
Specifications – Invitation to tender No VT/2011/013

Study on transfers of undertakings in insolvency situations

1. Title of the contract

Tender No VT/2011/013: Study on transfers of undertakings in insolvency situations

2. Background

2.1. PROGRESS programme

PROGRESS¹ is the EU employment and social solidarity programme, set up to provide financial support for the attainment of the European Union's objectives in employment, social affairs and equal opportunities as set out in the Social Agenda², as well as to the objectives of the Europe 2020 Strategy. This new strategy, which has a strong social dimension, aims at turning the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion. The European Union needs coherent and complementary contributions from different policy strands, methods and instruments, including the PROGRESS programme, to support the Member States in delivering on the Europe 2020's goals.

The PROGRESS mission is to strengthen the EU's contribution in support of Member States' commitments and efforts to create more and better jobs and to build a more cohesive society. To this effect, PROGRESS is instrumental in:

- Providing analysis and policy advice on PROGRESS policy areas;
- Monitoring and reporting on the implementation of EU legislation and policies in PROGRESS policy areas;
- Promoting policy transfer, learning and support among Member States on EU objectives and priorities; and
- Relaying the views of the stakeholders and society at large.

More specifically, PROGRESS supports:

- The implementation of the European Employment Strategy (section 1);

¹ Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, JO L 315 of 15.11.2006.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewed social agenda: Opportunities, access and solidarity in 21st century Europe COM/2008/0412 final of 02.07.2008.

- The implementation of the open method of coordination in the field of social protection and inclusion (section 2);
- The improvement of the working environment and conditions including health and safety at work and reconciling work and family life (section 3);
- The effective implementation of the principle of non-discrimination and promotion of its mainstreaming in all EU policies (section 4);
- The effective implementation of the principle of gender equality and promotion of its mainstreaming in all EU policies (section 5).

The present call for tenders is issued in the context of the implementation of the 2011 annual work plan which can be consulted at <http://ec.europa.eu/social/main.jsp?catId=658&langId=fr>.

2.1. Background information specific to this contract

Original Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses³ did not lay down the provisions specifically regulating the transfers of undertaking in insolvency situations. The European Court of Justice⁴ could not introduce a comprehensive set of rules to be applied to insolvency situations, although it declared, among others, that transfers effected in insolvency liquidation proceedings were excluded from the Directive⁵.

It was only Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC⁶ that introduced such provisions. The Commission explained that it decided to initiate a new approach for the transfers as going concerns of undertakings, businesses and parts of businesses in the context of pre-liquidation and liquidation proceedings taking into account the case law of the ECJ, the need to conciliate the survival of insolvent undertaking, the acquired rights of creditors and the rights of employees, notably the right to work⁷.

In accordance with the preamble to Directive 98/50/EC, with a view to ensuring the survival of insolvent undertakings, Member States should be expressly allowed not to apply Articles 3 and 4 of Directive 77/187/EEC to transfers effected in the framework of liquidation proceedings, and certain derogations from that Directive's

³ OJ L 61, 5.3.1977, p. 26–28.

⁴ See Case 135/83 Abels (1985), para. 23. See also other cases where the Court tackled the issue of transfers in insolvency situations, notably Case 179/83 *Industriebond FNV* (1985), Case 189/83 *Botzen* (1985), Case 105/84 *Mikkelsen* (1985), Case C-362/89 *D'Urso* (1991), Case C-472/93 *Spano* (1995), Case C-319/94 *Dethier* (1995), Case C-399/96 *Europièces* (1998) and Case C-561/07 *Commission against Italy* (2009).

⁵ See the proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses - COM/94/300 final - CNS 94/0203, p. 8-9.

⁶ OJ L 201, 17.7.1998, p. 88–92.

⁷ See the proposal for a Council Directive - COM/94/300 final - CNS 94/0203, p. 9.

general provisions should be permitted in the case of transfers effected in the context of insolvency proceedings.

The provisions regulating transfers in insolvency situations set forward by Directive 98/50/EC have been codified in what is now Article 5 of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses⁸.

Article 5 of Directive 2001/23/EC provides:

"1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).

2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (1), and, or alternatively, that,

(b) the transferee, transferor or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

3. A Member State may apply paragraph 2(b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already existed in national law on 17 July 1998.

⁸ OJ L 82, 22.3.2001, p. 16–20.

