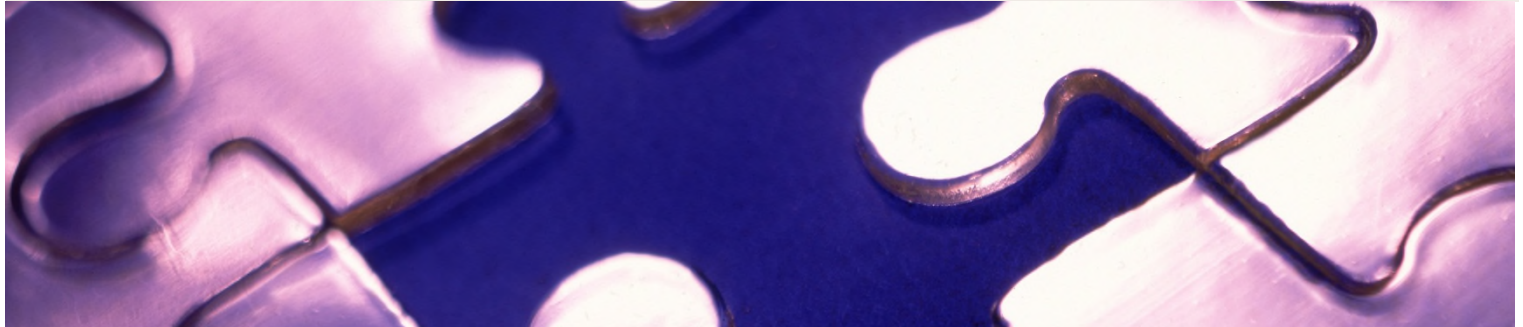


Financial Cooperation

»» Guidelines for Procurement



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Guidelines for Procurement of Goods, Works
and associated Services in Financial
Cooperation with Partner Countries

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Introduction

These guidelines give information on the minimum requirements for the award of contracts for goods, works and associated services in the implementation of projects and programmes financed under *German Financial Cooperation* (FC)¹. The guidelines are based on internationally acknowledged procedures and standards and apply to all supplies of goods, works and associated services² that are financed in full or in part from funds of German FC.

KfW has a responsibility for all of society and regards sustainability in the projects and programmes it supports as an overarching objective of its mission. The design, implementation and subsequent operation of the projects and programmes supported by KfW Development Bank should take reasonable account of economic efficiency as well as ecological and social aspects. Within the possibilities of the partner systems, these aspects can be considered in different ways in the selection of firms and/or in the evaluation of tenders.

Under FC, contracts for goods, works and associated services are always *awarded* by the agency ("project executing agency" or "client"³) in charge of project implementation, which in most cases is also the agency that calls for tender. It is usually subject to applicable national laws. KfW takes care that

- the funds applied under FC are used as economically and efficiently as possible;
- the bidding process allows a fair competition that gives all bidders an equal opportunity and ensures the selection of the most favourable bid and, thus, the most efficient utilisation of scarce funds;
- the decision on the award of the contracts is taken in a comprehensible and transparent manner.

In addition, KfW reviews the draft contracts to be submitted to it to make sure that the international commercial practices applicable in the industry in question are observed, especially with regard to liability, payment terms and warranty, and that the drafts do not have any serious flaws or contain contradictions that might impede the execution of the project.⁴ Where these guidelines require a statement from KfW, its positive comment ("no objection") is a prerequisite for the contract to be financed from funds of FC.

KfW endorses the harmonization of the principles and procedures applied in the framework of international development cooperation. Therefore the harmonized standard documents for tenders and contracts, introduced by the international financing institutions (IFIs) as lead agencies, are generally to be utilized.

¹ Expressions written in italics are explained in Annex 6.

² Consulting services will be carried out in accordance with the "Guidelines for the Assignment of Consultants in German Financial Cooperation with Partner Countries".

³ In the following, the terms "project executing agency" and "client" will be used interchangeably unless otherwise specified.

⁴ A list of KfW's information and review requirements is contained in Annex 1.

In exceptional cases, for instance for specific programme lines, other awarding procedures may be applied. In appropriate cases KfW may also agree with the project-executing agency, following a general review of the executing agency's procurement system, on a simplified review procedure. For archiving purposes the documents are to be submitted on paper and in electronic format (PDF file).

Financial Cooperation – what is it?

Financial Cooperation (FC) is a component of German Development Cooperation. The purpose of FC is to finance investments in the economic and social infrastructure, poverty reduction, and environmental protection in partner countries with loans at favourable conditions and grants provided from the German federal budget and, where appropriate, complemented by market funds raised by KfW. FC is carried out by KfW on behalf of the German Ministry for Economic Cooperation and Development (BMZ). FC funds are used to expand water and electricity supplies, improve health and education systems, develop transport infrastructure and increase agricultural output, among others. They are also used to support loan programmes for small and medium-sized enterprises and economic reforms.

1 Principles

1.1 Competitive Bidding

1.01 In principle, supplies and services for projects financed from FC funds are to be procured by the *contracting agency* on the basis of international competitive bidding. Unless there are justified restrictions in individual cases or if none of the reasons for exclusion specified under para 1.04 apply, there are no restrictions regarding the bidder's country of domicile or the country of origin of supplies and services.

1.02 Restrictions to the principle of international competitive bidding described in Section 2 are admissible in justified cases only upon prior approval by KfW. The specific features of the alternative forms of procurement to be applied in these cases are described in Section 3. The provisions of Section 2 will apply to these cases accordingly.

