

## **SPECIFICATIONS TENDER N° VT/2010/037**

### **Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union**

#### **1. TITLE OF THE CONTRACT**

Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union

#### **2. BACKGROUND**

##### **2.1 General background and context**

The Posting of Workers Directive 1996/71/EC aims to reconcile the exercise of companies' fundamental freedom to provide cross border services under Article 49 EC, on the one hand, with the appropriate protection of the rights of workers temporarily posted abroad to provide them, on the other. In order to do that it identifies the mandatory rules of general interest at Union level that must be applied to posted workers in the host country and establishes a hard core of clearly defined terms and conditions of work and employment for minimum protection of workers (laid down in article 3 (1) a - g) that must be complied with by the service provider in the host Member State.

The Directive thus provides a significant level of protection for workers, who may be vulnerable given their situation (temporary employment in a foreign country, difficulty to obtain proper representation, lack of knowledge of local laws, institutions and language). The Directive also plays a key role in promoting the necessary climate of fair competition between all service providers (including those from other Member States) by guaranteeing a level playing field, as well as legal certainty for service providers, service recipients, and workers posted within the context of the provision of services.

The Directive applies to undertakings which post workers in the framework of the provision of services to work temporarily in a Member State other than the State in which they habitually carry out their work and whose legislation governs the employment relationship (excluding merchant navy undertakings as regards seagoing personnel). It covers three transnational posting situations, namely:

- posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended,
- posting to an establishment or an undertaking owned by the group,
- posting by a temporary employment undertaking to a user undertaking operating in a Member State other than that of the undertaking making the posting,

with the proviso, in all three situations, that there is an employment relationship between the undertaking making the posting and the posted worker.

Furthermore, the Directive stipulates that undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State (article 1(4))<sup>1</sup>.

The hard core of rules to be respected, which are laid down in article 3(1) of the Directive, include in particular the following:

- maximum work periods and minimum rest periods,
- minimum paid annual holidays,
- minimum rates of pay,
- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings,
- health, safety and hygiene at work,
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people.

These rules must be laid down either by law and/or by collective agreements or arbitration awards which have been declared universally acceptable<sup>2</sup> in the case of activities in the building work sector (referred to in the annex), while Member States are left the choice of imposing such rules laid down by collective agreements in the case of activities other than building work. They may also, in compliance with the Treaty, impose the application of terms and conditions of employment on matters other than those referred to in the Directive in the case of public policy provisions<sup>3</sup>.

To ensure the practical effectiveness of the system established, Article 4 of the Directive provides for cooperation on information between the Member States. Liaison offices and authorities are designated to monitor the terms and conditions of employment and to serve as correspondents and contact points for authorities in other Member States, for undertakings posting workers and for the posted workers themselves.

The Directive also contains a jurisdiction clause, in Article 6, which states that judicial proceedings may be initiated in the Member State in whose territory the worker is or was posted.

The possible tension between the application of internal market rules and the need to respect the protection of the rights of workers, led to the adoption of guidelines to clarify the prevailing European Union law as regards administrative requirements and control measures in 2006<sup>4</sup>.

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<sup>1</sup> See also Recital 20 of the Directive which indicates that the Directive does not affect either the agreements concluded by the Union with third countries or the laws of Member States concerning the access to their territory of third-country providers of services. The Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.

<sup>2</sup> See in this respect also article 3 (8) which provides for further possibilities in the absence of a system for declaring collective agreements universally applicable.

<sup>3</sup> Article 3 (10). See for further details also the Communication of the Commission on the implementation of Directive 96/71/EC, COM (2003) 458 final, 25.7.2003.

<sup>4</sup> COM (2006) 159, "Guidance on the posting of workers within the framework of the provision of services" and the accompanying Staff Working Document SEC (2006) 439.

