



Brussels,
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Dear Ms Ferguson, Dear Mr Wynrocx,

Thank you for your letter of 30 March 2021¹, which helps us to understand the challenges that the consultancy companies face when participating in tender procedures, and to reflect on possible changes in the future.

Before addressing the questions you raised, I would like to explain the reasons behind some of the changes introduced in PRAG that you have called into question. The objective of these modifications is twofold: (i) harmonisation with rules applicable to public procurement in other policy fields; (ii) sound financial management and protection of the Union's financial interests by applying best practices in the field of public procurement.

With these changes, PRAG aligns with the European Commission's practices in contract award procedures in internal policies, which are also subject to the same principles enshrined in the Financial Regulation (FR). To be noted that this convergence also takes place in the context of transition to e-procurement, using IT corporate solutions.

Please find below our response to the comments raised in your letter.

1. Technical & professional capacity criteria window

As already clarified previously, the reference period for technical & professional capacity in the PRAG 2018 is in line with the provisions of point 20.2 (b) (i) and second subparagraph of Annex I to the FR, which were consistent in that regard since the 2012 rules of application. The reference period in those provisions is by default set at 3 years, except where, in order to broaden the access of economic operators including SMEs to procurement opportunities, the Contracting Authority wishes to extend this reference period beyond three years.

¹ Ares(2021)2437571.

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The PRAG already includes the possibility to take a longer period into account. This has been highlighted in the PRAG and in point 18 of the annex complementing the contract notice: “where necessary in order to ensure an adequate level of competition, the contracting authority may indicate that evidence of relevant services performed or relevant supplies delivered more than 3 years before will be taken into account”².

As for the post pandemic situation, besides the above-mentioned possibility to expand the reference period for technical capacity, the next PRAG will intend to clarify the type of information regarding the annual turnover of the candidate.

2. Reintroduction of prior information notice (PIN) as mandatory

PRAG 2020 has removed the obligation to publish prior information notices for reasons of harmonisation across the European Commission fields of activity, as it is not an obligation imposed by the FR. However, this is still a recommended practice. Please note that if no prior information notice is published, the procurement procedure starts from the publication of the contract notice.

3. Need for restricted procedures in service tenders

While the restricted procedure remains the option by default, the open procedure is a possibility, since 2018 FR, for external actions, and might be used where the contracting authority considers that the arrangements governing the restricted procedure will not result in the best value for money.

4. Short lists notices for restricted procedures in service tenders

While the Financial Regulation requires the publication of a shortlist in the field of external actions (point 38.3 Annex I of the FR), it gives discretion to the Commission to choose the moment (based on the different options given in point 31.1 of Annex I³). In this context, consideration must be given to sound financial management and the protection of Union financial interests, by reducing any risks of collusion. Risks of collusion cannot be underestimated and its prejudice is not “*immeasurably smaller*” to the alleged benefits you identify. Collusion essentially undermines the benefits of a fair, transparent, competition-driven and investment-oriented procurement market by restricting the access of companies to that market and limiting choice for public buyers.

In this regard, in order to reduce any risk of collusion, it is best practice to “*hinder speculation among the bidders regarding the number and identity of their possible competitors*”, and to “*keep the identity of bidders undisclosed as far as possible to make it more difficult for cartel members to contact all bidders*”⁴.

² Additional information about the Contract Notice, PRAG Annex A5f.

³ Point 31.1 cannot be interpreted as referring to the shortlist, but has to be read in conjunction with the information rights candidates and tenderers have as per Article 170 Financial Regulation.

⁴ “Fraud in Public Procurement: A collection of Red Flags and Best Practices”. Working document developed by a working group of Member States' experts, directed and coordinated by the Fraud Prevention, Reporting and Analysis unit in the European Anti-Fraud Office (OLAF).

It can be consulted at: https://ec.europa.eu/sfc/sites/default/files/sfc-files/Fraud%20in%20Public%20Procurement_final%2020.12.2017%20ARES%282017%296254403.pdf.

See also 2012 Recommendation of the OECD Council on fighting bid rigging in public procurement, and OECD 2016 Report ‘Fighting bid rigging in public procurement’ (p. 42: « To the extent possible, qualify

The same principles are laid down in the European Commission Notice (2021/C 91/01) of 18 March 2021 on tools to fight collusion in public procurement⁵. This Notice underlines that the procurement officer (i.e. the person in the forefront of an award procedure) plays a central role in minimising the risk of collusion in public procurement and addressing collusion when it occurs. While designing award procedures the procurement officer is required to use methods to raise economic operators' awareness of potential consequences and to discourage them from colluding and in particular to “*consider carefully what information to disclose during the award procedure. You do not need to go beyond what is required by European and national law. If possible, avoid disclosing information (such as who submitted a tender, for which price, the details of the procedure, etc.) that could facilitate contacts between operators or allow colluders to easily check whether they have all followed the terms of their illicit agreement when participating in award procedures*” (emphasis added).

I am sure that FEACO and EFCA, as federations whose role is to promote best practices among their members, embrace the same principles.