1.2 Fair and Transparent Bidding Process, Core Labour Standards

1.03 All parties involved in a procurement process financed under FC must ensure a fair and transparent competition and observe the ILO Core Labour Standards. This must be documented by a corresponding declaration of undertaking (Annex 5) of all parties involved in the bidding process. The declaration of undertaking must be signed in a legally binding manner by duly authorized representatives of the bidder. Failure to submit this declaration and non-compliance with the requirements will lead to exclusion from the tender.

1.3 Eligible Bidders

1.04 Tenders from bidders will be admitted to the procedure provided that none of the following reasons for exclusion apply:

- Sanctions or embargoes issued by the Security Council of the United Nations, the EU or the German Government preclude the participation of a bidder;
- The bidder is excluded from the tendering process with legal effect of the country of the contracting agency on grounds of criminal offences, especially fraud, corruption or other economic crimes;
- The bidder is a state-controlled company in the partner country that is not legally or economically independent, or that is not subject to commercial law, or that is a public authority dependent on the contracting agency or the project executing agency or the recipient of the loan/financing amount;
- The bidder or individual members of the bidder's staff or a subcontractor has economic links or family ties with personnel of the contracting agency who are involved in preparing the tender documents, awarding the contract or supervising the execution of the contract, insofar as the conflict of interests could not be resolved to KfW's satisfaction in advance of the contract award and execution phase;
- The bidder is or was involved as a consultant in the preparation or implementation of the project. The same applies to an enterprise or an individual that is closely connected to the bidder under a company group or a similar business link, or to several enterprises or individuals associated correspondingly. (exception: In *BOT* projects or turnkey projects a participation of future suppliers or manufacturers may even be desirable);
- The bidder or individual members of the bidder's staff or a subcontractor are or were during the last 12 months prior to publication of the invitation to tender indirectly or directly linked to the project in question through employment as a staff member or advisor to the contracting agency, and are or were able in this connection to influence the award of the contract for services, or the bidder is or was otherwise able to influence the award of the contract for services.

By signing the Declaration of Undertaking (see Annex 5), the bidder attests that none of these reasons for exclusion or conflicts of interest apply. In case of doubt, when tendering the bidder in question shall furnish proof to the satisfaction of the contracting agency and KfW.

1.4 Engagement of a Consultant

1.05 During the awarding procedure the *contracting agency* is usually supported by an independent qualified consultant in the preparation of the bidding documents, the evaluation of the bids, the award of contract, the drafting of contract documents and contract negotiations.

2 Procedures in international competitive bidding

2.1 Submission of Documents to KfW, Publication of Procurement Notice and Bidding Period

2.01 As a rule, KfW must be furnished with the pre-qualification and bidding documents for comment in due time prior to the planned publication. It will examine whether the documents respond in form and substance to the requirements of the project, the loan and financing agreements concluded for the project and the provisions of these procurement guidelines. Among other things, it will ensure that the *bidding period* allows the bidders sufficient time to

thoroughly prepare their bids and that the conditions of the procurement process have a neutral effect on competition.

2.02 The purpose of publishing the invitation to submit bids is to draw the attention of all potential bidders to the intended procurement process and to the opportunity of participating. The procurement notice must be published in due time prior to issuing the prequalification and bidding documents and in an appropriate form specifying date and place of issue. The invitation to participate in an international competitive bidding process is usually published in the partner country and in Germany, if appropriate also in international media. It is commissioned by the *contracting agency*.

- The procurement notice must be published in Germany in the databases of Germany Trade and Invest⁵ (GTAI) before or at the same time as its publication elsewhere. To this end, the *contracting agency* will supply the GTAI with the text of the procurement notice and, free of charge, with a copy of the complete bidding documents, at its discretion either as a copy in the partner country or in electronic file format directly per e-mail. Publication is free of charge.
- Publication in the partner country will follow the rules and regulations applicable there to the *contracting agency*. Publication will in principle take place in the daily newspapers of the partner country.

2.03 The deadlines for preparation of the qualification documents and for preparation of the bids must consider the particular circumstances of the project, its size and complexity and ensure adequate and transparent competition. In principle, at least 30 calendar days should be allowed for pre-qualification procedures and 45 calendar days for submission of bids.

2.04 An extension of the *bidding period* may be granted in exceptional circumstances only. Following prior information to KfW, all bidders must be notified in writing and in due time before the expiration of the original period.

2.05 Comments of the *contracting agency* on inquiries from individual bidders during the *bidding period* will be communicated to all bidders in writing simultaneously and in due time, that is, at least 14 days before expiry of the *bidding period*.

2.2 Qualification Procedure

2.06 The qualification of the bidders will be assessed in consideration of the scope and complexity of the projects. In complex and technically complicated projects that require substantial effort from the bidders in the preparation of their bids or in bidding processes that are likely to draw an unreasonably large number of bids, the *contracting agency* usually conducts a pre-qualification in consultation with KfW prior to the actual bidding process. In all other bidding processes a post-qualification is to be carried out (see section 2.2.2).

2.2.1 Prequalification

2.07 In procurement processes with prequalification the bidding will be conducted in two stages. In the first stage, the pre-qualification stage, the submitted documents are examined

⁵ Full name: Germany Trade and Invest – Gesellschaft für Außenwirtschaft und Standortmarketing mbH

in order to establish whether the bidders are capable of delivering the required goods and works duly and properly. In the pre-qualification the following essential criteria are examined:

- absence of reasons for exclusion (see criteria under para 1.04);
- experience in the execution of comparable projects;
- experience in the partner country or in comparable countries;
- availability of qualified personnel and appropriate facilities and equipment in sufficient quantities;
- adequate financial capacity.

