committee monitors developments within the European institutions involved in external aid such as the EC, EIB, KfW, AfD, and the EBRD.*

*The **European Federation of Management Consultancies Associations (FEACO)** has the purpose to assist in the promotion and development of the profession of Management Consultancy in Europe. The FEACO Procurement Committee (FPC) has been running for more than 20 years and is dedicated to follow all activities that the International Financing Institutions (IFI's) drive around Development Aid financing, policies and more particularly their related procurement procedures.*

Copy:

- ▶ **EESC European Economic and Social Committee**
 - B1 REX, Head of Unit
 - D5 CSS, Head of Unit
- ▶ **EUROPEAN COUNCIL**
 - Head of Cabinet
 - Chief Foreign Policy Advisor
- ▶ **PERMANENT REPRESENTATIONS TO THE EU**
 - Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden

RECENT CHANGES IN PRAG AND ISSUES DERIVING FROM THE FINANCING REGULATION

1. REFERENCE WINDOW

Article 20.2 (b) (i) of the Annex 1 of the FR indicates that *the contracting authority shall define in the procurement documents the evidence to be provided by an economic operator to demonstrate its technical and professional capacity. It may request one or more of the following documents: (i) **the principal services provided and supplies delivered in the past three years ...;***

The last PRAG revision (2020) has restricted the technical and professional capacity to portion of contract carried out “during the references period of 3 years” only.

The Federations believe this restrictive window period **is not proportionate** and leads to:

- (a) Distortion of competition by having only a few applicants with qualifying references, or extremely large, unnecessary, and ineffective Consortia. With such a restrictive reference period, European Economic Operators will face a shortage of available technical references, and even more so after the COVID-19 pandemic.
- (b) Restriction of competition and market access for European SMEs that already have difficulties to comply with the technical requirements. It jeopardizes the emergence of new actors in external aid and bring the risk of monopole positions.
- (c) Additional and unnecessary administrative difficulties for both Contracting Authorities and European Economic Operators to prove and assess the exact portion of services carried out “during the references period” only. This situation is even worsened as the Contracting Authorities often restricts the reference to a certain type of activities carried out in the context of the referenced project.

We believe that the principles set out in EU Directive 2014/24/EU on public procurement should be clearly reflected in the FR and more precisely Article 18 stating that: *“The design of the procurement shall not be **made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition** [...]”*

It is also clear from the Directive preamble that competition shall not be artificially restrained and shall ensure SMEs’ participation, particular point (2): *“[...] the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council ... and Directive 2004/18/EC of the European Parliament and of the Council ... should be revised and modernised **in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals**[...]”*

☛ Our Federations therefore suggest to:

1. Set the reference period to **5 years by default**, as it is the case for Works Procurement.
2. Allowing Economic Operators to demonstrate their technical and professional capacity from:
 - The entire project’s reference if the project has been successfully completed during the reference period (as it was the case on all previous PRAG versions).
 - The part of the projects successfully carried up to the date of the procurement notice for projects not yet completed during the reference period.

2. REINTRODUCTION OF PRE-INFORMATION NOTICE (PIN)

Article 2.2 of the Annex 1 of the FR indicates that “*The contracting authority may make known its intentions of planned procurement for the financial year through the publication of a prior information notice. It shall cover a period equal to or less than 12 months from the date on which the notice is sent to the Publications Office of the European Union (the Publications Office)*”. The new PRAG revision (2020), while it does recommend the use of PIN, **does not make it mandatory anymore**.

The Federations believe that the publication of a PIN is a **very important element in the procurement cycle, critical for strategic planning and commercial decisions**. It is considered an **international good practice in procurement** maximising value for money and encouraging International competition.

- ☛ The Federations support the re-introduction of a **mandatory PIN** for EU external aid procurement.

3. NEED FOR RESTRICTED PROCEDURES IN SERVICE TENDERS

Preparing quality service tenders for EU External Aid is complex and requires significant resources from Economic Operators, so the decision to tender makes sense if the competition is limited. The use of Open Procedure leads to excessive preparation costs for firms and requires more technical capacities for Contracting Authorities.

- ☛ The Federations encourage the use of **mandatory restricted procedure** for tenders in EU external aid above the threshold for services tenders. It will be more attractive for Tenderers and will help to improve the quality of tenders.

4. PUBLICATION OF SHORT LIST NOTICE FOR RESTRICTED PROCEDURES IN SERVICE TENDERS

The restricted procedure in service tenders is a two-stage procedure. The first stage is a pre-selection process thru an *Application Form*, where the candidate’s capability, capacity, and experience to perform the contract are assessed. This means the number of tenderers can be reduced in that stage.³

The second stage is an *Invitation to Tender* sent to the prequalified tenderers only. The tenders are assessed to determine the most economically advantageous tender, the basis of contract award.