The monitoring exercise launched on the basis of the Commission's Communication of April 2006<sup>5</sup> showed that many Member States rely solely on their own national measures and instruments to control service providers and in a way which does not always appear to be in conformity neither with Article 49 EC, as interpreted by the ECJ, nor with the Directive. This situation may well be related to, if not caused by, the virtual absence of administrative cooperation, the still unsatisfactory access to information as well as cross-border enforcement problems.

The results of the monitoring exercise launched in 2006 furthermore highlighted that the Directive's main — if not all its — shortcomings can be traced to a range of issues relating to its implementation, application and enforcement in practice<sup>6</sup>.

Moreover, recent judgments of the European Court of Justice in the Viking-Line, Laval, Ruffert and Commission against Luxembourg case have fuelled an intense debate on the implementation and application of the Posting of Workers Directive and, amongst others, led to a quest for clarification on a number of points.

Debates about the issues raised by the implementation of the Directive have also taken place in the European Parliament which has adopted several resolutions<sup>7</sup>. The last one, adopted in 2008<sup>8</sup> asks the Commission to continue examining the implementation, correct application and enforcement of the Directive and suggests that this should not exclude a partial revision of the Directive.

Adequate and effective implementation and application, as well as compliance with and enforcement of the legislation in practice are key elements in protecting posted workers rights, whereas poor enforcement undermines the effectiveness of the Union rules applicable in this area. Close co-operation between the Commission and the Member States is therefore essential, without neglecting the important role of labour inspectorates.

In line with the conclusions laid out in its Communication of October 2007, the Commission considers that urgent action is required to remedy shortcomings in implementing, applying and enforcing Directive 96/71/EC. It recognizes that properly functioning administrative cooperation among the Member States is essential for monitoring compliance. However, the problems encountered cannot be solved unless the Member States improve the way they cooperate with each other and, in particular, comply with their obligations regarding administrative cooperation and access to information under the Directive.

On 3 April 2008, the Commission published a Recommendation calling on Member States to take urgent action to improve the situation of posted workers through better cooperation

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<sup>5</sup> COM (2006) 159 and the accompanying Staff Working Document SEC (2006) 439, as well as the follow-up communication COM (2007) 304, "Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers" and the accompanying Staff Working Document SEC (2007) 747.

<sup>6</sup> See for further details COM (2007) 304, SEC (2007) 747, as well as COM (2003) 458.

<sup>7</sup> European Parliament resolution on the implementation of Directive in the Member States (2003/2168(INI), OJ C 92E, 16.4.2004, p. 404-407; Resolution on the application of Directive 96/71/EC on the posting of workers (2006/2038(INI)), OJ C 313E, 20.12.2006, p. 452-457; Resolution of 11 July 2007 on the Commission Communication on the Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers (P6\_TA(2007)0340).

<sup>8</sup> European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).

between national administrations. It sets out a series of practical measures to remedy shortcomings in the way the existing legislation is implemented, applied and enforced. It calls in particular for more effective exchange of information, better access to information and exchange of best practice. The Recommendation was endorsed by Council conclusions on 9 June 2008, and followed up by a Commission Decision on 19 December 2008, establishing an Expert Group on Posting of Workers.

## **2.2. On the pilot project**

The complementary study will be funded by Article 04 03 09 of the EU Budget — Pilot Project Working and living conditions of posted workers. The Pilot project is within the meaning of Article 49(6) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1).

This appropriation is intended to fund initiatives which help exploring the real working and living conditions of posted workers and how the Member States, social partners and labour inspectorates work in practice. The pilot project focuses on few specific sectors with a high number of posted workers e.g. construction, agriculture and healthcare sectors.

The aims of the pilot project are amongst others:

- promoting the analysis and/or monitoring of the working and living conditions of posted workers in specified sectors or countries;
- discussing relevant aspects of the legislation or the jurisprudence, at EU or national level, concerning the rules applicable to posted workers [ ... ] which should lead to
- improved knowledge on the working and living conditions of posted workers,
- clarification of the legal aspects concerned with the implementation and application of Directive 96/71/EC on posting of workers [ ... ].