2.08 The invitation to the pre-qualification will specify the minimum requirements for the qualification, the evaluation matrix and the criteria for determining the number of bidders that are to be invited to submit their bids following the qualification. In appropriate cases, such as infrastructure projects, environmental and social standards will be taken into account. The maximum number of bidders depends on the nature of the project and the effort involved in preparing the bid.

2.2.2 Postqualification

2.09 In bidding procedures with post-qualification the qualification documents and the actual bid are usually submitted simultaneously in two separate envelopes (two-envelope procedure). In the first public session only the qualification documents will be opened and examined for completeness, inclusion of the required bid bond and fulfilment of the qualification criteria. The qualification will be evaluated according to the criteria specified under para 2.08.

2.10 The two-envelope procedure may be dispensed with in justified exceptions, for instance in the procurement of standardized commercial goods or when bidding is restricted to enterprises whose qualification has been verified as part of their registration with the *contracting agency*. In this case fulfilment of the necessary qualification criteria will be examined at the start of the evaluation of the bids.

2.2.3 Evaluation Report on Qualification, Information of the Bidders

2.11 The *contracting agency* will prepare a detailed evaluation report on the results of the qualification procedure. If the contracting agency is supported by a consultant (para 1.05) this report is to include his/her certificate or separate comment. In procedures with pre-qualification the *evaluation report* includes the *contracting agency's* recommendation on the bidders to be invited to tender. The report shall include all clarifications and communication with bidders. If more than the maximum number of candidates qualify (para 2.08) these will be selected according to the number of points scored.

2.12 The evaluation report is to be sent by the *contracting agency* to KfW. Financing of the supplies and works from FC funds will be conditional on KfW's no-objection to the recommendations contained in the *evaluation report* before the invitations to tender are sent out (in procedures with pre-qualification) and before the bids are opened in the case of the two-envelope procedure.

2.13 Following receipt of KfW's no-objection, the *contracting agency* will inform all bidders immediately on the outcome of the evaluation.

2.2.4 Further Steps following Conclusion of the Qualification Procedure

2.14 In procurement procedures with pre-qualification, the bidders selected in accordance with the findings of the *evaluation report* will be invited to submit their bids in the second stage. In bidding procedures with post-qualification only the bids of those bidders who have fulfilled the qualification criteria will be opened in the second public session. The procedure for opening the bids will be conducted in accordance with para 2.22. If the two-envelope procedure was dispensed with (see para 2.10), after appraisal of the qualification criteria only the bids of those bidders will be evaluated further who have met the qualification criteria.

2.3 Bidding Documents and Terms

2.15 The bidding documents inform the bidders about the nature and scope of the goods and works to be provided and about the conditions of the contract. They will be designed in a way that ensures fair and transparent competition with equal opportunities for all bidders. To this end the bidders will also have to be informed about the selection criteria and how these are weighted in the evaluation of the bids. As a general rule, the documents include:

- general information about the project and the supplies and services to be provided;
- information on the execution of the bidding process and evaluation procedures;
- sample form of tender;
- general and specific conditions of contract and, if appropriate, draft contract;
- general technical conditions of contract, neutral technical specifications with bill of quantities, specifications or performance criteria for performance-based contracts;
- clear and complete design documents;
- specification of standards and measuring system applied;
- specimen declaration of undertaking;
- standard forms of bid bond, advance payment bond and performance bond (see Section 4.6)
- preliminary cost estimates, unless there are serious reservations against their disclosure.

2.16 Wherever possible, the standard documents of the *IFIs* are to be utilized. These will be applied wherever possible without any modifications, particularly with regard to the distribution of risk between the contractual parties. Any deviations that may become necessary are to be listed clearly in an annex. The version of the Pink Book containing KfW-specific particular conditions, licenced by KfW, should be utilized instead of the FIDIC Red Book.

2.17 Implementation agreements and covenants of KfW, for instance with regard to the inclusion of HIV/AIDS prevention measures in construction projects in sub-Saharan Africa, to

the extent that they are relevant for the contracts, will usually be taken into consideration in the specific or technical conditions of contract but not in the general conditions of contract.

2.18 The procurement conditions clearly and unequivocally define the obligations to be entered into by the subsequent contractual parties. In particular, this applies to the scope of supplies and the place of delivery, liability and warranty obligations, and public charges and levies to be borne by the bidder. The distribution of risks resulting from geotechnical or hydrological conditions and from environmental protection requirements is to be settled. The *contracting agency* will make available studies accessible to all bidders.

2.19 The procurement conditions will also specify whether alternative bids are admissible and how they may be taken into consideration in the evaluation of bids.

2.4 Currency of Bid Price

2.20 The bidding documents specify the currencies in which the bid price is to be expressed. Usually the currencies of bids are commonly used international currencies (such as the US dollar or the Euro) and/or the national currency of the *contracting agency*.

2.21 With regard to possible changes in the exchange rates during the procurement process, the *contracting agency* specifies the relevant date for the conversion of bid prices. Such date should be as near the bid opening date as possible. The contracting agency also indicates the rate to be used for the conversion (usually the selling rate published by an official source on a specific date).

2.5 Bid Opening

2.22 The bids, which are to be submitted in a sealed envelope, must be opened at the place and time specified in the bidding documents. The bid opening will take place in public, with the name of the bidder and total amount of the bid and any alternative bids read aloud and recorded. A record of the bid opening session will be prepared, signed by the members of the bid opening commission and submitted to KfW immediately. If the documents are to be submitted in separate envelopes (e.g. separate technical proposal and price quotation), which will be evaluated consecutively, a record must be prepared from each opening session. At KfW's request a copy of the bid will be presented simultaneously to KfW in a sealed envelope.

