

## Annex 5a Specific rules for Polish beneficiaries

Beneficiaries based in Poland have to comply with the following specific rules of awarding contracts under the project:

### 1.1. Contracts awarded under projects

- 1) The beneficiary is obliged to prepare and conduct the procedure of awarding contracts with an estimated value exceeding PLN 50,000. PLN net<sup>1</sup>, i.e. excluding value added tax (VAT), in the manner ensuring transparency and maintaining fair competition and equal treatment of contractors. The above requirements are met by means of Public Procurement Law (further: PPL) application or the competition principle, described in Section 1.2 of this Sub-chapter <sup>2</sup>
- 2) Expenditures under the project must be incurred in a transparent, reasonable and effective manner.
- 3) If the beneficiary is a public administration body, in accordance with Article 5(2)(1) of the Act of 24 April 2003 on public benefit activity and voluntary work it may entrust the implementation of public tasks under the procedure specified in the Act. In case of above mentioned entrustment the procedures specified in Section 1.2 of this Sub-chapter shall not apply.
- 4) If, pursuant to effective regulations other than the PPL, provisions of the PPL no longer apply, the beneficiary referred to in Article 3 of the PPL conducts a public procurement procedure in compliance with those regulations. In such a case the procedures specified in Section 1.2 shall not apply.
- 5) The procedures specified in Section 1.2 of this Sub-chapter do not apply to:
  - a) contracts referred to in Article 4 of the PPL, except for contracts referred to in Article 4(8) of the PPL, whereas the award of a contract for the acquisition of ownership or other rights to the existing buildings or real property by an entity other than the contracting authority within the

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<sup>1</sup> Determination of the value of the contract shall be made no earlier than 3 months before the date of initiation of the contract award procedure, if the subject of the contract are deliveries or services, and not earlier than 6 months before the date of initiation of the contract award procedure, if the subject of the contract are construction works. Whenever in this subsection the value is expressed in the euro, the average exchange rate of the zloty against the euro constituting the basis for the conversion of the value of orders is determined based on the provisions issued on the basis of Article 35 (3) PPL.

<sup>2</sup> In accordance with the rules governing the disbursement of ESIF funds, EU funds are aimed at implementing a strategy for smart, sustainable and inclusive growth. These goals are implemented by spending funds in a way that ensures the creation of, among others, high quality jobs or environmental protection. In relation with the above for contracts which value exceed the amounts specified in §1 point 1 of the Regulation of the Minister of Development and Finance of 22 December 2017 on the value of orders and competitions, on which the obligation to submit notices to the Publications Office of the European Union is required, it should be considered to oblige contractors to comply with labor law, social law, environmental law.

meaning of the PPL without application of the principle of competitiveness is only possible when no personal or capital ties referred to in Section 1.2(2)(a) exist,

- b) contracts specified in Article 4d of the PPL;
  - c) expenditures settled by simplified methods referred to in the Programme Manual;
  - d) contracts awarded by the beneficiaries selected in accordance with the procedure specified in the Act on public-private partnership or in the Act on concession for construction works or services in order to implement the project under a public- private partnership (hybrid project<sup>3</sup>)
  - e) contracts, subject of which are services provided in the scope of research and development works carried out in the project by persons constituting the human resources of the beneficiary indicated in the approved FAF.
- 6) Contracting authorities may be exempt from the obligation to follow the procedures specified in Section 1.2 of this Sub-chapter with regard to awarding contracts in the following cases:<sup>4</sup>
- a) where, as a result of a proper implementation of principle of competitiveness specified in Section 1.2 of this Sub-chapter, no offer fulfilling request for proposal was received; conclusion of an agreement on the implementation of the contract with the exception of the principle of competitiveness is possible when the original terms of the contract have not been substantially changed,
  - b) where the contract may only be performed by a sole contractor for any of the following reasons:
    - i.  
lack of competition for technical reasons of objective nature; i.e. there is only one contractor who is the only one who can execute the order,
    - ii.  
the subject of the contract is covered by the protection of exclusive rights, including intellectual property rights; i.e. there is only one contractor who has the exclusive right to dispose of the object of the contract, and this right is subject to statutory protection.
- The exemption may apply, unless there is an alternative or substitutive solution and lack of competition results from artificial narrowing down of the parameters of the contract;

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<sup>3</sup> Detailed regulations regarding hybrid projects can be found in the Guidelines on issues related to the preparation of investment projects, including income-generating projects and hybrid projects for the years 2014-2020.

