

ANNEX IV

Procurement by grant Beneficiaries for CDTF implemented projects for the Community Environment Facility

1. GENERAL PRINCIPLES

If the implementation of a project requires procurement by the Beneficiary, the contract must be awarded to the most economically advantageous tender (that is the tender offering the best price-quality ratio), in accordance with the principles of transparency and fair competition for potential contractors and taking care to avoid any conflicts of interest.

To this end, the Beneficiary must comply with the rules set out in sections 2 to 6 below, subject to section

In the event of failure to comply with the rules referred to above, expenditure on the operations in question is not eligible for Community financing.

CDTF will carry out ex post checks on Beneficiaries' compliance with the rules.

The provisions of this Annex apply also to contracts to be concluded by the Beneficiary's partners.

2. ELIGIBILITY FOR CONTRACTS

2.1. The nationality rule

Participation in tender procedures administered by the Beneficiary is open on equal terms to all natural and legal persons or entities registered in Kenya, of all other ACP states¹ and of the Member States of the European Union², or European Economic Area³ or an official candidate country⁴ that is a beneficiary of the Instrument for Pre-Accession Assistance or least developed countries as defined by the United Nations that are not also ACP countries⁵. Tenderers must state, in the tender, the country of which they are nationals by presenting the usual proof of nationality under their national legislation.

This rule does not apply to the experts proposed by service providers taking part in tender procedures or service contracts financed by the grant.

¹ Angola, Antigua & Barbuda, Bahamas, Barbados, Belize, Bénin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo (Kinshasa), Congo (Brazzaville), Cook Islands, Cote d'Ivoire, Cuba, Djibouti, Dominica, Dominican Republic, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Federated States of Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, Sudan, Suriname, Swaziland, Tanzania, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, and Zimbabwe

² Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom

³ Iceland, Liechtenstein and Norway.

⁴ Iceland, Croatia, The former Yugoslav Republic of Macedonia and Turkey.

⁵ Afghanistan, Bangladesh, Bhutan, Cambodia, Lao People's Democratic Republic, Maldives, Myanmar, Nepal, Samoa, Yemen

2.2. The rule of origin

Supplies and materials purchased under a procurement contract financed from the EDF must originate in a State that is eligible under point 2.1.

For the purpose of this annex, the term "origin" is defined in articles 23 and 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and other Community legislation governing non-preferential origin.

Contractors must present proof of origin to the Beneficiary no later than when the first invoice is presented, for equipments and vehicles of a unit cost on purchase of more than € 5 000. The certificate of origin must be made out by the competent authorities of the country of origin of the supplies and must comply with the rules laid down by the relevant Community legislation.

2.3. Exceptions to the rules on nationality and origin

Purchases of goods, **on the local market**, for contracts with a maximum value of Kenya Shilling 6,000,000, can be made irrespective of their origin. These purchases are subject to CDTF's approval as required under point 4 or CDTF needs to be informed through monthly reporting.

2.4. Grounds for exclusion from participation in procurement

Candidates or tenderers will be excluded from participation in a procurement procedure if:

- (1) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (2) they have been convicted of an offence concerning their professional conduct by a judgment of the courts;
- (3) they have been guilty of grave professional misconduct proven by any means which the Beneficiary can justify;
- (4) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of Kenya;
- (5) they have been the subject of a judgment of the courts for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the financial interests of the Government of Kenya;
- (6) they are currently subject to an administrative penalty referred to in section 2.3.5 of the Practical Guide to contract procedures for EC external actions.

Candidates or tenderers must certify that they are not in one of the situations listed above.

2.5. Exclusion from award of contracts

Contracts may not be awarded to candidates or tenderers which, during the procurement procedure:

- (a) are subject to a conflict of interests;
- (b) are guilty of misrepresentation in supplying the information required by the Beneficiary as a condition of participation in the contract procedure or fail to supply this information.

3. RULES COMMON TO ALL TENDER PROCEDURES

The tender documents must be drafted in accordance with best local practice. The Community Development Trust Fund will provide the relevant contract to the project beneficiaries.

The time-limits for receipt of tenders and requests to participate must be long enough to allow interested parties a reasonable and appropriate period to prepare and submit their tenders.

All requests to participate and tenders declared as satisfying the requirements must be evaluated and ranked by an evaluation committee on the basis of the exclusion, selection and award criteria announced in advance. This committee must have an odd number of members, at least three, with all the technical and administrative capacities necessary to give an informed opinion on the tenders.

4. RULES APPLICABLE TO SUPPLY AND SERVICE CONTRACTS

4.1. Contracts of Kenya Shilling 15,000,000 or more

Beneficiaries are not allowed to enter into supply and service contracts of more than 15,000,000 Kenya Shilling.

4.2. Contracts between 6,000,000 and 15,000,000 Kenya Shilling

Supply and service contracts between 6,000,000 and 15,000,000 Kenya Shilling must be awarded by means of an open tender procedure published locally: the procurement notice is published in appropriate media in Kenya.

A local open tender procedure must provide the same opportunities to firms from all eligible countries (see article 2.1 above).

The Project Implementation Committee (PIC) of the beneficiary (or its equivalent) must approve the tender documents before their publication and must approve the procurement before the signing of a contract, as reflected in the minutes of its meetings. **In addition** CDTF must approve in writing the tender documents before their publication and must approve the procurement before the signing of a contract.