In the restricted procedure for EU external aid, the publication of the list of prequalified tenderers (also known as *Shortlist Notice*) was a **standard practice since that procedure exists**. The shortlist was published on the DEVCO/INTPA website as soon as the evaluation was completed and included in the tender dossier sent out to all prequalified tenderers.

The communication of the shortlist of prequalified tenderers immediately after the evaluation of all Application Forms is a **standard practice in International Financing Institutions**⁴ as well as in **Bilateral Development Agencies** of EU Members States.⁵

This two-stage procedure and the communication and publication of the shortlist of prequalified tenderers after the evaluation of the Application Forms have numerous advantages for all actors:

³ Under PRAG, for service tender, the maximum number of candidates is limited to 8 – see PRAG 3.4.2 – Drawing up shortlist.

⁴ European Investment Bank, European Bank for Reconstruction and Development, World Bank Group, Asian Development Bank, etc.

⁵ Agence Française de Développement – France, Kreditanstalt für Wiederaufbau – Germany, etc.

- a) For Economic Operators, and especially SME's, it allows them to be more **cost-effective** with the contracts they decide to tender for, and increase their chances of award;
- b) For Contracting Authorities, in addition to reducing the number of proposals to evaluate, it **encourages quality and innovation** as Economic Operators are keen to invest in tenders when they know they have better chances of getting the contracts;
- c) It **exposes potential conflicts of interest** of prequalified tenderers;
- d) It adds **transparency and fairness** to the procurement process;
- e) **SME's and individual experts** can offer their services as subcontractors to prequalified tenderers.

However, in the last PRAG revision (2020), the Commission has changed this process and decided that the shortlist notice **would be published together with the award notice on TED**⁶. Consequently, the prequalified tenderers and potential subcontractors would no longer be informed about the list and number of the prequalified tenderers before the contract is awarded.

The Commission justifies this change on the ground of harmonisation on the rules in force in internal procurement and based on the DG BUDGET vade-mecum on public procurement, in section 4.5.3 *Selection of candidates*, that provides: [...] *"If any candidate requests information about the selection of other candidates, it should not be given this information until the time limit for receipt of tenders has elapsed. Indeed, there is a risk of collusion between selected candidates and a risk of transmission of this information from non-selected candidates to selected candidates"*.

The obligation of information and publication is however well stated in the Annex 1 of the Financing Regulation (FR) in its articles 31.1 and 38.3:

- 31.1 *"[...] the list of selected candidates shall be published on the Commission's website [...]"*
- 38.3: *"The contracting authority shall inform all candidates or tenderers, simultaneously and individually, by electronic means of decisions reached concerning the outcome of the procedure **as soon as possible** after any of the following stages:
(a) the opening phase for the cases referred to in Article 168(3);
(b) a decision has been taken on the basis of exclusion and selection criteria in procurement procedures organised in two separate stages;
(c) the award decision
[...]"*

The Commission argues that the requirement to publish the list of selected candidates as stated in point 38.3 of Annex 1 to the FR **does not set a date or timeframe for this publication** and only provides that *"...the list of selected candidates shall be published on the Commission's website"*.

Our Federations consider that by changing the principle of publication of *Shortlist Notice*, the Commission is **deflecting a major element of the restricted procedure** and leading to the loss of all the advantages of the restricted procedure towards the open procedure.

Moreover, the "risk of collusion" as announced by the DG BUDGET vade-mecum on public procurement is immeasurably smaller than the loss of all the benefits of publication of the list of prequalified tenderers directly after its completion. In addition, this risk is not corroborated by any objective cases or statistics and is not a specific risk related to the restricted procedure.

⁶ TED (Tenders Electronic Daily) is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement.

- ☛ The Federations suggest that the Financial Regulation should **confirm the obligation to publish the Shortlist Notice after the evaluation of the Application Forms in TED and its disclosure in the Invitation to Tender to all the prequalified tenderers.**

5. BEST PRICE QUALITY RATIO (BPQR) OF AT LEAST 80/20 FOR KNOWLEDGE-BASED SERVICES

The Article 67 of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement introduces the notion of *Most Economically Advantageous Tender (MEAT)*: Contracting Authorities are encouraged to use other criteria than price only.

Award based on MEAT⁷ brings the **best value for money** to Contracting Authorities as it combines economic and non-economic criteria that meets the Contracting Authorities requirements with a view to achieve an optimum combination of costs and required quality.

- ☛ The Federations advocate to **maintain a minimum Quality / Price ratio of 80 / 20** for procurement of services contract in EU External Aid.