## **3. Subject of the contract**

With this study the Commission intends to complement the Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (VT/2009/063) launched under the 2009 Pilot Project on posting<sup>9</sup> with respect to the remaining Member States not covered by it. The Member States which should be covered are the following: Austria, Bulgaria, Cyprus, Czech Republic, Greece, Finland, Hungary, Ireland, Latvia, Lithuania, Malta, Portugal, Slovenia, Slovakia and Spain (hereinafter referred to as "the Member States").

Therefore the task is the same as in the previous study, namely to examine any questions and difficulties which might arise in practical application of the posting of workers legislation, as well as in its enforcement in practice. In this respect the study should carry out further analysis of the main problems regarding the implementation, application and enforcement of

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<sup>9</sup> See further: <http://ec.europa.eu/social/main.jsp?catId=626&langId=en&callId=229&furtherCalls=yes>

the Directive 96/71/EC on the posting of workers in the context of cross-border provision of services. It should also identify cases of good practice and outline suggestions to address such problems and improve the legal and practical situation in the respective Member States covered by the complementary study in that respect.

The study shall investigate not only the role of Member States authorities (labour inspectorates) in enforcing adequately the directive, including the frequency of their controls, but also the relevant activities of social partners in this respect. In this context, particular attention should be paid to existing practices and initiatives that have been established with the aim to ensure enforcement (e.g. cross-border cooperation between Social Partners).

#### **4. Participation:**

Please note that:

- The participation and competition in this tender is open to any physical person or legal entity coming within the scope of the Treaties and any other physical person or legal entity from a third country which has concluded with the Union a specific agreement in the area of public contracts, under the conditions provided for in that agreement.
- Where the Multilateral Agreement on Public Contracts concluded within the framework of the WTO applies, the contracts are also open to nationals of States that have ratified this Agreement, under the conditions provided for therein. It should be noted that research and development services, which come under category 8 of Annex II A of Directive 2004/18/CE, are not covered by this Agreement.

#### **5. Tasks to be carried out by the contractor**

##### **5.1 Description of the tasks - General obligations**

The study will include the following tasks:

- (1) A stock-taking of existing problems in the implementation and application in practice of the Directive;
- (2) A stock-taking of existing problems in enforcing rights conveyed by the Directive;
- (3) Assessment and recommendations.

##### Methodology

As a starting point a methodological plan will be developed presenting in a coherent manner the different phases of work by the contractor. The contractor is expected to review relevant literature, reports and studies from which information can be extracted. Information shall also be collected by surveying the competent authorities and/or offices of Member States, employer's associations, businesses and trade unions in sectors with a high number of posted

workers (e.g. construction, transport, hotel, restaurant and catering, agriculture, fisheries and temporary agencies). For this purpose, the contractor shall send questionnaires (to be drafted by the contractor and agreed by the Commission) requesting relevant information on the implementation, application and enforcement of the Directive in practice and conduct interviews with stakeholders when deemed helpful.

## **5.2 Description of tasks – Specific obligations**

### 5.2.1. Stock-taking of existing problems in the implementation and application of the Directive

The contractor shall look into existing problems and difficulties encountered in the implementation and application of the Directive, in particular by undertakings posting workers to another Member State as well as by monitoring authorities, and social partners, in the host Member State.

It shall examine the problems created by the application of Article 3 of the Directive. The study shall look in particular into the difficulties created by the implementation and application of Articles 3 (7), (8), (10) of the Directive, and possible different interpretations in this respect by Member States. It shall further provide an overview regarding the application of derogations foreseen in Article 3 (2) – (5) and how the calculation of the length of the posting (Article 3 (6)) is applied in practice. It shall also indicate whether and how Member States have implemented Article 3 (9) as well as how it is applied in practice.

The study shall describe the different systems applied and present explanations in case the stock-taking exercise proves the existence of discrepancies in the interpretation and application of the provisions of the Directive between the different Member States.