4.3. Contracts between Kenya Shilling 80,000 and 6,000,000

Supply and service contracts between Kenya Shilling 80,000 and KS 6,000,000 must be awarded by means of a negotiated procedure without publication, in which the Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them.

The Project Implementation Committee of the beneficiary (or its equivalent) must approve the proposed procurement before the consultation of the suppliers and must approve the procurement before the signing of a contract as reflected in the minutes of its meetings.

In addition CDTF must approve the procurement before the signing of a contract only.

The choice of suppliers needs to be made in a transparent manner.

4.4. Contracts between 20,000 and 80,000 Kenya Shilling

Supply and service contracts between 20,000 and 80,000 Kenya Shilling must be awarded by means of a negotiated procedure without publication, in which the Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them.

The Project Implementation Committee of the beneficiary (or its equivalent) must approve any such procurement before the signing of a contract, as reflected in the minutes of its meetings.

In addition CDTF must approve the procurement before the signing of a contract only.

The choice of suppliers needs to be made in a transparent manner.

4.5. Contracts between 3,000 and 20,000 Kenya Shilling

Supply and service contracts worth less than Kenya Shilling 20,000 must be awarded by means of a negotiated procedure without publication, in which the Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them. The choice of suppliers needs to be made in a transparent manner. The Project Implementation Committee of the beneficiary (or its equivalent) must approve the proposed procurement before the consultation of the suppliers.

4.6. Contracts under Kenya Shilling 3,000

For supplies or services of a value of Kenya Shilling 3,000 or less, the Beneficiary may place orders on the basis of a single tender.

5. RULES APPLICABLE TO WORKS CONTRACTS

5.1. Contracts of Kenya Shilling 30,000,000 or more

Beneficiaries are not allowed to enter into works contracts of more than Kenya Shilling 30,000,000.

5.2. Contracts between Kenya Shilling 80,000 and 30,000,000

Works contracts between Kenya Shilling 80,000 and KS 30,000,000 must be awarded by means of a negotiated procedure without publication, in which the Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them

The choice of suppliers needs to be made in a transparent manner.

The Project Implementation Committee of the beneficiary (or its equivalent) must approve the proposed procurement before the consultation of the suppliers and must approve the procurement before the signing of a contract as reflected in the minutes of its meetings.

In addition CDTF must approve the procurement before the signing of a contract only.

5.3. Contracts between 20,000 and 80,000 Kenya Shilling

Works contracts between 20,000 and 80,000 Kenya Shilling must be awarded by means of a negotiated procedure without publication, in which the Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them. The choice of suppliers needs to be made in a transparent manner. The Project Implementation Committee of the beneficiary (or its equivalent) must formally approve any such procurement before the signing of a contract, as reflected in the minutes of its meetings.

In addition CDTF must approve the procurement before the signing of a contract only.

5.4. Contracts between 3,000 and 20,000 Kenya Shilling

Works contracts between 3,000 and 20,000 Kenya Shilling must be awarded by means of a negotiated procedure without publication, in which the Beneficiary consults at least three suppliers of its choice and negotiates the terms of the contract with one or more of them. The choice of suppliers needs to be made in a transparent manner. The Project Implementation Committee of the beneficiary (or its equivalent) must approve the proposed procurement before the consultation of the suppliers.

5.5. Contracts under Kenya Shilling 3,,000

For works of a value of Kenya Shilling 3,000 or less, the Beneficiary may place orders on the basis of a single tender.

6. USE OF THE NEGOTIATED PROCEDURE

The Beneficiary may **after written agreement by CDTF** use the negotiated procedure on the basis of a single tender in the following cases:

- (a) where, for reasons of extreme urgency brought about by events which the Beneficiary could not have foreseen and which can in no way be attributed to him, the time-limit for the procedures referred to in sections 3 to 5 cannot be kept. The circumstances invoked to justify extreme urgency must in no way be attributable to the Beneficiary.
- (b) where the services are entrusted to public-sector bodies or to non-profit institutions or associations and relate to activities of an institutional nature or designed to provide assistance to peoples in the social field;
- (c) where contracts extend activities already under way which are not included in the main contract but which, because of unforeseen circumstances, have become necessary to perform the contract, or which consist of the repetition of similar services entrusted to the contractor providing services under the initial contract;
- (d) for additional deliveries by the original supplier intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the Beneficiary to acquire equipment having different technical characteristics which would result in either incompatibility or disproportionate technical difficulties in operation and maintenance;
- (e) for additional works not included in the initial contract concluded which have, through unforeseen circumstances, become necessary for carrying out the works;
- (f) where the tender procedure has been unsuccessful, that is where no qualitatively and/or financially worthwhile tender has been received. In such cases, after cancelling the tender procedure, the Beneficiary may negotiate with one or more tenderers of its choice, from among those that took part in the tender procedure, provided that the initial terms of the tender procedure are not substantially altered;
- (g) where the contract concerned follows a contest and must, under the rules applying, be awarded to the winner of the contest or to one of the winners of the contest, in which case, all winners shall be invited to participate in the negotiations;
- (h) where, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract can be awarded only to a particular service provider;
- (i) where warranted by the nature or particular characteristics of the supplies, for example, where performance of the contract is exclusively reserved for the holders of patents or licences to use patents;