

## Attachment No. 6: The principle of competition in investments A 2.1.1

### § 1

#### General rules

1. The principle of competition defines the minimum procedures that must be met in order to recognize costs as eligible.
2. Eligible costs may be costs that are incurred in a rational, justified manner, only for activities planned by the final recipient, hereinafter referred to as "FR". Costs incurred in a rational manner mean those whose amount is adjusted to the needs of the appropriate implementation of the project. They cannot be both underestimated and overestimated. Costs incurred in a justified manner are those that are necessary and directly related to the implementation of activities planned in the project for its proper implementation.
3. The principle of competition does not apply to:
  - 1) Public orders awarded on the basis of the Act of September 11, 2019 - Public Procurement Law (Journal of Laws of 2022, item 1710, as amended), hereinafter referred to as: "Pzp";
  - 2) Public orders whose value does not exceed PLN 50,000 net.
4. FR is obliged to develop its own procurement procedure, which will take into account the principle of competition.
5. The provisions of the Act of 23 April 1964. Civil Code (Journal of Laws of 2022, item 1360, as amended) unless the provisions of the Public Procurement Law provide otherwise.
6. Projects that are public investments implemented by FR, which is a company with the share of the State Treasury, should comply with the criteria of green public procurement<sup>1</sup>.

### § 2

#### Conflict of interest

1. FR takes appropriate measures to effectively prevent conflicts of interest, as well as to recognize and eliminate them when they arise in connection with the conduct of the contract award procedure or at the stage of contract performance, in order to prevent distortion of competition and ensure equal treatment of contractors.

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<sup>1</sup>Green Public Procurement (GPP) is a process by which public authorities seek to procure goods, services and works that have a lower environmental impact during their life cycle compared to goods, services and works construction works for the same purpose that would otherwise be ordered - <https://www.uzp.gov.pl/baza-knowledge/sustainable-public-procurement/green-procurement>

2. A conflict of interest means any situation in which persons involved in the preparation or conduct of a contract award procedure or who may influence the outcome of this procedure have or may have, directly or indirectly, a financial, economic or personal interest which may be perceived as threatening their impartiality and independence in connection with the procurement procedure.
3. FR, which is not a contracting authority within the meaning of the Public Procurement Law, in order to avoid a conflict of interest, may not award a contract to entities related to it personally or by capital, excluding sectoral contracts and contracts specified in § 6.
4. In order to avoid conflicts of interest, FR cannot award contracts to entities personally or financially related to it. Personal and capital connections are understood as:
  - 1) participation in the company as a partner in a civil law partnership or partnership;
  - 2) holding at least 10% of shares (unless a lower threshold is not provided for by law);
  - 3) acting as a member of the supervisory or management body, proxy, representative;
  - 4) being in a marriage, consanguinity or affinity relationship in the direct line, by consanguinity or affinity in the collateral line up to the second degree, or by adoption, guardianship, or cohabitation with the economic operator, his legal representative or members of managing bodies or supervisory bodies of economic operators competing for the contract award;
  - 5) being in such a legal or actual relationship with the contractor that it exists reasonable doubt as to their impartiality or independence in connection with the procurement procedure.
5. Activities related to the preparation and conduct of the contract award procedure are performed by persons ensuring impartiality and objectivity.
6. Persons indicated in section 5 shall be submitted in writing or electronically (within the meaning of Article 78 and Article 78<sup>1</sup> of the Civil Code) a declaration of the lack of existence or lack of influence of personal or capital connections with contractors referred to in section 3.

### **§ 3**

#### **Estimating the value of the order**

1. FR is obliged to estimate the value of the order in order to:
  - 1) select the appropriate contract award procedure;

- 2) plan a budget to finance the order;
  - 3) avoid circumvention of the law by "artificial" division of the order or underestimate it values
- 2 The basis for determining the value of the order is the contractor's total estimated remuneration, net of value added tax, determined with due diligence.
- 3 FR cannot divide the order into separate orders if this leads to non-application of the provisions of the Public Procurement Law or these rules, unless it is justified by objective reasons, in particular when:
  - 1) the division would result in restriction of competition or excessive technical difficulties or excessive costs of contract performance;
  - 2) the need to coordinate the activities of various contractors implementing individual projects part of the contract could seriously jeopardize the proper performance of the contract
- 4 When determining whether services, supplies and works should constitute one contract, the following three conditions must be taken into account:
  - 1) a contract for services, supplies and construction works indicates similarity in technical and economic functions or is the same in terms of type or functionality, and in the case of supplies it includes similar supplies (subject identity);
  - 2) it is possible to award the contract at the same time (temporal identity);
  - 3) it is possible to perform the contract by one contractor (subject identity)
- 5 The FR cannot, in order to avoid the application of the provisions of the Public Procurement Law, underestimate the value of the contract.
- 6 Activities related to the determination of the contract value should be carried out with due diligence (including supplementary orders) and documented in a way that ensures an appropriate audit trail. Due diligence is manifested primarily in taking into account in the estimated value all the conditions that currently accompany a given market at the time of estimation.
- 7 The value of the contract should be estimated on the basis of available information on the market and prices offered by potential contractors, taking into account the quantity and quality of the ordered goods or services. You should also take into account the expected delivery time and payment terms.
- 8 The estimated value of the order should be documented, e.g. in the form of a memo and attached documents.
- 9 If the subject of the contract are supplies or services, the contract value shall be determined not earlier than 3 months before the date of initiation of the contract award procedure, in the case of works - not earlier than 6 months before the date of initiation of the contract award procedure.