The Commission shall present a report on the effects of this provision before 17 July 2003 and shall submit any appropriate proposals to the Council.

4. Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive."

Only paragraphs 1, 2 and 4 of Article 5 concern insolvency situations that should form part of the analyses of the present study. The situation as regards the use of Article 5(3) of the Directive in Italy (none of the other Member States were considered to be concerned by the provision of Article 5(3)) has already been assessed in a separate study. In addition, the scope of this provision is clearly limited⁹. Hence, Article 5(3) does not need to be covered by the present study.

Insolvency situations stemming from the scope of Article 5 (1) (2) and (4) form a broad group which differ from one Member State to the other. An indicative and certainly not exhaustive list of insolvency proceedings can be found in Annexes A and B to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended¹⁰.

Three situations can be distinguished following the provisions of Article 5:

- 1) Articles 3 and 4 of the Directive do not apply to insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority.
- 2) Articles 3 and 4 of the Directive apply to insolvency proceedings - whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor, and provided that such proceedings are under the supervision of a competent public authority - and the options provided for in Article 5 (2)(a) and/or 5 (2)(b) are used.
- 3) Articles 3 and 4 of the Directive fully apply to insolvency situations.

It is important to note that fourteen Member States - Belgium, Greece, France, Ireland, Italy, Cyprus, Latvia, Malta, the Netherlands, Austria, Slovenia, the Slovak Republic, Finland and Sweden - declare actually not to apply national provisions implementing Articles 3 and 4 of the Directive to the transfers in bankruptcy proceedings and analogous insolvency proceedings mentioned in Article 5(1) of the Directive¹¹. According to the information in the Commission's possession, also Bulgaria and Romania fall within this category.

⁹ Cf the judgment of the Court in Case C-561/07 Commission against Italy.

¹⁰ OJ L 160, 30.6.2000, p. 1–18.

¹¹ See the questionnaire annexed to Commission report on Directive 2001/23/EC adopted on 18 June 2007 – COM(2007) 334 final. **It is important to note, however, that the declarations by the Member States made in the questionnaire must be treated only as an indication. Therefore, it is for the contractor to ascertain precisely which Member States fall within this category.**

Seven Member States - Belgium, Germany, Spain, France, Poland, Luxembourg and the United Kingdom - declare to make use of the possibilities offered by Article 5 (2)(a) and/or 5 (2)(b)¹².

However, only the Czech Republic, Denmark, Estonia, Hungary and Portugal declare not to make use of both Article 5 (1) and Article 5 (2)(a)(b) of the Directive and hence do not provide for special provisions regulating transfers in insolvency situations and aiming at the transposition of Article 5 (1) and (2)¹³. As the purpose of this study is the analysis of not only the legislative framework but also of the practical application of the provisions applicable to transfers in insolvency situations and of the level of protection of employees in case of the transfers in insolvency situations (see the Member States covered by point 5.2.II below regarding the analytical report), also these Member States need to be included within the scope *ratione personae* of the present study.

It is important for the national authorities, including judges and for the public (especially employers and employees) to know how to apply the relevant provisions, what rights of employees are safeguarded and how to protect them and to compare the way the provisions are applied in other countries. For the Commission the study would provide updated detailed information on the national implementing provisions, their interpretation, application and effects in practice and the problems occurring in the process of application. The study should also propose solutions to the problems incurred. It could also be used as a source of information on possible infringements. In general, the study should answer to the question on how and to what extent are the rights of employees protected in case of transfers in insolvency situations mentioned in Article 5 of the Directive in the EU.

Although Article 5 of the Directive was adopted with a view to ensuring the survival of insolvent undertakings, one cannot forget that the purpose of the Directive is the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded. This is especially important in the current critical period, when insolvency proceedings have become more frequent and the employees are at greater risk of having their rights not respected. It is thus a right time, in the aftermath of the crisis, to ascertain the effects of the Directive.

In line with the better regulation agenda and the evaluation policy of the Commission, there is need to evaluate whether EU law has actually met the identified needs in an effective, efficient and consistent way, and whether it produced the intended results.