<sup>4</sup> The circumstances specified in Points 7 and 8 of this Section allowing for non-application of the procedures should be interpreted in the context of the interpretation of relevant provisions of the PPL, i.e. Articles 62 and 67, which permit to apply a non-competitive procedure if specific conditions are met.

- c) where the supplies, services or construction works may only be provided by one contractor, in the case of contracts relating to creative or artistic activity;
- d) in the case of contracts to which the principle of competitiveness applies, where the deadlines referred to in Section 1.2 of this Sub-Chapter cannot be kept due to the urgent need to award the contract which could not have been foreseen, such urgent need have not resulted from any action or negligence of the contracting authority;
- e) in the case of contracts to which the principle of competitiveness applies, where the contract must be performed immediately and the deadlines referred to in Section 1.2 of this Sub-Chapter cannot be met due to the extraordinary situation which could not have been foreseen (e.g. natural disasters, catastrophes, breakdowns, unexpected accidents), and such extraordinary situation have not resulted from any action or negligence of the contracting authority;
- f) where the contract for supplies concerns items produced solely for research, experimentation, scientific or development purposes, which do not lead to mass production by the contracting authority aimed at achieving economic viability or coverage of research and development costs;
- g) where the contracting authority awards contracts for additional supplies to a contractor selected in accordance with the principle of competitiveness, and contracts consist in partial replacement of the supplied products or installations or in increasing the current supplies or in development of the existing installations, and a change of contractor would lead to a purchase of materials of different technical properties, which would result in technical incompatibility or disproportionately serious technical problems with the use and maintenance of such products or installations. Duration of an agreement on additional supplies cannot exceed three years;
- h) where the contracting authority awards supplementary contracts for services or construction works provided for in the request for quotation to a contractor selected in accordance with the principle of competitiveness within three years from the date of award of the main contract, supplementary contracts consisting in repetition of similar services or construction works;
- i) where the contract concerns supplies on particularly favourable conditions due to liquidation of operations of a third entity, or due to enforcement or bankruptcy proceedings;
- j) where the contract for supplies is executed on a commodity market within the meaning of regulations on commodity markets, including commodity markets of other European Economic Area member states;
- k) where the contract is awarded by a foreign service post within the meaning of foreign service regulations;

- l) where the contract is awarded for the exclusive purposes of a military unit within the meaning of regulations governing the use or stay of the Polish Armed Forces outside the territory of the Republic of Poland.
- 7) Contracting authorities may be exempt from the obligation to follow the procedures specified in this Sub-chapter in the cases specified in Article 67(1)(12) through (15) of the PPL. Such option applies solely to the entities specified in that provision.
- 8) Fulfilment of the conditions allowing for exemption from the obligation to follow the procedures specified in Points 6 and 7 must be proved in writing.
- 9) The basis for determining the value of the contract is the total estimated net remuneration of the contractor, excluding value added tax (VAT), determined with due diligence, taking into account possible orders referred to in point 6 (h). (e.g. in the approved FAF or in the note from the estimation).

Understatement of the estimated value of the contract or its division resulting in the lowering of its estimated value is forbidden. In determination of the value of the contract, the three identities must be jointly met<sup>5</sup>:

- a) services, supplies and construction works are identical in terms of type or function (subject identity);
- b) contract may be awarded at the same time (time identity);
- c) contract may be performed by a sole contractor (contractor identity).

If a contract is awarded in parts (for specific economic, organisational or functional reasons), contract value is determined as total value of its respective parts<sup>6</sup>.