2.6 Examination and Rejection of Bids

2.23 After opening of the bids they are examined for completeness, for compliance with the bidding documents and for conformity of the bonds submitted by the bidder with the specifications of the bidding documents.

2.24 Bids are generally rejected if

- a bid is received after the *closing date*;
- a bid fails to comply with the bidding documents in material respect, e.g. with the general conditions of contract or major technical specifications;
- a bid contains major reservations or restrictions; or

- a bid lacks the declaration of undertaking specified under para 1.03.

2.25 Negotiations between the *contracting agency* and a bidder as well as alterations of bids between the opening of the bids and the award of the contract are not admissible. However, the *contracting agency* may seek clarifications from the bidders that are necessary for the evaluation of the bids. Neither the clarifications demanded by the *contracting agency* nor the alterations made by the bidder may lead to any changes in the contents or price of the bid. Queries on the part of the *contracting agency* and responses from the bidder must be in writing.

2.26 The procurement procedure is confidential. Confidentiality enables the *contracting agency* and KfW to prevent inadmissible interference. The *contracting agency* and KfW as well as the persons in charge of the evaluation and preparation of the recommendation for the award of contract therefore will give no information on the evaluation of bids nor make any award recommendation to the bidders or to other persons who are not officially involved in the procurement procedure. In the case of breach of confidentiality KfW may demand cancellation of the tender procedure.

2.7 Evaluation of Bids

2.27 Bids that are not rejected are usually evaluated by the *contracting agency* in cooperation with the consultant or by the consultant. The purpose of the evaluation is to determine the most advantageous offer by assessing the relevant factors of the individual bids and by subsequently comparing all the bids submitted. If specified in the bidding documents (see para 2.15), the evaluation includes not only the price offered but also other factors that are relevant to the success of the project and its sustainability and that can be quantified, such as the delivery or construction period, personnel, equipment lists, environmental and social impacts, costs of operation and total useful life, supply of spare parts, service, and the qualification for training local personnel. If the evaluation was preceded by a prequalification, criteria that were already considered then may not be examined again unless doubts have subsequently emerged with regard to the fulfilment of the minimum qualification criteria.

2.28 The bids that have not been rejected are examined individually for technical and arithmetic correctness. Bids are evaluated and weighted in quantitative terms, in monetary units where possible and only according to the criteria stipulated in the bidding documents. The most advantageous bid determined on the basis of this procedure after correction of any arithmetic errors will win the contract. The lowest bid price alone is generally not decisive.

2.29 If a bid price appears to be unusually low in relation to the services to be rendered the bidder will be requested to submit a written breakdown of his price calculation. If after review of the notes submitted by the bidder reasonable doubts persist as to whether the required goods and works can be provided at the rates offered and if this is reasonably expected to pose a considerable risk to the performance of the contract, the bid in question will have to be excluded.

2.30 To enable a comparison of bids the evaluation of the bid prices will consider the import duties and taxes actually applicable. In cases where competition between qualified bidders would be seriously distorted as a result of local regulations or double taxation agreements, an appropriate procedure will be agreed between the *contracting agency* and KfW prior to the start of the tender to redress such distortion; a corresponding note will be included in the bidding documents.

2.31 On completion of the bid evaluation KfW is furnished with a detailed report on the evaluation and comparison of the bids ("*Evaluation Report*") and with a substantiated recommendation for award that must be coordinated with any government agencies of the partner country whose involvement may be required. The report shall include all clarifications and communication with bidders. If the *contracting agency* is supported by a consultant (para 1.05) this report is to include his/her certificate or separate comment.

2.32 If an extension of the *validity period* became necessary the reasons are to be stated in the *evaluation report*. An extension of the *validity period* may not lead to changes in the bid prices. The extension entitles the bidders to withdraw their bids upon expiry of the original binding period without allowing the bid bond to be drawn. KfW reserves the right to refrain from financing if the procurement procedure is unduly delayed.

2.33 The *contracting agency* will submit to KfW the *evaluation report* and award recommendation in such good time as to permit KfW's comment to be issued not later than three weeks before expiry of the *validity period*. KfW reserves the right to refrain from financing if the report is not submitted in due time.

2.34 KfW generally reserves the right to review the bids of all bidders or of specific bidders as well as all other documents in connection with the procurement process and award up to two years after completion of the project.

2.8 Cancellation of the Bidding Process

2.35 The bidding process may be cancelled if

- competition was inadequate;
- no bid was received that is considered as substantially responsive;
- the responsive bids substantially exceed the budget;
- the technical or financial bases of the procurement have changed materially prior to the award, or
- the rates of the bid are obviously and clearly unreasonably high.

2.36 Competition is usually inadequate if clearly fewer bids qualified for evaluation than could be expected from the size of the market, if the prices appear to be clearly excessive or if there is obvious price fixing.

2.37 If no substantially responsive bid was received a new qualification procedure may be dispensed with and a new bidding process may be initiated, or, under circumstances defined

in Section 3.6, the contract may be *awarded at the contracting agency's discretion* to one of the bidders that originally qualified.

2.38 If the lowest bid was higher than the estimated cost this alone is no reason for cancelling the bidding procedure.

2.39 If the lowest responsive bid is clearly higher than the cost estimate the *evaluation report* must discuss on the basis of an analysis of causes whether a reasonable price could be achieved through a new bidding process. If this is not to be expected, after KfW's no-objection and cancellation of the procurement process, negotiations may be conducted with the bidder who has submitted the most advantageous responsive bid in order to determine how a reasonable contract price can be reached by adjusting the scope of the contract and/or by altering the distribution of risks and burdens.