The study shall further examine whether the problems in the application of the Directive differ depending on the different modalities of posting of workers (Article 1 (3) (a), (b) and (c)) of the Directive. Furthermore, it shall investigate whether, and if so for how long, workers need to have been employed in their country of origin by the same or another employer before being able to be posted in the context of the provision of services to another Member State. Moreover, it shall examine whether a distinction should be made between posted workers from member and non-member States, taking in consideration that the Directive stipulates that undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State (article 1(4)).

The study shall, to the extent possible, be illustrated by references to concrete situations and examples, such as cases having led to the judgments of the European Court of Justice<sup>10</sup>, or the incidents in Porcheville regarding Polish workers (December 2006), 'site de construction navale' in St Nazaire, the Galmet case in Denmark<sup>11</sup>, as well as Lindsey, Lincolnshire on the Total site (2009), which could serve as examples for illustrating situations where the interpretation, application and/or enforcement of the Posting of Workers Directive has been controversially debated.

### 5.2.2. Stock-taking of existing problems in enforcement of rights conveyed and/or obligations imposed by the Directive

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<sup>10</sup> such as for instance Laval (C-341/05) and Rüffert (C-346/06)

<sup>11</sup> QENA 911/08 and 2969/08

The study shall also look into and describe existing problems, difficulties and obstacles encountered by posted workers when intending to enforce their rights stemming from the Directive, as well as by monitoring authorities in the host Member States when controlling the respect of the working conditions under Article 3 of the Directive and its enforcement in practice. Special attention shall be given to any difficulties possibly created by the need to conciliate enforcement duties with legal obligations resulting from international agreements or other EU-legislation.

In this respect the contractor shall examine possibilities for the posted workers and/or workers' representatives of seeking remedy for breaches of contract in the host country or the country of origin (e.g. mediation, joint and several liability of the employer). He/She shall further study whether posted workers' are affiliated to trade unions both in the host country and the country of origin and whether collective bargaining takes place in view of securing (better) working conditions while being posted.

The contractor shall also take stock of existing cross-border cooperation arrangements regarding enforcement of the Directive between Social Partners in different Member States and assess their effectiveness.

Furthermore, the study shall examine specific problems raised by posting for labour inspectorates and bodies responsible for enforcement of law (including social security). Therefore, the contractor shall investigate how frequently labour inspectorates control sites where posted workers are employed and examine how labour inspectorates assess self-employed rendering services in the receiving Member State and how they verify whether an undertaking is properly established in the country of origin. He/She shall also look into the question whether the existence and misapplication of transitional measures result in additional problems regarding the enforcement of the Directive.

The contractor shall take stock of existing cross-border agreements between labour inspectorates in different Member States to deal with problems such as the ones stated above and give a summary of their contents.

Moreover, the study shall further examine whether the existence of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties<sup>12</sup> has proven to be useful for administrative sanctions imposed in the context of posting of workers and whether and what kind of cross-border enforcement problems still exist.

To the extent possible, the study shall contain an overview of cases before national courts involving the enforcement of workers rights based on the Directive. It shall indicate what issues were brought in front of the courts, if workers or their representatives initiated procedures and the average duration of the proceedings.

### 5.2.3. Assessment of whether the Posting of Workers Directive is being effectively implemented applied and enforced.

The contractor shall as a final task produce an overall assessment of the legal situation in the surveyed member States with regard to the implementation, application and enforcement of the Directive.

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<sup>12</sup> OJ L 76, 22.3.2005, p. 17.

He/she shall also assess the extent to which the problems encountered in practice may be primarily problems of implementation and/or application, or if and to what extent they may have their roots or are caused by the structure and (lack of) provisions in the Directive itself.

On that basis, the contractor shall make suggestions on whether further clarification is needed on the interpretation of some provisions of the Directive, as well as on measures to improve the implementation, application and enforcement in practice of the Directive.

