



EUROPEAN COMMISSION
 DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT
 Directorate B. Multilateral relations, quality policy
B.5. Promotion

Brussels, 07.07.2016
 DDG1.B5/MJ/db D(2016)3210777

GUIDANCE ON COMPETITIVE PROCEDURE

The purpose of this note is to provide guidance on the application of the competitive procedure for the selection of implementing bodies in case of simple programmes. It is addressed to non-public organisations acting as applicants/beneficiaries. It also aims at providing clarity to the competent services of the Member States on what is expected from a competitive procedure.

CONTEXT

The basic act¹ empowers the Commission to adopt delegated acts setting out the conditions governing the competitive procedure for the selection of the implementing bodies.

Article 2(1) of the delegated act² requires that the proposing organisations select the bodies responsible for implementing simple programmes ensuring a competitive procedure aimed at offering best value for money without any conflict of interests.

According to the implementing Regulation³, Member States have an obligation to verify that the implementing bodies have been selected in accordance with the competitive procedure provided for in Article 2 of the Delegated Regulation before they conclude contracts with the selected proposing organisations.

This guide does not concern cases when a proposing organisation is a body governed by public law within the meaning of Directive 2014/24/EU (or Directive 2004/18/EC); Article 2(2) of the delegated act requires such proposing organisation to select implementing bodies responsible for implementing of simple programmes in accordance with the national legislation transposing that Directive.

In addition the conditions set out in the Grant Agreement (GA)⁴ apply. According to Article 10 of the GA the two following conditions - best value for money (or, if appropriate, the lowest price) and conflict of interests – are to be respected. Similarly,

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R1144&from=EN>, Article 13(1)

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R1829&from=EN>

³ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R1831&from=EN>, Article 10(3) and Article 18

⁴ H2020 AGA — Annotated Model Grant Agreement: V2.1 – 30 October 2015 General MGA, http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/amga/h2020-amga_en.pdf

these conditions are to be fulfilled also when beneficiaries acquire goods, works and services (cf. Article 9 of GA).

1. BEST VALUE FOR MONEY

According to the explanation provided in the annotated MGA H2020⁵, beneficiaries have to base their subcontracts on the ‘best value for money’ (also called ‘best price-quality ratio’) thus considering the quality of the service proposed. For the best price-quality ratio, price is an essential aspect (together with quality criteria, such as technical quality, etc.), but it is not automatically necessary to select the offer with the lowest price. In order to provide a good analysis of the price-quality ratio, the criteria defining ‘quality’ must be clear and coherent with the purposes of the action task that is subcontracted.

The best value for money principle does not require competitive selection procedures in all cases. However, if a beneficiary did not request several offers, it must demonstrate how best value for money was ensured⁶.

2. CONFLICT OF INTERESTS

The beneficiaries have to take all measures to prevent any situation where the impartial and objective implementation of the programme would be compromised for reasons involving economic interest, political or national affinity, family or emotional ties or any other shared interest (‘conflict of interests’).

Article 20 of GA concerns the conflict of interest. Annotated H2020⁷ provides the explanations and examples of the conflict of interests as follows:

The beneficiaries (and linked third parties) must ensure that the action is implemented impartially and objectively, as described in the GA. They must do their best to avoid conflicts of interest.

A ‘conflict of interests’ exists if **shared interests**:

- influenced the contract’s/subcontract’s selection/award procedure
- influenced the contract’s/subcontract’s price and this does not correspond to the market price or
- affected the action’s performance, as measured by the appropriate quality standards.

These interests may be:

- **economic interests** (*e.g. unjustified and preferential contracts or*

⁵ H2020 AGA — Annotated Model Grant Agreement: V2.1 – 30 October 2015 General MGA, http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/amga/h2020-amga_en.pdf, p. 131

⁶ NOTE FOR THE ATTENTION OF THE MEMBERS OF COMMITTEE FOR THE COMMON ORGANISATION OF AGRICULTURAL MARKETS – PROMOTION, Ares(2016)438327 - 27/01/2016

⁷ H2020 AGA — Annotated Model Grant Agreement: V2.1 – 30 October 2015 General MGA, http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/amga/h2020-amga_en.pdf, p. 239 - 240

subcontracts with connected companies (not based on best value for money, technical merit, etc.))

Examples:

A beneficiary subcontracts work to another legal entity at above the market prices because it is a shareholder or has economic interests in this other legal entity.

A university subcontracts work to a consultancy firm owned by a professor carrying out part of the work for the project in which the university participates.

A university gives a preferential subcontract to its spin-off company: the contract is not based on the best value for money principle (i.e. the price is higher than the general market price for the same type of service).

- **political or national affinity** (e.g. beneficiaries or third parties are chosen, or research-related decisions are adopted, based on political considerations, connections or national affinity)

Example: *The choice of an action's demonstration site is based on national affinities, not on the site's merits. H2020 AGA — Annotated Model Grant Agreement: V2.1 – 30 October 2015 General MGA*

- **family or emotional ties** (e.g. contracts or subcontracts made with family members for their benefit)

Example: *A husband works for a beneficiary who subcontracts work to an SME owned by his wife.*

- **other shared interests.**

Examples:

If a beneficiary or third party participates in the action not because of its technical capacity and objective merits, but because it has a close relationship with someone else working for the action, and this affects the action's implementation.

If decisions made in the context of the action are taken not according to objective and impartial criteria, but because of these shared interests.

If entities with close ties create a professional relationship with the intention of being part of the action in order to satisfy other interests, and as a result, the quality of the implementation is (or is likely to be) compromised.

If there is a **(risk of) a conflict of interests**, the beneficiary must **inform** the Commission/Agency (via the electronic exchange system, *see Article 52*), so that steps can be taken to resolve or avoid it.

This may result in the Commission/Agency putting in place certain measures.

Although not limitative, these examples provide a good basis for the Member States for the development of their own guidelines.

COMPETITIVE PROCEDURE GUIDELINES

The Delegated act allows for a certain leeway on how a competitive procedure may be organised by potential beneficiaries for the selection of the implementing bodies, provided that the two conditions laid down in this act are respected.

However, the Basic act requires a competitive procedure in all cases, irrespective of whether a proposing organisation is non-public or public. Public organisations are subject to the national rules that transpose the Public Procurement Directive (which by definition ensures compliance with the "competitive procedure" principle); these rules however do not apply to non-public organisations.

Considering that implementation of promotion programmes is not confined to a limited part of the programme the amounts of EU contributions used by subcontractors are normally substantial.

In view of the above, and in order to ensure transparency, equal treatment between economic operators and adequate management and control, it is appropriate that Member States establish a 'competitive procedure' laying down the criteria to be respected by non-public organisations.

Establishing the criteria for a 'competitive procedure' should take into account that the weight and complexity of the procedure should be proportionate to its economic importance whilst ensuring the fundamental principles of the EU Treaty: non-discrimination, equal treatment as well as full transparency on the selection and award criteria to be applied. This would require at least the following:

- the contract notice is published and adequately advertised;
- sufficient time for the receipt of tenders is provided;
- an objective and non-discriminatory evaluation of the tenders
- the assessment of any possible conflict of interests.

Reference is made to the provisions of Title V of the Financial Regulation⁸

For low-value **contracts**, a negotiated procedure without prior publication of a contract notice with consultation of at least three candidates may be used, or any other alternative method ensuring that the best value for money has actually been achieved.

In case a beneficiary has an existing **framework contract** with an implementing body, the latter can be used if the conditions (best value-for-money and absence of conflict of interests) have been complied with at the time of their award⁹.

The existence of national rules that would guarantee a competitive procedure may be subject to audit within the conformity clearance procedure.

⁸ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1); Synoptic presentation of Financial Regulation applicable to the general budget of the Union and its rules of application accessible at http://ec.europa.eu/budget/biblio/publications/publications_en.cfm

⁹ **Questions & Answers** at http://ec.europa.eu/agriculture/promotion/policy-post-2015/qa_en.pdf (Ares(2016)1196729 - 09/03/2016)