With regard to the principle of transparency, you mention that this change “*decreases transparency in the procurement process*”. I wish to clarify that a later publication of the shortlist notice does not imply a breach of the principle of transparency. This principle implies an obligation to ensure adequate advertising as well as fair and impartial procedures⁶.

This obligation is fully ensured in the PRAG by:

- publishing contract notices in the Official Journal and on dedicated EU websites, such as the Funding & Tenders opportunities Portal⁷ do ensure a wide advertisement to the market,
- laying down clear and precise rules governing contract award procedures.

The principle of transparency does not imply, as you infer, a duty to publish a shortlist.

In this regard, I remind you that the tenderers, in the signed declaration submitted with their tender, have to confirm in all conscience that they “*have no professional conflicting interests and/or any relation with other short-listed candidates or other parties in the tender procedure or behaviour which may distort competition at the time of submitting this tender according to Section 2.5.4. of the PRAG*” (emphasis added).

Contrary to what you state in your letter, this change aims at increasing fair competition and avoid any risk of collusion at tendering stage, in line with best practices within the Union and at international level. The purpose is thus to encourage competition so that

bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.”).

⁵ Notice fight collusion in public procurement and on guidance on how to apply the related exclusion ground, (2021/C 91/01) [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC0318\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC0318(01)&from=EN)

⁶ Cases C-324/98, Telaustria, [2000] ECR I-10745, paragraph 62, and C-458/03, Parking Brixen, judgment of 13.10.2005, paragraph 49.

⁷ <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/home>

candidates prepare their bids in an autonomous way in view of the award criteria, terms of reference and any other information included in the invitation to tender.

5. Best price quality ratio (BPQR) of at least 80/20 for knowledge-based service tenders

The current situation where the quality/price ratio is set at 80/20 is indeed quality driven and is applied to services tenders. However, this ratio is not set by the FR and the Commission, when determining the applicable ratio, will always opt for those ratio that favour both competition and the protection of the EU's financial interests.

6. Transparency on the applicable tax regime with EU External Aid

In this regard, it is important to highlight that each tenderer or candidate is indeed expected to know the tax regime applicable to the project to which they intend to participate. Before tendering, the tenderer must be aware of the applicable tax regime when preparing the financial offer. The contracting authority will in turn ensure the transparency of the tax regime specifically agreed with the partner country, if any, so that tenderers have the necessary information about the degree of exemption that that country applies to EU funding.

For that purpose, the instructions to tenderers shall include information regarding specific arrangements agreed with the partner countries on taxes. The information to be inserted depends on the third country where the project is located and applicable financing agreements or other administrative arrangements.

However, considering the number of countries in which the EU implements external action projects, it is not possible to provide single answers to the questions you raise. This is the reason why clarifications can be requested from the contracting authority when the tax conditions agreed between the EU and the partner country have not been clearly stated in the tender dossier.

7. Security issues to be addressed in the procurement process

On this point, we need to reiterate the fact that including an amount for security costs in the project budget is an operational decision taken by each contracting authority which is assessed on its own merits. Even if the budget contains a fixed provision for incidental expenditure (IE), the budget for IE is fixed by the contracting authority on a case-by-case basis and the general rule is that the items included under IE should be kept at a minimum. However, PRAG templates apply to all external action instruments (except for humanitarian assistance) and are flexible to fit any type of procurement contract regardless of its nature (organisation of events, capacity building, etc.) or location.

Moreover, we want to underline that DG INTPA has no specific guidance on IE management rules, but only gives recommendations to HQ and EU Delegations during trainings or specific Finance & Contracts working groups for example. General information on IE can be found in the PRAG, section 2.8, and in the template of terms of Reference for fee-based contracts (annex b8e to the PRAG).

8. Let's go 100% digital and green

DG INTPA has already been moving into a 100% digital and green public procurement and project implementation, since the 2018 European Commission Digital Strategy. DG INTPA participates actively in corporate IT developments. As you may know, the focus of the IT strategy is now the operationalisation of OPSYS, a modern IT system currently being built with one overarching goal: the delivery of trusted services providing fast, reliable and secure access to relevant, high quality and protected information. OPSYS is a large-scale business transformation introducing a more efficient, transparent and results-oriented planning, management, and follow-up of EU external actions. Please note that OPSYS covers the entire project cycle of the different Commission services responsible for external action. .

In order to make OPSYS operational and to consolidate full digital transformation, DG INTPA's objectives are indeed to guarantee the authenticity, availability and integrity of supporting documents in compliance with the rules of the Commission (eDomec) and to ensure paperless procedures in OPSYS by the use of digital formats for all the supporting documents and by the progressive integration of advanced or qualified electronic signature in replacement of handwritten formats, according to legal obligations.

Until the deployment of OPSYS, some measures are already being implemented, like the progressive introduction of electronic signatures compliant with the eIDAS Regulation standards (qualified electronic signatures, QES). The new PRAG 2021 will provide additional information in this regard. I encourage FEACO and EFCA members to make full use of this new tool.

We hope this answered the concerns you raised and we look forward to our further cooperation.

Yours faithfully,

Electronically signed

Koen DOENS