## **6. Gender mainstreaming**

The Contractor will take the necessary steps to ensure that:

- Gender equality issues are taken into account when relevant for the drafting of the technical offer by paying attention to the situation and needs of women and men;
- Implementation of the requested tasks includes a gender perspective by considering systematically women and men dimension;
- Performance monitoring includes the collection and gathering of data disaggregated by sex when needed.
- Its proposed team respects the gender balance at all levels.

Equally, needs of disabled people shall be duly acknowledged and met while executing the requested service. This will in particular entail that where the Contractor organises training sessions, conference, issues publications or develops dedicated websites, people with disabilities have equal access to the facilities or the services provided.

Finally, the Contracting Authority encourages the Contractor to promote equal employment opportunities for all its staff and team. This entails that the Contractor shall foster an appropriate mix of people, whatever their ethnic origin, religions, age, and ability.

The Contractor will be required to detail in its activity report accompanying the request for the final instalment the steps and achievements it made towards meeting these contractual provisions.

## **7. PROFESSIONAL QUALIFICATIONS REQUIRED**

See Annex IV of the draft contract, experts' CVs and classification.

The contractor, team coordinator or Scientific Committee (if any) must satisfy the requirements for at least Level II experts and the other experts must satisfy the requirements for at least Level III experts. They need to be experienced lawyers and/or academics and/or practitioners, specialised in the relevant area in the concerned countries.

## **8. TIME SCHEDULE AND REPORTING**

The duration of the contract shall not exceed **6 months** from the date of signature of the contract.

For further details see Article I.2 of the draft contract.



## ***Specific deadlines***

### **Interim report**

Within **3 months** of signing the contract, the contractor will submit to the European Commission<sup>13</sup> (Unit EMPL F/2) a concise and clear interim report describing progress in relation to the timetable laid down, together with a summary of results obtained so far. The interim report should be in English.

### **Draft final study**

**4,5 months** after signature of the contract, the contractor will submit to the European Commission (Unit EMPL F/2) draft final study in English, along with an executive summary in English, German and French.

The European Commission (Unit EMPL F/2) will examine the draft final study and notify the contractor of possible objections or comments to be made within 30 (thirty) days of receipt of this draft final study.

### **Final study**

The final study – taking into account, where appropriate, the objections or comments made by the European Commission (Unit EMPL F/2) – will be submitted before the end of the contract. It will also include an executive summary in English, German and French. The aforementioned final study shall be transmitted by the contractor in both paper and electronic versions compatible with Commission standards (texts in Word, spreadsheets in Excel). Each paper copy will correspond in full with the electronic version. The aforementioned documents, plus two copies of them, must arrive at the Commission no later than the last day of the period of execution of the tasks.

### **Meetings with the Commission**

The contractor may be requested to attend at least three meetings with the Commission in Brussels: one to kick off the study; one to discuss the interim report within 30 days after receipt of the report and one to discuss the draft final study within 30 days of its submission.

### **Publicity and information requirements**

In accordance with the General conditions, all contractors are under the obligation to acknowledge that the present service has been commissioned for the European Union in all documents and media produced, in particular final delivered outputs, related reports, brochures, press releases, videos, software, etc, including at conferences or seminars.

For publications it is also necessary to include the following reference: *"The information contained in this publication does not necessarily reflect the position or opinion of the European Commission"*

With regard to publication and any communication plan linked to the present activity, the Contractor will insert the European Union logo and mention the European Commission as the

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<sup>13</sup> Official receipt date by DG EMPL, attested by its Archive Department, Internal Mail Service stamp.

Contracting Authority in every publication or related material developed under the present contract.

## **9. PAYMENTS AND STANDARD CONTRACT**

See Article I.4 and II of the attached draft study contract.

In drawing up the bid, the tenderer should take into account the provisions of the standard contract comprising the "General terms and conditions applicable to service contracts".