- 10) In the case of contracts performed by beneficiaries who are not contracting authorities within the meaning of the PPL, contract value is determined with regard to a specific project. Entities that are awarding entities in the meaning of the PPL shall as first step assess the value of the contract in accordance with the provisions of the PPL. After finding that the estimated value of the contract determined on the basis of the PPL does not exceed the value indicated in article 4 (8) of the PPL or in the case of sector contracts - the value indicated in the regulations issued on the basis of article 11(8) of the PPL, determine the value of their contracts in relation to a given project.
- 11) If the beneficiary violates the terms and procedures of soliciting a public contract defined in this Subchapter, all or part of the expenditures related to this public contract may be considered ineligible by the FLC, pursuant to

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<sup>5</sup> The listed circumstances should be interpreted in line with the interpretation of the provisions of the PPL relating to estimation of the value of the contract.

<sup>6</sup> In the case of beneficiaries obliged to apply the PPL, it does not concern the contracts referred to in Article 6a of the PPL.

the Ordinance of the minister competent for regional development issued on the basis of Article 24(13) of the implementation act.

### **1.2. Specific conditions for the performance of public contracts by entities obliged to apply the principle of competitiveness**

- 1) The beneficiary awards the contract under the project in accordance with the principle of competitiveness in a situation:
  - a) where the beneficiary is not the contracting authority within the meaning of the PPL and the value of the contract exceeds PLN 50,000 net, i.e. excluding value added tax (VAT);
  - b) where the beneficiary is the contracting authority within the meaning of the PPL and the value of the contract is equal to or lower than the amount specified in Article 4(8) of the PPL, while exceeds PLN 50,000 net, i.e. excluding value added tax (VAT), or where the contract is a sectoral contract with the value that is lower than the amount specified in the regulations issued on the basis of Article 11(8) of the PPL while exceeds PLN 50,000 net, i.e. excluding value added tax (VAT).
- 2) In order to prevent a conflict of interests:
  - a) in the case of beneficiaries not being the contracting authorities within the meaning of the PPL, contracts cannot be awarded to entities with personal or capital ties to such beneficiaries, excluding sectoral contracts and the contracts referred to in Sub-chapter 1.1(6)(g) or (h)
  - b) persons carrying out the activities relating to contractor selection procedure on behalf of the contracting authority, in particular persons participating in the tender evaluation process, cannot have any personal or capital ties to the contractors who submitted tenders. Such persons should be impartial and objective.
- 3) Capital or personal ties mean mutual relationships between the beneficiary or persons authorised to undertake obligations on behalf of the beneficiary, or persons carrying out the activities relating to contractor selection procedure on behalf of the beneficiary, and the contractor, consisting in particular in:
  - a) participation as a partner in a partnership or a civil law partnership;
  - b) holding of at least 10% of shares or stocks, unless the effective regulations provide for a lower threshold;
  - c) performance of the function of a member of the supervisory or management body, a proxy or an attorney;
  - d) being a spouse, relative by lineal consanguinity or affinity, secondary relative in the second degree of consanguinity or the second degree of affinity, or in a relationship of adoption, care or guardianship.

In the case the FLC finds the award of the contract to an entity with ties

other than those listed in (a) through (d), the FLC is obliged to demonstrate the existence of a breach of the principle of competitiveness through an existing link prior to reducing the eligible expenditure.