It is also worth mentioning that a study was commissioned on the implementation of the Directive (including the provisions regulating the transfers in insolvency situations) in the EU-25, which was published in 2007¹⁴. Furthermore, recently a

¹² See the questionnaire mentioned in the preceding footnote. **Again, in view of the explanation given in the preceding footnote it is for the contractor to ascertain precisely which Member States fall within this category.**

¹³ See the questionnaire mentioned in footnote 9. **Again, in view of the explanation given in the preceding footnote it is for the contractor to ascertain precisely which Member States fall within this category.**

¹⁴ <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=208>.

study has been carried out regarding the implementation in Romania and Bulgaria. The studies do not concentrate specifically on the issue of the transfers in insolvency situations and therefore, in addition to the information already provided in those studies, updated, more systematic and in depth description of the measures in force and the profound analysis of the application in practice and the effects of the provisions concerned is sought.

3. Subject of the contract

In view of the background described above and in order to ascertain how and to what extent have the rights of employees been protected, the contractor has to (1) describe the measures in force providing for special rules on the transfers of undertakings, businesses or parts thereof in insolvency situations in the Member States of the EU concerned, (2) analyse the application in practice of the measures applicable to transfers in insolvency situations in a selected group of Member States and assess the effects that are generated by the measures in place in same group of Member States, (3) undertake a comparative analysis and identify best practices aiming at the protection of employees in case of transfers in insolvency situations and the solutions of the problems occurring in the process of application of law.

4. Participation

Please note that:

The competition 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 General - requirements on how the tasks shall be carried out

The PROGRESS Programme aims to promote gender mainstreaming in all its five policy sections and commissioned activities. Consequently, the Contractor shall 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 proposed activities includes a perspective informed by a systematic consideration of the gender dimension;

- Performance monitoring includes the collection and gathering of data disaggregated by sex when needed;
- Its proposed team and/or staff 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 ensure in particular that where the Contractor organises training sessions and conferences, issues publications or develops dedicated websites, people with disabilities will 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 is encouraged to foster an appropriate mix of people, whatever their ethnic origin, religion, age, and ability.

The Contractor will be required to detail in its final activity report the steps and achievements made towards meeting these contractual requirements.

5.2 Specific

Taking into account the background described under point 2 above, and in order to ascertain how and to what extent the rights of employees have been protected, the contractor shall prepare 3 reports in English:

- 1) A detailed "descriptive" report on the measures in force providing for special rules on the transfers of undertakings, businesses or parts thereof in insolvency situations in the EU Member States concerned
- 2) An analytical report on the application in practice of the measures applicable to transfers in insolvency situations in the selected group of Member States and on the effects of this application in the same group of Member States.
- 3) A comparative report bringing together the findings of the above two reports, highlighting differences, similarities and encountered difficulties across Member States, and assessing a variety of effects generated by the Directive both from an economic and social point of view

The contractor shall also provide: (1) a list of relevant national case-law (2) a list of relevant bibliography consulted (3) a table listing for every Member State concerned (i) the insolvency situations falling within respectively paragraph 1, paragraph 2(a) and paragraph 2(b) of Article 5 of Directive 2001/23/EC and (ii) the proceedings in case of economic difficulties that, although similar, cannot be regarded as falling within the scope of insolvency situations covered by Article 5 (1) and (2) of the Directive, (4) a separate, clear and comprehensive executive summary of the main findings (in English, French and German) of no more than 10 pages, following the structure of the reports, with a presentation of the concise, sharp, easily understandable key points (not more than 1 page).

I. Detailed "descriptive" report on national measures in the Member States concerned

As explained in footnote 11 and 12, the questionnaire mentioned there may not provide an accurate picture of the actual situation and therefore it is for the contractor to specify the Member States that made use of Article 5 (1) and (2) of the Directive and hence do not fully apply Articles 3 and 4 of the Directive to insolvency situations mentioned in Article 5 (1) and (2). All these Member States concerned will be included in the first "descriptive" report.

Other Member States (according to the declarations made – see footnote 13 above – this includes the Czech Republic, Denmark, Estonia, Hungary and Portugal) which fully apply Articles 3 and 4 of the Directive to insolvency situations mentioned in Article 5 (1) and (2), do not need to be incorporated in the "descriptive" report, but this group should be included in the second analytical report (see below).