2.40 Any cancellation of the bidding process as well as the further steps require KfW's no-objection. The cancellation of the bidding process must be notified by the *contracting agency* to all bidders stating the reasons. If the bidding process is cancelled a new procurement process is usually conducted under different circumstances that ensure greater competition, for instance by changing the object or the terms of the procurement.

2.9 Information to the Bidders

2.41 After the award of the contract the other bidders will be informed by the *contracting agency* that their bid was not successful and whether their bid fulfilled the general and technical procurement conditions.

3 Other Forms of Procurement, Discretionary Award and Counterpart Measures

3.01 On the condition that KfW give its prior no-objection, a deviation from the principle of international competitive bidding is possible in specific cases. Particularly in the forms described in sections 3.2 to 3.4, KfW may admit less stringent review requirements than those specified in section 2, or it may permit conditions of contract that differ from those specified in section 4 if this does not violate the principles mentioned in section 1. The following forms of procurement may be applied in lieu of international competitive bidding.

3.1 Supplies and Services Limited to Germany or to the Member States of the European Union

3.02 When competition is adequate the procurement process may be limited to enterprises domiciled in, for example, Germany or the EU, that conduct a significant portion of their business there and that do not resort to supplies or services from third countries to provide the supplies and services to be contracted.

3.2 Local Competitive Bidding

3.03 If adequate competition is expected and if it is likely that international enterprises will not take part in the bidding process because of the moderate size of the project, for logistical reasons or because of the low local price level, the bidding process may be restricted to the

partner country in question. In this case it will be admissible to restrict publication of the tender exclusively to national media and to the official national language and to conduct it in accordance with payment and contractual procedures customary in the country. Enterprises not domiciled in the partner country are generally allowed to participate in the tender.

3.3 Limited Competitive Bidding

3.04 The procurement may be restricted from the beginning to a limited number of firms, for instance if they are the only firms that are capable of meeting the specifications or if the contract volume does not justify public bidding.

3.4 Price Quotation

3.05 In individual cases the procurement of commercially obtainable goods and services of a kind, value or scope that does not justify a competitive bidding process can be conducted on the basis of price quotations and of a sufficient number of (at least three) price quotations obtained from local or international dealers or manufacturers.

3.5 Multi-Stage Process

3.06 In complex technical projects, particularly in the procurement for turn-key projects (BOT, BOOT or similar) precise technical specifications often cannot be made in advance. In such cases a multi-stage procurement process may be used. Details of this process are agreed between the *project-executing agency* and KfW at project appraisal.

3.6 Discretionary Award

3.07 *Discretionary awards* of contracts are permitted in exceptional cases only. They are permitted

- in amending existing contracts if the additional scope is minor in comparison with the existing contract, the nature of the supplies and works is the same, and the award of these supplies and works does not justify a new bidding process;
- upon cancellation of a bidding process if a renewed bidding process is unlikely to yield reasonable results (see section 2.8);
- if for specific reasons only a particular enterprise is suitable for supplying the goods and services to be procured (for instance original spare parts, goods protected by copyright or patent registration, special experience or equipment);
- if supplies and services are so urgent that a bidding contest under these procurement guidelines is not possible, such as in the case of emergency measures.

3.08 In *discretionary awards* the *contracting agency* will examine in any case whether the bid price and the other elements of the bid are reasonable. The outcome of this verification procedure must be documented in writing, and shall require KfW's approval prior to the conclusion of the contract.

3.7 Force Account, Target Group-implemented Measures

3.09 Bidding procedures may be dispensed with if measures are to be carried out by the *contracting agency*, by units that report to it, or directly by the target group to achieve greater

sustainability or employment effectiveness because of specific circumstances (for instance emergency measures). In this case the contract is to be adapted to the particular requirements.

4 General Conditions of Contract

4.1 General

4.01 The General Conditions of Contract are an integral part of the tender documents. They define the obligations of the contract parties and the distribution of the risks.

4.02 The General Conditions of Contract may be drafted along the lines of internationally applied standard contracts in accordance with the nature and scope of the supplies and services to be awarded. For civil works projects these are usually the Conditions of Contract prepared by *FIDIC*. The *IFIs* have prepared *standard documents* for supply contracts. Other provisions, such as contractors' general terms and conditions or model forms of agreement should additionally be agreed only if this is inevitable. In such cases the order in which the individual arrangements are to be considered should be stated.

4.2 Liability

4.03 The liability between the contractual parties will be settled in such a manner as to prevent any gaps in liability. Especially in complex projects that are difficult to coordinate technically and on a time axis, and in which various enterprises are involved, the contract should stipulate that the overall liability for the execution and successful completion of the project be assumed by one of the parties to the contract in order to avoid gaps in liability. Where measures are to be carried out by a joint venture the contract is to stipulate joint and several liability of the participating firms.

4.3 Payment Terms

4.04 Payment terms will be in accordance with the usual international practice in the industry concerned and will provide for payments to be dependent on the delivery of supplies and performance of services and be in line with the progress of the project.

4.05 The advance payment represents an input by the *contracting agency* that is designed to cover mobilization expenses accruing to the contractor. As a rule, it should not exceed 20 % of the contract price and is to be paid immediately upon entry into force and effect of the contract and upon presentation of the required advance payment and performance guarantees.

4.06 Further payments will be effected in down-payments or instalments pro rata of the progress of the project.

4.07 Disbursement will be effected in the currencies specified in the contract. If necessary, exchange rate and currency risk agreements will be entered into that place none of the contractual parties at an unreasonable advantage or disadvantage.