## § 4

### Inquiry

1. After estimating the value of the order, FR prepares an inquiry in order to select the most advantageous offer.
2. It is required that the inquiry contains at least:
  - 1) order description;
  - 2) conditions for participation in the proceedings;
  - 3) offer evaluation criteria;
  - 4) information on planned supplementary orders, if the FR provides for such a possibility;
  - 5) a description of the method of awarding points for meeting a given offer evaluation criterion;
  - 6) deadline for submitting offers;
  - 7) information about the possibility of submitting partial offers, if FR allows it predicts;
  - 8) information on planned supplementary orders, if the FR provides for such a possibility;
  - 9) contract completion date;
  - 10) material provisions of the contract and conditions for changing the material provisions of the contract;
  - 11) conditions for possible withdrawal from concluding the contract.
3. The subject of the contract is described in an unambiguous and exhaustive manner, using precise and understandable terms, taking into account all requirements and circumstances that may affect the preparation of the offer. The description should be detailed and objective.
4. The description of the subject of the contract may not result in favoring or eliminating certain contractors or products. In the description of the subject of the contract, the names and codes specified in the Common Procurement Vocabulary (CPV) should be used.
5. The conditions for participation in a procurement procedure must be proportionate to the subject of the contract, clear and precise, should ensure fair competition and equal treatment, and must not discriminate against potential bidders.
6. The deadline for submitting the offer (the date of receipt of the offer to the FR is decisive) is at least 7 days - in the case of supplies and services, at least 14 days - in the case of construction works and

in the case of sectoral contracts with a value lower than the EU thresholds within the meaning of Art. 3 Pzp. In the case of contracts with an estimated value equal to or exceeding the EU thresholds within the meaning of Art. 3 PZP, the deadline is at least 30 days. The deadline begins on the day following the date of publication of the request for quotation and ends on the last day. If the end of the period falls on a Saturday or a public holiday, the period expires on the day following the non-working day or days.

7. The procedure is to be conducted in a transparent manner, maintaining fair competition and equal treatment of contractors and the rules of competition. For this purpose, the FR:
  - 1) publishes the inquiry at least on its website;
  - 2) selects the most advantageous offer based on the criteria specified in the inquiry ratings.
8. The selection of the offer is documented in a protocol. The protocol includes at least :
  - 1) date of preparation of the report;
  - 2) information on the method of publishing the inquiry;
  - 3) a list of offers received in response to the request for proposals, along with an indication date of receipt of the offer to FR;
  - 4) information on the fulfillment of the conditions for participation in the procedure by economic operators, if any such conditions were placed;
  - 5) information about the point or percentage weights assigned to each criteria and the method of awarding points to individual contractors for meeting a given criterion;
  - 6) indication of the selected offer together with the justification for the choice or justification for withdrawing from the contract;
  - 7) confirmation going public inquiries tender offer ;
  - 8) declarations on the lack of links with the selected contractor or an indication of dependence between the selected contractor and FR.
9. At the request of the contractor who submitted the offer, the protocol referred to in section 8 should be made available, with the exception of part of the offers constituting a business secret.
10. Any negotiations with contractors should also be documented (e.g. in the form of a protocol or note). Negotiations cannot lead to a deterioration of the FR situation and must take into account the principle of equal treatment of contractors.
11. Contract award procedure may end with the selection of several contractors if the FR allows the submission of partial offers.

12. Information on the outcome of the contract award procedure shall be made public in the manner in which the request for proposals was made public. Information on the outcome of the contract award procedure includes the name of the selected contractor, its registered office and the price of the contract.
13. If requests for proposals have been made public before submitting the application under investment A2.1.1 of the National Reconstruction Plan, the issue of meeting market conditions when selecting a contractor is examined individually by the institution responsible for the implementation of the investment. On this basis, a decision is made as to whether or not the competition principle is met. The decision is final and is not subject to appeal.