- 4) In the case of beneficiaries being the contracting authority within the meaning of the PPL, the principle of competitiveness will be considered satisfied if the public contract procedure is conducted based on the PPL.
- 5) The subject of the contract is described in an unambiguous and exhaustive way, using precise and understandable terms, taking into account all requirements and circumstances that may affect the preparation of the offer. The subject of the contract cannot be described by indicating the trademarks, patents or origin, source or special process that characterizes products or services provided by a specific contractor, if this could lead to privilege or elimination of some contractors or products, unless justified by the specificity of the subject of the contract and the contracting authority cannot describe the subject of the order by means of sufficiently precise terms, and the indication is accompanied by the words "or equivalent".
- 6) For business confidentiality reasons, it is possible to limit the scope of the description of the subject of the contract, but the contracting authority is obligated to share the supplemented description of the subject of the contract to a potential contractor who has committed to confidentiality in relation to the information provided, in a timely manner to prepare and submit the offer.
- 7) The subject of the contract is described by the names and codes specified in the Common Procurement Vocabulary referred to in Regulation (EC) No. 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ L 340 of 16.12.2002, p. 1, as amended; Special edition in Polish: Chapter 06, Volume 005, p. 3)<sup>7</sup>.
- 8) Conditions of participation in the contract award procedure and description of the methodology of evaluation of their fulfilment, provided such conditions are included in the request for quotation referred to in Point 11 (a), are determined proportionally to the subject of the contract so as to ensure fair competition and equal treatment of contractors. The beneficiary cannot specify any conditions that would exceed the requirements sufficient for proper performance of the contract.
- 9) The criteria for the evaluation of tenders submitted under the contract award procedure are formulated in the manner guaranteeing fair competition and equal treatment of contractors, whereas:
  - a) each tender evaluation criterion must refer to a specific subject of the contract;
  - b) each criterion (and description of its application) must be formulated in a clear and precise manner so that all well-informed tenderers could interpret it identically with due diligence;

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<sup>7</sup> Common Procurement Vocabulary is available e.g. at: <http://kodv.uzp.gov.pl>

- c) the weights (significance) of respective criteria should be defined in the manner allowing for selection of the best possible tender;
  - d) tender evaluation criteria cannot relate to the properties of the contractor, in particular to their economic, technical or financial credibility. This reservation does not apply to contracts for social services and other special services<sup>8</sup>, nor to non- priority contracts in the field of defence and security<sup>9</sup>;
  - e) price can be the only criterion for the evaluation of offers. Apart from the price requirements, it is recommended to include other requirements relating to the subject of the contract, such as quality, functionality, technical parameters, environmental, social, innovative aspects, maintenance, contract performance deadline, operating costs and organization, professional qualifications and experience of persons appointed to perform the contract, if they can have a significant impact on the quality of the contract.
- 10) The deadline for submitting an offer (the date when the offer is received by the contracting authority decides) is at least 7 days for deliveries and services, at least 14 days for construction works and for sectorial contracts with a value lower than the amount specified in the regulations issued on the basis of Article 11 (8) of PPL. For contracts with an estimate value equal to or greater than the amounts specified in §1 point 1 of the Regulation of the Minister of Development and Finance of 22 December 2017 on the value of orders and competitions, on which the obligation to submit notices to the Publications Office of the European Union is required, the deadline is at least 30 days. The period starts on the day following the day the offer inquiry is made public and ends on the last day. If the deadline ends on a Saturday or a public holiday, the due date is the day following the day or days off from work.
- 11) In order to comply with the principle of competitiveness, the beneficiary should:
- a) publish the request for quotation in line with the conditions referred to in Point 12 or 13, including at least:
    - i. description of the subject of the contract,
    - ii. conditions of participation in the procedure and description of the methodology of evaluation of the fulfilment of those conditions, whereas determination of participation conditions is not mandatory;
    - iii. tender evaluation criteria;

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<sup>8</sup> The list of social services and other special services forms Annex XIV to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94 of 28.03.2014, p. 65) and Annex XVII to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94 of 28.03.2014, p. 243).

<sup>9</sup> The list of non-priority services in the fields of defence and security forms Annex II to Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 209.216.76, as amended).