4.08 The final payment, usually ten per cent of the contract value, is to be made upon preliminary acceptance. It is to be secured by a performance bond in the amount of the retention money for the services to be rendered during the warranty period (usually five per cent of the contract value). If the contractor fails to present this guarantee in due time, payment of the portion of the final payment representing the retention money will be made on final acceptance unless otherwise agreed in accordance with para 4.12.

4.09 The payment terms are to be in line with the Information leaflet "*Disbursement of Funds under Financial Cooperation with Partner Countries*". In particular, the necessary documentary evidence of the proper use of the funds must be provided for disbursement. As import duties and public charges to be borne by the *contracting agency* generally are not financed from funds of German Financial Cooperation they have to be shown separately by the contractor in the invoices. If the contractor pre-finances taxes and import duties, the deadlines for reimbursement and consequences of any breach of the obligation to reimburse must be agreed.

4.4 Price Adjustment

4.10 In cases where the supply of goods and works for a project may extend over a longer period of time, the bidding documents may contain price adjustment clauses that reasonably compensate cost changes that may occur during contract implementation. These clauses should take account of changes in the prices of the major cost constituents of the contract (such as labour, raw materials, supplies and equipment) according to a given system of index numbers or on other contractually agreed bases. Evidence of cost changes is to be furnished regularly by submission of official documents such as those issued by chambers of commerce or statistical offices. In order to prevent advantages or disadvantages to a contractual party, it must be ensured that the amounts for the price adjustment are disbursed in the currency that was contractually agreed for the cost subject to price adjustment (see section 4.3).

4.5 Warranty

4.11 The contractor's warranty obligations are defined in accordance with international industry practice. The warranty period is usually one to two years.

4.12 If the final acceptance towards the end of the warranty period is delayed by more than 90 days for reasons for which the contractor cannot be held accountable, the contracting agency may commission an international audit firm to determine whether and to what extent the services have been duly performed. Its vote will be binding for both parties. In particular cases it may be agreed that the contractor's warranty obligations will be considered fulfilled, if a contractually agreed latest date was exceeded for reasons beyond the contractor's control.

4.6 Guarantees

4.13 The contractor will provide abstract bid bonds, advance payment bonds and performance bonds. Advance payment bonds and performance bonds are to be made payable to KfW. The guarantor and the content of the bond (see specimens in Annexes 2 - 4)

will require KfW's no-objection. The *contracting agency* will return the bonds of its own accord and immediately after their expiry or after the total amount has been utilized.

4.14 The bid bond ensures that the bidder adheres to the bid for the duration of the *validity period*. It is to be returned to the unsuccessful bidders after the contract has been awarded or after the *validity period* has expired, whichever event occurs first.

4.15 The advance payment bond ensures that in case the services are not performed the contracting agency will be refunded the advance payment which it has made. The amount of the advance payment bond equals the amount of the advance payment. As a rule, the bond will decrease pro rata in accordance with the value of the supplies and works provided.

4.16 The performance bond guarantees that all contractual obligations will be duly fulfilled by the contractor. The performance bond is usually valid throughout the life of the contract and normally amounts to ten per cent of the order price up to preliminary acceptance and five per cent of the order price after preliminary acceptance.

4.7 Penalties

4.17 Contractual penalties will be agreed in case the contractor fails to perform the services within the agreed period for reasons for which the contractor is responsible and if this failure leads to a delay in acceptance and entry into operation of the project. The amount of the penalty is usually established in the bidding documents as a specific amount or portion in relation to a time unit (e.g. an amount of money or percentage of the contract price per week) with a ceiling (usually five to 10 per cent of the contract price). This penalty is a blanket compensation for the additional cost and loss of operation caused by the delay. Especially in the case of contracts for plant and machinery, performance penalties are also stipulated which are due in the event of failure to achieve certain contractually agreed parameters.

4.8 Insurance

4.18 Goods and works are to be insured adequately and to the customary extent against all risks that may occur up to the orderly completion and acceptance of the project so that replacement or rehabilitation is possible in the event of damage.

4.19 Transport insurance is to be provided for the duration of the entire transport. Insurance to be agreed upon must be for full coverage (All Risks) and, where necessary, should include War Clauses (Cargo) and clauses for strikes and disturbances in accordance with internationally acknowledged clauses such as the *Standard Clauses* of the German Insurance Association.

4.20 For civil works, plant and machinery the insurance provided must cover risks resulting from the operation of construction sites and the assembly of structures. Here the main insurance to be provided is Contractors All Risks Insurance as well as insurance against damage to persons.

4.21 Insurance is to be taken out against extraordinary events such as war, riot, terrorism or revolution to the extent possible at reasonable terms and conditions. Otherwise the

contracting agency and the contractor are to reach a settlement on the distribution of these risks in coordination with KfW.

4.22 In the case of financing of foreign currency costs, insurance is to be taken out in freely convertible currency and will provide for any payments due from the insurer to be made payable to KfW for account of the *contracting agency*. The payment clause corresponds to that of the advance payment bond and performance bond (Annex 3 and 4). If such insurance payments are rendered in national currency, they must be transferred to a special account of the *contracting agency* which cannot be accessed without KfW's consent.

4.9 Force Majeure

4.23 Force majeure means extraordinary circumstances that prevent the due performance of contractual obligations and are beyond the control of any of the parties to the contract, such as natural disasters, war, or disruption of public order.