## **§ 5**

### **Criteria grades offers**

1. In order to determine which offer is the most advantageous among those submitted, the FR must examine and evaluate them on the basis of the offer evaluation criteria adopted in the documents of the request for proposals.
2. The tender evaluation criteria are described in an unambiguous, precise and understandable manner, bearing in mind that they must be related to the subject of the given contract.
3. The criteria for evaluating offers submitted as part of the procurement procedure should be formulated in a way that ensures fair competition and equal treatment of contractors.
4. Price may be the only evaluation criterion. Other non-price criteria may also be used, in particular qualitative ones.
5. In the request for proposals, the contracting authority shall specify the weight it assigns to each of the criteria selected for the purpose of determining the most advantageous tender, except for situations where the price is the only tender evaluation criterion.

## **§ 6**

### **Application exclusions rules competitiveness**

1. The principle of competitiveness may not be applied:
  - 1) due to an exceptional situation or an urgent need (necessity) to provide order, not resulting from reasons attributable to FR, which could not have been predicted earlier and the deadlines could not be met ;
  - 2) in the case of orders that can only be completed by one contractor for the following reasons:
    - a) for technical reasons of an objective nature,
    - b) when there is only one contractor who can complete the order,

- c) the subject of the contract is protected by exclusive rights resulting from regulations, including intellectual property rights,
    - d) when there is only one contractor who has the exclusive right to dispose of the subject of the contract, and this right is protected by law, unless there is a reasonable alternative or substitute solution and the lack of competition is not the result of artificially narrowing down the parameters of the contract;
  - 3) in the case of orders for creative or artistic activities that may be carried out by only one contractor;
  - 4) in the case of contracts for deliveries on particularly favorable terms in connection with the liquidation of another entity's operations, enforcement or bankruptcy proceedings;
  - 5) exchange in the case of orders for deliveries made on a commodity exchange within the meaning of the provisions on commodity exchanges, including on a commodity exchange of other Member States of the European Economic Area;
  - 6) in the case of contracts awarded to a contractor selected in accordance with the principle of competitiveness for additional supplies, consisting in partial replacement of the delivered products or installations or increasing current supplies or expansion of existing installations, and a change of contractor would lead to the acquisition of materials with different technical properties, which would result in technical incompatibility or disproportionate technical difficulties in the use and maintenance of these products or installation.
2. The fulfillment of the above conditions must be justified in writing.
3. If, as a result of the correct application of the principle of competition, no offer was received, or only offers subject to rejection were received, or no contractor met the conditions for participation in the contract award procedure, provided that the FR imposed such conditions on the contractors, concluding an agreement on the performance of the contract disregarding the principle of competition is possible if the original terms of the order have not been changed.

## § 7

### Conclusion contracts

1. The contract with the contractor is concluded in writing or in electronic form (with a qualified electronic signature).
2. If the FR allows the submission of partial offers, the award procedure order may result in the conclusion of a contract for part of the order.

3. If the selected contractor withdraws from concluding a contract with FR, FR concludes a contract with the next contractor who obtained the next highest number of points in the tender order.
4. Changes to the essential terms of the concluded contract may only be made in the event of:
  - 1) when the possibility of change has been provided for in the content of the contract;
  - 2) occurrences of the so-called force majeure - if the contracting authority, acting with due diligence, could not foresee changes, and their value does not exceed 50% of the order.
5. It is not possible to make significant changes to the provisions of the concluded contract in relation to the content of the offer on the basis of which the contractor was selected, unless:
  - 1) the changes were provided for in the contract in the form of clear, precise and clear provisions that define their scope and type as well as the conditions for introducing changes;
  - 2) the changes concern the implementation of additional deliveries, services or construction works from the current contractor, not covered by the basic contract, provided that they have become necessary and the following conditions have been met jointly:
    - a) a change of contractor cannot be made for economic or technical reasons, in particular regarding the interchangeability or interoperability of equipment, services or installations ordered under the main contract,
    - b) a change of contractor would cause significant or significant inconvenience increasing costs for FR,
    - c) the value of each subsequent change does not exceed 50% of the order value originally specified in the contract;
  - 3) the change does not lead to a change in the nature of the contract and have been met cumulatively the following conditions:
    - a) the need to amend the contract is caused by circumstances whose FR, acting with due care, he could not have foreseen
    - b) the value of the change does not exceed 50% of the order value originally specified in contract;
  - 4) the contractor awarded the contract by FR is to be replaced by a new contractor:
    - a) based on contractual provisions,
    - b) as a result of a merger, division, transformation, bankruptcy, restructuring or acquisition of the existing contractor or its enterprise, provided that the new contractor meets the conditions for participation in the contract award procedure, there are no grounds for exclusion and this does not entail other significant changes to the contract,



- c) as a result of the FR's taking over the obligations of the contractor towards its subcontractors. In the event of a change of the subcontractor, FR may conclude a contract with a new subcontractor without changing the terms of the contract, taking into account the payments made for the work completed so far;
- 5) the change does not lead to a change in the overall nature of the contract and the total value below the EU thresholds and is below 10% of the value of the original contract in the case of service or supply contracts or 15% in the case of works contracts.