- iv. information about the weights in points or per cent attributed to respective criteria of tender evaluation;
  - v. description of the methodology of awarding points for the fulfilment of a specific criterion of tender evaluation;
  - vi. deadline for submitting offers;
  - vii. agreement performance deadline;
  - viii. information about the required lack of personal or capital ties referred to in Point (2)(a) (i-ii)<sup>10</sup>;
  - ix. determination of conditions of material amendment of the agreement executed as a result of the contract award procedure, if the contracting authority allows it;
  - x. information about the possibility of awarding a contract in the form of separate lots, if the contracting authority allows it;
  - xi. description of how to present variant offers and the minimum conditions that variant offers must meet, along with selected assessment criteria, if the contracting authority requires or permits their submission;
  - xii. information about the planned contracts referred to in Section 1.1 (6)(h), about their scope and the conditions on which the contracts will be awarded, if the contracting authority allows it.
- b) select the best tender from the tenders submitted by the contractors who meet the conditions of participation in the procedure<sup>11</sup>, based on the evaluation criteria defined in the request for quotation. Tender selection is documented by the report on the contract award procedure referred to in point 16. The procedure may end with the selection of several contractors, when the contracting authority allows separate lots.
- 12) Publication of the request for quotation by the beneficiary involves registration of such request in the competitiveness database<sup>12 13</sup>. In case the operational functionality of such database is suspended, which has been confirmed by a relevant communication of the minister competent for regional development – the beneficiary directs the request for quotation to at least three potential contractors, if three potential contractors for a given contract exist on the market, and publishes the request at least on the beneficiary's

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<sup>10</sup> Not applicable to entities being contracting authorities within the meaning of the PPL.

<sup>11</sup> If the contracting authority allows awarding a contract in the form of separate lots, the procedure may result in selection of more than one contractor

<sup>12</sup> Website indicated in the communication of the minister competent for development, used for publication of requests for quotation (<https://bazakonkurencyjnosci.funduszeuropejskie.gov.pl/>).

<sup>13</sup> Publication of request for quotation in the competitiveness database takes place in the module "I want to add an advert - I am an Applicant (Ordering - Applicant). In the "Call for proposal number (\* required)" field, enter the following number: PLSK.01.01.00-IP.01-00-PBU/16



website. Publication of the request for quotation means initiating the procurement procedure under the project

- 13) Where due to the specific nature of the project an entity, that applies for the funds, begins to implement the project at its own risk before signing the subsidy contract, publication of the request for quotation by the entity involves registration of such request in the competitiveness database<sup>14</sup>. In case the operational functionality of such database is suspended, which has been confirmed by a relevant communication of the minister competent for regional development – the entity directs the request for quotation to at least three potential contractors, if three potential contractors for a given contract exist on the market, and publishes the request at least on the beneficiary's website, if the beneficiary has such website. Publication of the request for quotation means initiating the procurement procedure under the project.
- 14) The request for quotation may be amended before the end of deadline for submission of tenders provided for in the request for quotation. In such situation, information about the amendment should be included in the request for quotation published in accordance with Point 12 or 13. Such information should contain at least the date of publication of the amended request for quotation and the description of the amendments. The contracting authority extends the deadline for the submission of tenders for the period required for tender adjustment if it is necessary due to the scope of the amendments.
- 15) The content of questions regarding the request for quotation along with the explanations of the contracting authority is published in accordance with points 12 or 13.
- 16) The report on the contract award procedure (in writing) should include at least:
- a) list of tenders submitted in response to the request for quotation with indication of the dates when the tenders were received by the contracting authority;
  - b) information about the fulfilment of the condition referred to in Point (2)(a);
  - c) information about the fulfilment of the conditions of participation in the procedure by contractors, if such conditions were formulated;
  - d) information about the weights in points or per cent attributed to respective criteria of tender evaluation and the methodology of awarding points to respective contractors for the fulfilment of a specific criterion;
  - e) identification of the selected tender with justification of such selection,

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<sup>14</sup> Publication of request for quotation in the competitiveness database takes place also in the module "I want to add an advert - I am an Applicant (Ordering - Applicant). In the "Call for proposal number (\* required)" field, enter the following number: PLSK.01.01.00-IP.01-00-PBU/16

- f) date of preparation of the report and signature of the contracting authority,
- g) the following appendices:
  - i. confirmation of publication of the request for quotation in the manner specified in Point 12 or 13, along with amendments to the request for quotation referred to in point 14, if they have been made;
  - ii. submitted tenders,
  - iii. declarations of lack of ties with the contractors who submitted tenders, signed by the contracting authority and persons carrying out the activities relating to contractor selection procedure on behalf of the contracting authority, including participation in the tender evaluation process (i.e. the ties referred to in Point 2(b)).