Modalities applicable to this contract will be:

### **Pre-financing**

Following signature of the Contract by the last contracting party, within 30 days of the receipt by the Commission of a request for pre-financing with a relevant invoice, a pre-financing payment equal to 30% of the total amount referred to in Article I.3.1 of the draft contract shall be made.

### **Interim payment**

Requests for interim payment by the Contractor shall be admissible if accompanied by

- an interim technical report in accordance with the instructions laid down in Annex I of the draft contract,
- the relevant invoices,

provided the report has been approved by the Commission.

The Commission shall have 60 days from receipt to approve or reject the report, and the Contractor shall have 30 days in which to submit additional information or a new report. Within 30 days of the date on which the report is approved by the Commission, an interim payment corresponding to the relevant invoices, up to maximum 40% of the total amount referred to in Article I.3.1 of the draft contract, shall be made.

### **Payment of the balance**

The request for payment of the balance of the Contractor shall be admissible if accompanied by:

- the final technical report in accordance with the instructions laid down in Annex I of the draft contract,
- the relevant invoices,

provided the report has been approved by the Commission.

The Commission shall have 60 days from receipt to approve or reject the report, and the Contractor shall have 30 days in which to submit additional information or a new report. Within 30 days of the date on which the report is approved by the Commission, payment of the balance of the total amount referred to in Article I.3.1 of the draft contract shall be made.

*Performance guarantee: not applicable*

## **10. PRICES**

The maximum amount available for this contract is € 150,000.00 (one hundred fifty thousand euro).

*Tenderers should note that any bid exceeding this limit will not be considered.*

Under the terms of Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union, the latter are exempt from all charges, taxes and duties, including value added tax; such charges may not therefore be included in the calculation of the price quoted. The amount of VAT is to be indicated separately.

The price must be stated in EUR(€), net of VAT (using, where appropriate, the conversion rates published in the C series of the Official Journal of the European Union on the day when the invitation to tender was issued), and broken down according to the model in Annex III included in the attached standard contract.

**Part A: Professional fees and direct costs, to be specified:**

- Fees, expressed as the number of person-days multiplied by the unit price per working day for each expert proposed. The unit price should cover the experts' fees and administrative expenditure,
- Any translation expenses
- Travel expenses (other than local transport costs),
- Subsistence expenses of the Contractor and his staff (covering the expenditure incurred by experts on short-term trips outside their normal place of work)
- unavoidable expenses necessary to the achievement of the Contract

**Part B: Reimbursable expenses:**

Not applicable

Total price = Part A

**11. GROUPINGS OF ECONOMIC OPERATORS OR CONSORTIA**

Tenders can be submitted by groupings of service providers/suppliers who will not be required to adopt a particular legal form prior to the contract being awarded, but the consortium selected may be required to assume a given legal form when it has been awarded the contract if this change is necessary for proper performance of the contract<sup>14</sup>. However, a grouping of economic operators must nominate one party to be responsible for the receipt and processing of payments for members of the grouping, for managing the service administration, and for coordination. The documents required and listed in the following points 12 and 13 must be supplied by every member of the grouping.

Each member of the grouping assumes a joint and several liability towards the Commission.

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<sup>14</sup> These entities can take the form of an entity with or without legal personality but offering sufficient protection of the Commission's contractual interests (depending on the Member State concerned, this may be, for example, a consortium or a temporary association). The contract has to be signed by all members of the group, or by one of the members, which has been duly authorised by the other members of the grouping (a power of attorney or sufficient authorisation is to be attached to the contract), when the tenderers have not formed a legal entity.

## 12. EXCLUSION CRITERIA AND SUPPORTING DOCUMENTS

1) Bidders must provide a declaration on their honour, duly signed and dated, that they are not in one of the situation referred to in Articles 93 and 94 a) of the Financial Regulation.