6. TRANSPARENCY ON TAX REGIME WITH EU EXTERNAL AID

The tax regime applying to European Economic Operators performing services contract financed by EU external aid – in direct or indirect management - is suffering lack of transparency:

- The tax conditions applying to EU external aid projects and eventually agreed between the EU and the partner/benefiting country of EU Assistance are often **not stated in the Tender Dossier**.
- The financing agreements signed between the EU and the partner/benefiting countries are **considered as confidential and therefore not accessible**. Additionally, *“provisions granting tax exemptions for aid projects are often included in agreements that are not public and that may be negotiated without the involvement of the tax authorities. Sometimes, a tax administration does not even have access to the wording of these provisions even though it is responsible for their application.”*⁸
- Tender Dossiers may sometimes contain information about taxes⁹, but it refers to custom taxes, import duties and VAT only while **direct taxation is not addressed**.
- Responses to requests for clarification about taxes during the tender procedure often just refer to the tender dossier rather than replying to the request. It demonstrates that the Contracting Authorities **are not able to give a clear answer**.
- On the EDF, the Cotonou agreement and its subsequent Economic Partnership Agreement (EPA) foresee a *Most Favoured Nation (MFN)* clause. The MFN clause requires the partner/benefiting countries to extend to the EC [and its Economic Operators] any more favourable treatment that they may grant to other developed and major developing economies. **It is not possible in practice** for an Economic Operator applying for EU-funded projects to clearly identify and access the details of these “more favourable treatment”.

⁷ Also known as *Best Price Quality Ratio (BPQR)*

⁸ Committee of Experts on International Cooperation in Tax Matters - Twenty-first session of 20-30 October 2020 - Revised Guidelines on the Tax Treatment of Government-to-Government Aid Projects <https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-10/CRP30%20Revised%20Guidelines%20Taxation%20GtoG%20aid%20projects%201OCT2020.pdf>

⁹ under *Annex b8b Instructions to tenderers: The applicable tax and customs arrangements*

- Double Taxation Agreements (DTA) between two or more countries are International Treaties that may also define specific tax regimes depending on the country of registration of the Economic Operator.

Consequently, with EU External assistance being delivered in more than 100 countries, it is not realistic nor feasible for a European Economic Operators, especially SME's, to assess the exact tax regime under which the project will be carried out.

This situation brings an atmosphere of **legal and fiscal uncertainties** that prevent European SME's to apply for projects or that can expose them to severe fiscal problems or financial losses.

- ☛ The Federations advocate for **full transparency on tax regime to be applied**. The Tender Dossier should indicate: (a) whether or not an European Economic Operator will need to formally register in the benefiting country for implementing the project; and (b) what precise direct and indirect tax regime will apply to the project and to the Economic Operators implementing it.

7. SECURITY ISSUES TO BE ADRESSED IN THE PROCUREMENT

There is an urgent need to provide more security in contract delivery in an increasingly instable, uncertain, and unpredictable world (i.e. terrorism acts, humanitarian crisis, natural events, pandemics, etc.). The last two decades have demonstrated that **organised crime and terrorism are an increasing threat** in many countries. Both Federations believe that this threat must be systematically addressed in the procurement of European Union external actions.

The current PRAG foresees the possibility to include a special security provision in the incidental expenditure, *when considered necessary by the Contracting Authority*.¹⁰, so it is left at the discretion of each Contracting Authority.

However, we believe that the assessment of the security risk is very different depending on whether one belongs to a governmental organization or an international institution that benefits from constant and consequent means of protection. Many Economic Operators, particularly SME's, **cannot analyse or cover these risks**, and the scope of work often implies travelling to remote or poorly accessible areas where the risk of terrorist attacks and other security risks are very high. If there is not security provision in the incidental expenditure, there is also a risk of distortion of competition as only large firms are able to cover them.

- ☛ The Federations consider that the cost of protection of goods and persons **must be considered in the calculation of project costs** under incidental expenses, and this without exception in all countries where the Delegation of the European Union itself or its personnel benefit from exceptional security measures.

¹⁰ PRAG Terms of Reference for fee-based service contracts (Annex b8e)

8. LETS'GO 100% DIGITAL AND GREEN

The unprecedented Covid-19 crisis has demonstrated the benefits of using digital means. Going digital, is also more **environment-friendly** and **increases our resilience** to future pandemics and natural disasters. In this context, the Commission digitalisation of the procurement process is welcome.

The validity of electronic signature, for example, is also confirmed by Regulation (EU) No 910/2014¹¹ in its Article 25 clearly stating that *qualified electronic signature shall have the equivalent legal effect of a handwritten signature*.

We need to go further in this process: the **acceptance of electronic documents** for Application Forms and Tenders, the exchange of scanned copies of contracts in electronically signed pdf format, and the acceptance of invoices and accompanying reports and supporting documents by e-mail, should be the **new standard** and not considered as an exceptional measure. It is no longer reasonable to require, as is still too often the case, the submission of original documents or signatures.

- ☛ The Federations suggest that the Financial Regulation should unambiguously (re)confirm that the objective is to make the public procurement and project implementation process **100% digital and green**.

¹¹ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC