

**EUROPEAN COMMISSION
International Cooperation and
Development
DEVCO R3 - Legal Affairs
Mrs. Sandra BARTELT
Director**

Brussels, 25 April 2019

Subject: European Service Providers comments to the PRAG 2018

Dear Mrs Bartelt,

We refer to your presentation on the new version of the Practical Guide at the EFCA External Committee meeting last September 2018, for which we thank you again.

In general, we would like to stress the importance of keeping a specific set of rules for the EU external action, particularly in low and middle-income countries. Operating in this context requires specific Procurement and Contracting Rules that may be less relevant or not even applicable when doing business inside of the EU.

Other International Institutions providing Official Development Assistance (ODA) have found interesting ways to address, in line with their respective Procurement Rules, some of the issues that Contractors/Consultants face when implementing projects in developing countries, and we would like to exchange on the ones that could be useful to introduce in the PRAG.

Our Federations consider that some principles are essential to preserve a *fair, equitable, transparent* and *accessible* procurement system. As agreed during the meeting, our Members have reviewed the new version of the PRAG and we would like to share with you the critical elements that we believe should be addressed when tendering outside the EU:

1. A **restricted procurement procedure**, whereby tenderers have knowledge of their competition, in conjunction with **Prior Information Notices**, enabling companies to set up their strategies well in advance, either alone or in partnership(s);

➡ We strongly recommend maintaining them.

2. The use of a **quality-cost evaluation ratio of minimum 80/20**, making quality the main element of award to get value for money;

➡ We strongly advise to keep the 80/20 ratio.

3. A **two-envelope system**, that prevents any bias coming from price during the evaluation process;

In the latest version of PRAG, a financial offer that does not respect the principle of double envelope (ie a separate "financial" envelope from the technical offer) would not automatically lead to a rejection of the offer. We believe the double envelop system ensures neutrality and objectivity in the tender-award decision, as it reduces the risk of biased technical evaluation where price considerations may take precedence over quality.

➡ In this sense we advise that a financial offer that is not in a separate envelope from the technical offer should lead to the automatic rejection of the bid, both in calls for service tenders and in Framework Contracts.

4. Technical & professional capacity criteria window of the last five years

With the objective to enlarge competition and allow SMEs to actively participate in the DEVCO market, both Federations have long advocated for an extension of the validity of technical & professional references to 5 years instead of 3. This has led to modification of the financing regulation and of the previous version of the PRAG to allow evidences of technical & professional capacity up to 5 years by default. Returning to the 3-year period is a real step backwards that will exclude many companies that are currently active in the market.

Furthermore, we have reasons to believe that such limitation contradicts the principles stated in the “European code of best practices facilitating access by SMEs to public procurement contracts”, which among other principles includes “setting proportionate qualification levels and financial requirements”, as well as of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, which at art (78) reads “Public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of best practices set out in the Commission Staff Working Document of 25 June 2008 providing guidance on how to apply public procurement framework to facilitates SME participation”.

➔ We advise to reintroduce the 5 years reference period by default.

5. Reasonable financial selection criterion

The frequently used financial criterion refers to “current assets/current liabilities to be at least 1”. This criterion was raised to “1 to 3” in previous editions of the PRAG and it had to be changed due to the harm it caused to many European companies active in the DEVCO market.

➔ We advise to keep the minimum criterion at reasonable levels.

6. Adequate staff qualification’s requirements

We believe that 10 years of relevant experience is enough for senior experts to perform successfully, and it also avoids having very senior teams working in challenging environments where adaptability and flexibility can be key for a successful project outcome. Additionally, it also opens opportunities for younger professionals, which are much needed in this market.

➔ We advise not to advantage most senior experts through the qualification’s requirements.

7. Standard expert’s curriculum vitae length and format

The use of Excel format for a curriculum vitae is not a standard professional practice. DEVCO is the only ODA Institution using this format. In addition, we would suggest allowing CVs of 4 pages instead of 3 to allow more work period to be included. Also, under the current format it is not clear how to reflect part time activities that an expert carried out during the same period.

➔ We recommend going back to a Word format for CVs and advise to allow 4 pages.

8. Reasonable supporting documents for staff requirements

In consideration that standard work certificates do not include the number of working days, additional justifying documents should be accepted. Permissible documentary evidence should not be restricted to an employment certificate: other valid proofs should also be allowed such as signed contracts or received payments.

➔ We believe that a broader list of acceptable proofs could be included in the PRAG.

9. Separate definition of “conflict of interest” & “unfair competition”

A situation of “unfair competition” that would prevent a company or an expert of participating in a tender is often confused with a “conflict of interest” that refers to a situation in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity.

- ➔ In order to avoid different interpretations and definitions from Contracting Authorities, we suggest that a general definition of “unfair competition” and “conflict of interest” together with examples could be included in the PRAG.

10. Clear taxation conditions

An indication of the taxation conditions – both direct and indirect - for each tender should be stated in the tender document to allow tenderers to quote adequately their offered price. It would also avoid unfair competition depending on the tenderer’s country of registration. Other ODA Institutions are addressing this issue clearly in their tenders.

- ➔ Taxation on Service Contracts financed by the EU budget is a very complex subject. Our Federations are ready to work closely with R3 to analyse the issue and identify possible solutions and adequate wording.

11. Security and safety issues being considered in tenders

We refer to our letter of 24th October 2017 to Mr. Manservisi describing the issue of Security & Safety for EU External Aid contracts and his response dated 14th November 2017 (see annex). Unfortunately, we do not see any changes on this subject in the current PRAG while other ODA Institutions have already addressed this. As an example, The French Development Agency (AFD) has now added in its service tender dossier a full provision, with the necessary financing, as well as the obligations of the Parties for safety & security measures in countries presenting a potential risk.

- ➔ We urge the European Commission to take position of this matter and to provide for financing of adequate and standard security and safety measures in DEVCO tenders.

12. Audit of Service Contracts in line with General Conditions

There is an increasing number of Global Price Contracts rather than Fee-based. The Terms of Reference for expenditure verification have not been adapted to that change and are not in line with the General Conditions for Global Price contracts. This discrepancy brings confusions to both auditors and the audited companies.

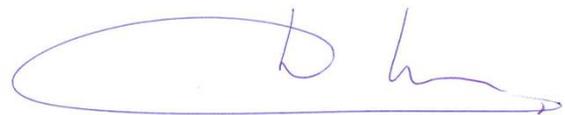
- ➔ We suggest that the European Commission adapt the ToR for expenditure verification to cover adequately Global Price Contracts.

We thank you very much for taking these comments into consideration and our Federations would be honored to exchange constructively with your team on these issues.

With best regards,



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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 15 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.

The European Federation of Engineering Consultancy Associations (EFCA) has member associations in 25 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 EIB, CEB, EBRD, EU and bilateral Aid of European Countries.

Annex: letter of 24th October 2017 to Mr. Manservisi & his answer from 14th November 2017

**EUROPEAN COMMISSION
Directorate General International
Cooperation and Development – DEVCO
Mr. S. Manservisi,
Director General**

**Rue de la Loi, 41
B-1049 BRUSSELS**

Brussels, 24 October 2017

Concern: Safety and security in EU external actions

Dear Mr. Manservisi,

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 15 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.

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Safety and security in EU external actions

It is an incontestable fact that there is need to ensure more security in a World that has become very instable (terrorism acts, humanitarian crisis, natural events etc.). The recent decade has demonstrated – if needed – that organised crime and terrorism are an increasing threat in many countries, including within our European societies.

Our both Federations believe that this threat cannot longer be neglected in the procurement system for European Union external actions.