Those articles are as follows:

"Article 93:

Applicants or tenderers shall be excluded if:

- a) 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;
- b) they have been convicted of an offence concerning their professional conduct by a judgement which has the force of res judicata;
- c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify;
- d) they have not fulfilled their 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 the country of the contracting authority or those of the country where the contract is to be performed;
- e) they have been the subject of a judgement which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Union's financial interests;
- f) they are currently subject to an administrative penalty referred to in Article 96(1)<sup>15</sup>.

(...)

Article 94:

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

- a) are subject to a conflict of interest;
- b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the procurement procedure or fail to supply this information;(..."

2) The tenderer to whom the contract is to be awarded shall provide, within a time limit defined by the contracting authority and preceding the signature of the contract, the evidence referred to in Article 134 of the implementing Rules, confirming the declaration referred to in point 1 above.

Article 134 of the Implementing Rules – Evidence

§3. The contracting authority shall accept as satisfactory evidence that the candidate or tenderer to whom the contract is to be awarded is not in one of the situations described in point (a), (b) or (e) of Article 93(1) of the Financial Regulation, a recent extract from the judicial record or, failing that, an equivalent document recently issued by a judicial or administrative authority in the country of origin or provenance showing that those

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<sup>15</sup> "Article 96(1): The contracting authority may impose administrative or financial penalties on the following:

- (a) candidates or tenderers in the cases referred to in point (b) of Article 94;
- (b) contractors who have been declared to be in serious breach of their obligations under contracts covered by the budget.

(...)"

requirements are satisfied. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in point (d) of Article 93(1) of the Financial Regulation, a recent certificate issued by the competent authority of the State concerned.

Where the document or certificate is not issued in the country concerned, it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in his country of origin or provenance.

§4. Depending on the national legislation of the country in which the candidate or tenderer is established, the documents referred to in paragraph 3 shall relate to legal persons and/or natural persons including, where considered necessary by the contracting authority, company directors or any person with powers of representation, decision-making or control in relation to the candidate or tenderer.

See Annex I (which may be used as a checklist) for the supporting documents accepted by the European Commission to be provided by applicants, tenderers or tenderers to who the contract will be awarded.

3) The contracting authority may waive the obligation of a candidate or tenderer to submit the documentary evidence referred to in Article 134 of the Implementing Rules, if such evidence has already been submitted to it for the purposes of another procurement procedure launched by DG EMPL and provided that the issuing date of the documents does not exceed one year and that they are still valid.

In such a case, the candidate or tenderer shall declare on his honour that the documentary evidence has already been provided in a previous procurement procedure and confirm that no changes in his situation have occurred.

### **13. SELECTION CRITERIA**

The candidates will be selected on the basis of their economic and financial capacity and their professional and technical capacity.

#### ***13.1. Economic and financial capacity:***

Economic and financial capacity to carry out the tasks set out in the tender specification must be demonstrated as follows:

(i) the tenderer (or all partners of the consortium together) must provide proof of a turnover of in the last financial year for which accounts have been closed at least 100% of the proposed price of the contract (150 000 euro).

(ii) balance sheets or extracts from balance sheets from the last three financial years that have been closed, where publication of the balance sheets is required under company law in the country in which the service provider is established; in the case of tenders from consortia, this certificate must be provided by each member of the consortium;

(iii) if one or both of the above mentioned documents cannot be provided because of duly justified reasons, a bank declaration providing evidence of good financial standing may be

accepted if the Commission so decides; in the case of tenders from consortia, this declaration must be provided by each member of the consortium;

If, for some exceptional reason which the contracting authority considers justified, the tenderer or candidate is unable to provide the references requested by the contracting authority, he may prove his economic and financial capacity by any other means which the contracting authority considers appropriate.