- 17) Information about the result of the procedure is published in the same manner as the request for quotation. Information about the result of the procedure should include at least the name of chosen contractor, its location and price of the contract. Upon request of the contractor who submitted tender, the contracting authority is obliged to provide access to the report on the contract award procedure for such contractor, excluding the tenders covered by business confidentiality<sup>15</sup>.
- 18) After the completion of the procedure described in this Section, an agreement with the contractor is concluded in a written or electronic form (together with a qualified electronic signature). If the contracting authority allows awarding a contract in the form of separate lots, the procedure may result in selection of more than one contractor. If the selected contractor withdraws from the execution of the agreement with the contracting authority, the agreement can be concluded with other contractor with the second highest number of points awarded in the contract award procedure.
- 19) Provisions of the executed agreement may not be materially amended<sup>16</sup> with regard to the content of tender on the basis of which the contractor was selected, unless:

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<sup>15</sup> Business confidentiality should be understood in accordance with the regulations on combating unfair competition (Act of 16 April 1993 on combating unfair competition, Dz. U. of 2018, item 419)

<sup>16</sup> An amendment is considered material if it changes the general nature of the agreement with regard to the nature of the agreement in its initial wording, or if it does not change the general nature of the agreement and at least one of the following circumstances occurs: the amendment introduces conditions which, were they formulated in the course of the contract award procedure, would result in a situation where other contractors participated or could have participated in the procedure, or other tenders could be accepted, or the amendment affects the economic balance of the agreement to the benefit of the contractor in the manner originally unforeseen in the agreement, or the amendment significantly broadens or narrows the scope of services and obligations resulting from the agreement, or consists in the replacement of the contractor to whom the contracting authority awarded the contract with a new contractor in cases other than listed in (d).

- a) possibility to amend the agreement was provided for by the contracting authority in the request for quotation and conditions of such amendment were specified, unless they result in a change of the nature of the agreement;
- b) the amendments relate to additional supplies, services or construction works by the current contractor that had not been covered by the main contract, provided such supplies, services or construction works are necessary and the following conditions are jointly met:
  - i. contractor cannot be changed for economic or technical reasons, in particular due to replacement potential or interoperability of the equipment, services or installations covered by the main contract;
  - ii. change of contractor could cause serious inconvenience or significant increase in costs for the contracting authority;
  - iii. the value of each subsequent amendment does not exceed 50% of the value of the contract initially determined in the agreement;
- c) the amendment does not change the nature of the agreement and the following conditions are jointly met:
  - i. the agreement must be amended for reasons the contracting authority could not have foreseen when acting with due diligence;
  - ii. the value of the amendment does not exceed 50% of the value of the contract initially determined in the agreement;
- d) the contractor to whom the contracting authority awarded the contract is to be replaced by a new contractor:
  - i. on the basis of the contractual provisions referred to in (a);
  - ii. as a result of a merger, division, transformation, bankruptcy, restructuring or acquisition of the current contractor or their enterprise, provided that the new contractor meets the conditions of participation in the procedure, is not subject to exclusion and the replacement does not require any other material amendments to the agreement;
  - iii. as a result of taking over the contractor's obligations towards their subcontractors by the contracting authority; in case of change of subcontractor, the contracting authority may conclude a contract with a new subcontractor without changing the terms of the contract, taking into account payments made for the work carried out so far,
- e) the amendment does not change the nature of the agreement and the total value of amendments does not exceed the amounts specified in §1 point 1 of the Regulation of the Minister of Development and Finance of 22 December 2017 on the value of orders and competitions, on which the obligation to submit notices to the Publications Office of the European Union is required, and at the same time it does not exceed 10% of the value of the contract initially determined in the agreement in the case of supplies

and services or, in the case of construction works, it does not exceed 15% of the value of the contract initially determined in the agreement.