4.24 It may be agreed that evidence of the existence of an event of force majeure and its being the cause for the contractor's failure to perform his contractual obligations is to be furnished in the form of a corresponding certificate issued by the local chamber of commerce or a similar institution.

4.25 An event of force majeure results in the suspension of contractual obligations and, thus, a postponement of the dates fixed for delivery of goods and provision of services and, accordingly, the warranty periods. As the case may be, the contractor is obligated to remove the obstacle, to take measures to eliminate damage, or to take any other extraordinary precautions (e.g. storage of goods) against reimbursement of costs. In the event of persistent force majeure the contract will be terminated; the General Conditions of Contract will contain provisions on the compensation of services rendered by the contractor in such a case.

4.10 Applicable Law, Settlement of Disputes

4.26 A clause will be included specifying the law applicable to the contract, and a provision on the settlement of disputes will be included. In larger or more complex projects the parties may agree on a Dispute Adjudication Board to accompany the project that will adjudicate on the disputed case upon failure of an attempt for an amicable settlement as first instance. In addition, an international court of arbitration will be appointed in any case, this means, in addition to the Dispute Adjudication Board, for instance a court of arbitration in accordance with the rules of arbitration of the International Chamber of Commerce (*ICC*). In case the parties agree on a Dispute Adjudication Board, the dispute should not be referred to the international court of arbitration until at least one of the parties to the contract has refused to accept the decision of the Dispute Adjudication Board. In principle, given the faster and less complex procedure, preference should be given to the Dispute Adjudication Board over an international court of arbitration or an ordinary court for the final settlement of a dispute.

Annexes

Information and Review Requirements of KfW

Prior to publication or invitation to pre-qualify or tender in procurement processes without pre-qualification, the following documents are to be submitted to KfW for comment:

- Invitation to tender
- Selection criteria for qualification (in detailed form)
- Tender documents, including specimen contract
- Draft notice specifying the fees for the purchase of the tender documents and their utilization, as well as list of the media in which the notice is to be published

In processes with **pre-qualification**, the following documents have to be submitted to KfW for comment prior to the **invitation to tender**:

- The *evaluation report* of the qualification, including the certificate or opinion of the consultant
- The recommendation on the list of bidders to be invited to tender

In processes with **post-qualification**, the following documents have to be submitted to KfW for comment prior to the **opening of the bids**:

- The *evaluation report* of the qualification, including the certificate or opinion of the consultant
- The recommendation on the list of bidders whose financial bids are to be opened.

Prior to the **award** of the contract, the following documents are to be submitted to KfW for comment:

- The signed record of the bid opening
- The *evaluation report*
- The recommendation on the award
- The certificate or opinion of the consultant on the recommendation of the award
- If applicable, an explanation why the *binding period* could not be observed
- At the request of KfW, if applicable, all or specific bids.

If a **suspension of the procurement process** is recommended instead of an award, KfW's no objection on the suspension and on the further steps must be obtained prior to suspension of the procurement process.

During the bidding process and *award*, **contacts between bidders and KfW** are undesirable unless KfW is the contracting agency in exceptional cases. Inquiries for clarifications are to be sent directly to the *contracting agency* or its representative.

If after notification of the result of the qualification or the award of contract a bidder files an **objection** or **protest**, KfW must be informed accordingly and on the subsequent decisions immediately.

Standard Form of a Bid Bond

Address of guarantor bank:

.....
.....

Address of beneficiary (contracting agency):

.....
.....

We, the undersigned (Guarantor), in order to enable to bid for (project, object of contract), hereby irrevocably and independently guarantee to pay to you an amount up to a total of

.....

waiving all objections and defences.

We shall effect payments under this guarantee on your first written demand, which must be accompanied by your confirmation that you have accepted the above-mentioned bid and that the firm is no longer prepared to abide by this bid.

This guarantee shall expire no later than

By this date we must have received any claims for payment by letter or encoded telecommunication.

It is understood that you will return this guarantee to us on expiry or after payment of the total amount to be claimed hereunder.

This guarantee is governed by the laws of

.....

Date

.....

Guarantor

Standard Form of an Advance Payment Bond

Address of guarantor bank:

.....
.....

Address of beneficiary (contracting agency):

.....
.....

On you concluded with ("Contractor")
a contract for (project, object of contract) at a price
of

In accordance with the provisions of the contract the Contractor receives an advance
payment in the amount of, which represents % of the order
value.

We, the undersigned (Guarantor), waiving all objections and defences
under the aforementioned contract, hereby irrevocably and independently guarantee to pay
on your first written demand any amount advanced to the Contractor up to a total of
..... (in words:
.....) against your written declaration that the
Contractor has failed to duly perform the aforementioned contract.

This guarantee shall come into force and effect as soon as the advance payment has been
credited to the account of the Contractor.

In the event of any claim under this guarantee, payment shall be effected to KfW, Frankfurt
am Main, BIC: KFWIDEFF, account IBAN: DE53 5002 0400 3800 0000 00, for account of
..... (contracting agency/project-executing agency).

This guarantee shall expire no later than

By this date we must have received any claims for payment by letter or encoded
telecommunication.

It is understood that you will return this guarantee to us on expiry or after payment of the total
amount to be claimed hereunder.

This guarantee is governed by the laws of

.....

Place, date

.....

Guarantor

Standard Form of a Performance Bond

Address of guarantor bank:

.....
.....

Address of beneficiary (contracting agency):

.....
.....

On you concluded with ("Contractor")
a contract for (project, object of contract) at a price
of

In accordance with the provisions of the contract the Contractor is obligated to provide a
performance bond for ... % of the contract price.