In the current EU PRAG, the General Conditions for service contracts enumerate the contractor's obligations concerning safety and security for its staff. Such provisions are contained in Article 13 “*Medical, Insurance and Security Arrangements*” of the General Conditions:

- **Insurance:** *the Contractor shall ensure that itself, its staff, its subcontractors and any person for which the Contractor is answerable, are adequately insured; insurance policy shall cover all medical expenses, cost of repatriation, accidental death or permanent disability, etc.*
- **Security arrangements:** *the same article envisages that the Contractor shall put in place security measures for its employees, experts and their families located in the partner country commensurate with the physical danger (possibly) facing them. The Contractor shall also be responsible for monitoring the level of physical risk to which its employees, experts and their families located in the partner country are exposed.*

However, the procurement system for EU external actions does not foresee any budget or do not list specific security measures to be taken to ensure that those requirements are fully satisfied. The security measures to be implemented are therefore unilaterally decided by the Contractor and are included in the Contractor's fees.

In our view, the current system generates the following issues:

- 1) The need and scale of security measures to be deployed depend on the opinion of each tenderer, and is therefore subject to varying perceptions. Consequently, the measures to be implemented can be inadequate and/or wrongly estimated.
- 2) For tenderers, price is an element of competition. There is therefore an adverse incentive for the tenderers to keep their security costs to a minimum, which in turn affects their capacity to provide adequate security and safety measures during implementation.

In that regards, it is interesting to analyse how others donors consider security costs in the service contracts they are financing:

- Some donors foresee specific security budget for sensitive countries. In the invitation to tender, DFID & DFAT indicates that security costs will be paid on a separated and specific budget. Similarly, USAID foresees at tender stage a full-time security manager to be paid on the project budget.
- In some other instances, security costs are considered as incidental expenditures. DFID foresees that upon submission of receipts, security costs are reimbursed. For USAID, security costs are fully repaid, as long as they are “appropriate and in line” with the security environment in the country in which they are carried out.

The objective of this letter is to suggest to the Commission to include a **provision for security expenditure** to cover the costs related to security and safety of all staff deployed under a service contract (local and international experts, key and non-key, and including project support staff). This provision could be a part of the existing Incidental Expenditure provision, or it could be included in the project ToRs as a separate provision, for which the amount would also be pre-fixed and cannot be changed by tenderers¹. The utilisation of this provision could also be subject to prior approval of the Contracting Authority.

For proper budgeting, the estimation of security costs for each services contract in sensitive countries ought to be determined at *Project Formulation* stage. For example, specific security measures could be imposed and budgeted, together with minimum security guidelines to be followed, at project, country or regional level. A “security and safety” section in the ToR for services contract could also refer to other International Institutions guidelines, such as UNDSS² or guidelines issued by Member States Embassies or Consulates.

We believe that the inclusion of such provision for security expenditure would have the following results on EU external actions:

- ✓ **Security and safety measures would no longer suffer from subjective perceptions of tenderers;**
- ✓ **Security and safety measures would not be impacted by price competition between tenderers;**
- ✓ **Security and safety measures for all the staff working on EU service contracts in the same country or region would be homogenous;**
- ✓ **Security and safety costs are provisioned based on objective assessments or existing guidelines;**
- ✓ **The EU can demonstrate that security and safety measures are ensured on its external actions in line with other donors;**

¹ Similarly to the current *Provision for Expenditure Verification*

² United Nations Department of Safety and Security

We thank you very much for considering our proposal and we remain fully available to discuss further this issue.

With best regards,



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Directorate-General for International Cooperation and Development

Director-General

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Subject: Safety and security in EU external actions, your letter of 24 October 2017

Dear Ms Ferguson and Mr Wynrocx,

Thank you for your letter of 24 October 2017 on the above-mentioned subject.

I share your concern fully about the trend of increasing threats in many countries, in particular in our partner countries benefiting from the EU external cooperation's funding.

Your proposals for safety and security provisions at contractual level in EU external actions are therefore very much appreciated.

Please note that my services are examining the possibility of including such relevant provisions and/or clauses at contractual level.

As soon as my services have finalised our internal assessment, I will come back to you.

Yours sincerely,

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