### ***13.2. Professional and technical capacity:***

The tenderer's professional and technical capacity in the field covered by the contract will be assessed on the basis of the following:

- Detailed CV's of the members of the study team responsible for providing the service, together with a listing of those designated as the co-ordinator(s) and other experts to be used for the study along with their CVs;
- A list of principal services or studies provided in the relevant policy domain over the past five years, with sums, dates and recipients (whether public or private) identified;
- Solid experience of analysis in the relevant field of labour and social law, including the theoretical and empirical aspects, as attested by the published work accredited to the members of the expert team in this field;
- For the co-ordinator (and members of the steering committee or scientific committee), this will require distinguished academics and/or practising lawyers with: proven expertise and at least 10 years professional experience with at least 4 years experience in dealing with legal issues in the area of labour and social law including the theoretical and empirical aspects;
- For the other experts, this will require distinguished academics and/or practising lawyers with: proven expertise of team members on the basis of experience as lawyers, academics or practitioners with a minimum of 5 years professional experience of which at least 2 years experience in relevant areas of labour and social law, including the theoretical and empirical aspects;
- Proven ability on the part of the co-ordinator(s) to deal effectively with the co-ordination and administrative tasks involved in organising and managing a team of experts capable of critically assessing legal developments in all the countries concerned by the contract;
- Sufficient knowledge of languages on the part of the coordinator to ensure communication with the Commission and the experts and, in particular, ability to draw up reports in English;
- A declaration by the co-ordinator certifying the competence of the team to carry out the study, including their respective professional and linguistic capabilities;
- In the case of tenders from consortia: clear identification of the co-ordinator of the work who will also be responsible for signing the contract, and written confirmation from each member of the consortium that they would be ready and willing to participate in the execution of the contract, and briefly describing their role(s).

Tenderers considered by the European Commission not to meet the above-mentioned requirements on financial and operational capacity will be eliminated without further assessment.

## **14. AWARD CRITERIA**

The contract will be awarded to the tenderer whose offer represents the best value for money, taking account of the criteria listed below:

### ***14.1 Quality of the offer***

- Approach - Depth of conceptual understanding of the nature of the assignment, its context and the results to be achieved, creativity and quality of the approach to the tasks to be performed. To this end, the bid should clearly indicate suggestions, options and alternatives for the research to be undertaken. (30 points)
- Methodology – The tenderer should describe clearly the way, as well as the methods to be used, in which the tasks will be performed and the analyses will be undertaken, i.e. the various steps envisaged for collecting the necessary data, the methodology for organising and coordinating the research and analytical work, the documentary efforts to be undertaken etc. The tenderer should also explain how the various parts of the analysis will be integrated into the conceptual approach and final outcome and assessment. (40 points)
- Work Organisation - the quality of the strategy for organising and coordinating the work, in particular of the administrative and logistical tasks involved and feasibility of the time schedule provided; this criteria also includes clarity and coherence of the work programme and the overall management of the project. (30 points)

### ***14.2 The Price***

Please note that the contract will not be awarded to any bid that receives less than 70% in the award criteria. The points total will then be divided by the price, with the highest-scoring bid being chosen.

## **15. CONTENT AND PRESENTATION OF BIDS**

### ***15.1 Content of bids***

Tenders must include:

- a signed and dated letter of introduction;
- the tenderer's name, full address, telephone and fax numbers and e-mail address;
- all information and documents necessary to enable the Commission to appraise the bid on the basis of the exclusion, selection and award criteria (see points 12, 13, 14 above);
- a bank ID form duly completed and signed by the bank;

- a "legal entity" form duly completed;
- the price;
- the detailed CVs of the proposed experts;
- the name and function of the contractor's legal representative (i.e. the person authorised to act on behalf of the contractor in any legal dealings with third parties);
- proof of eligibility: tenderers must indicate the State in which they have their registered office or are established, providing the necessary supporting documents in accordance with their national law.

### ***15.2 Presentation of bids***

Bids must be submitted in triplicate (i.e. one original and two copies).

They must include all the information required by the Commission (see points 10, 11, 12 and 13 above).

They must be clear and concise.

They must be signed by the legal representative.

They must be submitted in accordance with the specific requirements of the invitation to tender, within the deadlines laid down.