We, the undersigned (Guarantor), waiving all objections and defences
under the aforementioned contract, hereby irrevocably and independently guarantee to pay
on your first written demand an amount up to a total of
..... (in words:
.....)

against your written declaration that the Contractor has failed to duly perform the
aforementioned contract.

In the event of any claim under this guarantee, payment shall be effected to KfW, Frankfurt
am Main, BIC: KFWIDEFF, account IBAN: DE53 5002 0400 3800 0000 00, for account of
..... (project-executing agency/purchaser).

This guarantee shall expire no later than

By this date we must have received any claims for payment by letter or encoded
telecommunication.

It is understood that you will return this guarantee to us on expiry or after payment of the total
amount to be claimed hereunder.

This guarantee is governed by the laws of

.....

Place, date

.....

Guarantor

Declaration of Undertaking

We underscore the importance of a free, fair and competitive procurement process that precludes abusive practices. In this respect we have neither offered nor granted directly or indirectly any inadmissible advantages to any public servant or other person nor accepted such advantages in connection with our bid, nor will we offer or grant or accept any such incentives or conditions in the present procurement process or, in the event that we are awarded the contract, in the subsequent execution of the contract. We also declare that no conflict of interest exists in the meaning of the kind described in the corresponding Guidelines⁶.

We also underscore the importance of adhering to environmental and social standards in the implementation of the project. We undertake to comply with applicable labour laws and the Core Labour Standards of the International Labour Organization (ILO) as well as national and applicable international standards of environmental protection and health and safety standards.

We will inform our staff about their respective obligations and about their obligation to fulfil this declaration of undertaking and to obey the laws of the country of @ (name of country).

We also declare that our company/all members of the consortium has/have not been included in the list of sanctions of the United Nations, nor of the EU, nor of the German Government, nor in any other list of sanctions and affirm that our company/all members of the consortium will immediately inform the client and KfW if this situation should occur at a later stage.

We acknowledge that, in the event that our company (or a member of the consortium) is added to a list of sanctions that is legally binding on the client and/or KfW, the client is entitled to exclude our company/the consortium from the procurement procedure and, if the contract is awarded to our company/the consortium, to terminate the contract immediately if the statements made in the Declaration of Undertaking were objectively false or the reason for exclusion occurs after the Declaration of Undertaking has been issued.

.....
(Place) (Date)
.....
(Signature(s))

⁶ See "Guidelines for the Assignment of Consultants in Financial Cooperation with Partner Countries" and "Guidelines for Procurement of Goods, Works and associated Services in Financial Cooperation with Partner Countries"

Abbreviations and Glossary

Bidding period	Period between the date of issue of the bidding documents and the date of submission of bids
BOT	Build-Operate-Transfer; here the term is used synonymously with other terms like BOOT, BOO.
Contracting agency	See definition in the introduction
Core Labour Standards	The core labour standards define internationally agreed minimum standards for worker rights. They concern forced child labour and other forms of child exploitation, freedom of assembly and non-discrimination. They are established by the International Labour Organisation (ILO). Details on the Core Labour Standards and a list showing what countries have ratified which standards can be found in the Internet at http://www.ilo.org
Development Gateway	A list of ongoing procurement processes can be found at http://www.dgmarket.com .
Discretionary Award	The term is synonymous with “direct award”
Evaluation report	See definitions in para 2.12 and 2.32
FIDIC	Fédération Internationale des Ingénieurs-Conseils (http://fidic.org/). Civil works projects are covered by the so-called “Red Book”, electronic and engineering equipment and design-build projects by the “Yellow Book” and small, e.g. locally awarded projects by the “Green Book”. The “Silver Book” for turnkey plant and equipment is only of limited importance as it does not provide for an independent consultant for FC financed projects.
Financial Cooperation (FC)	See definition in the introduction (box)
GTAI	Foreign Trade and inward investment agency of the Federal Republic of Germany Address: Germany Trade and Invest GmbH ⁷ , Villemombler Str. 76, D-53123 Bonn, Telephone: +49 (228) 24993-374 or -377, Telefax: +49 (228) 24993-446, Email: kfw-tender@gtai.de , Internet: www.gtai.de
Guidelines for the Assignment of Consultants in German Financial Cooperation with Partner Countries.	Available in five languages at internet under Guidelines/Contracts: https://www.kfw-entwicklungsbank.de/International-financing/KfW-Development-Bank/Publications-Videos/Publication-series/

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ICC	International Chamber of Commerce Internet address http://www.iccgermany.de/ and others
IFI	International financing institutions such as the World Bank, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Caribbean Development Bank.
Leaflet for the Disbursement of Funds	Available in five languages at internet under Guidelines/Contracts: https://www.kfw-entwicklungsbank.de/International-financing/KfW-Development-Bank/Publications-Videos/Publication-series/
Project executing agency	Agency in the recipient country which is responsible for the implementation of the project, usually also <i>contracting agency</i> .
Procurement	Procedure to award a contract and its result. Procurement comprises preliminary information, qualification, preparation and evaluation of bids, contracting and information to unsuccessful bidders.
Recipient country	Country which is the recipient of the FC loan or grant or country in which the non-governmental recipient has its domicile.
Standard conditions of the German Insurance Association	http://www.tis-gdv.de/tis/bedingungen/inhalt2.htm
Standard documents	(“Standard Bidding Documents”) of the <i>IFIs</i> for tender, awarding and contractual documents are standardised specimen procurement documents of the <i>IFIs</i> . They are available in English, for instance, at http://www.worldbank.org/ or http://www.adb.org/ .
Validity period	Period within which the bids are binding; the binding period is identical to the term of the bid bond.