The contractor should in particular:

- Describe in a systematic way the measures in force aiming at the implementation of Article 5 paragraphs 1, 2(a) and 2(b) of the Directive. The description shall be made separately for each of the aforementioned paragraphs and must show that the measures/proceedings classified under paragraphs 1, 2(a), 2(b) meet the requirements and conditions for application provided for in those paragraphs and the case-law of the European Court of Justice, notably that mentioned in footnote 4 above;
- Describe the national measures regulating the proceedings in case of economic difficulties that cannot be regarded as falling within the scope of insolvency situations covered by Article 5 (1) and (2) of the Directive. The contractor should explain whether in such proceedings the rights of employees are safeguarded, as required by Directive 2001/23/EC;
- Present the meaningful conclusions highlighting difficulties and inconsistencies in every Member State concerned.

II. The analytical report for a selected group of Member States

The selected group of Member States, for which a detailed analysis is to be undertaken, should include at least 10 – 12 Member States, of which at least 4 are large Member States (UK, Germany, Spain, Italy, France, Poland). The group should contain a representative number of Member States of the EU within the specific categories comprising of the Member States that:

- (1) do not apply national provisions implementing Articles 3 and 4 of the Directive to the transfers in bankruptcy proceedings and analogous insolvency proceedings aimed at liquidation, mentioned in Article 5(1),

(2) make use of the possibilities offered by Article 5 (2)(a) and/or 5 (2)(b) and are different from the ones under point (1) above,

(3) do not make use of both Article 5 (1) and Article 5 (2)(a)(b) of the Directive and hence fully apply Articles 3 and 4 of the Directive to insolvency situations mentioned in Article 5 (1) and (2).

In drawing up the bid the tenderer should propose the selected group of Member States. A final composition of the selected group of Member States will be subject to the approval by the European Commission together with the inception report (see point 7.1 below).

The contractor should in particular:

- Identify difficulties (from the point of view of all the stakeholders involved, including employees, employers, public authorities and courts) that have arisen with the application in practice of the national measures applicable in case of transfers in insolvency situations. Ascertain whether the actors are aware of the rules governing the transfers in insolvency situations;

- Report on the existence of eventual gaps, legal uncertainties and inconsistencies;

- Analyse how the collective rights of employees, as enshrined in Articles 6 and 7 of the Directive, have been realised in insolvency situations;

- Indicate and describe case studies, illustrating the operation of the Directive in insolvency situations in practice. These case studies can build upon cases already analysed in existing literature. There should be at least 2 case studies concerning each of the large Member State (see above) and at least 1 case study concerning each of the remaining Member State. The selection of the case studies should be carried out by the contractor in agreement with the Commission on the basis of appropriate criteria including size of the undertaking, sector and type of the insolvency situation.

- Strive to estimate the number of transfers in insolvency situations.

- Strive to assess to what extent the transposing measures were effective with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in the Directive.

- Strive to assess whether the provisions have been helpful to attain the objective to enable the survival of insolvent undertakings.

- Strive to assess whether the provisions had an effect on facilitating restructuring.

- Strive to assess to what extent have the insolvency proceedings been accompanied by the social plans aimed at helping the workers losing their jobs

and whether the social plans were satisfying the workers' needs and to what extent they appeared to compensate the loss of jobs;

- Consider and discuss the spectrum of significant effects (social and economic) that could be created by the legislation in question, and strive to assess whether the effects are useful for the directive in reaching its objectives. The contractor will strive to assess what are the social and economic costs and benefits related to the measures aiming at the implementation of respectively paragraphs 1, 2(a) and 2(b) of Article 5 of the Directive for workers, employers, other actors (e.g. creditors) and the economy/society at large.

Following the analysis and the assessment made for every Member State concerned, the contractor should present the meaningful conclusions. Difficulties and inconsistencies as well as best practices in every Member State concerned should be highlighted and the overall effect of the operation of the provisions applicable to transfers in insolvency situations clearly presented.

The contractor shall report on the views of concerned stakeholders (including the public administration, the Labour Inspection and the social partners) on the issues covered by the analytical report.

III. Comparative report

The contractor should:

- Bring together the findings of the other two reports, highlighting differences as well as similarities across Member States and evaluating the operation and effects of the Directive's provisions concerned at EU level.

- On the basis of comparative analysis, identify best practices aiming at the protection of employees (their individual and collective rights) in case of transfers in insolvency situations.

- Propose solutions to the problems occurring in the process of application of the relevant provisions of the Directive in the Member States, including where appropriate proposals for reform regarding the Directive in case major difficulties are discovered in the Member States.

6. Professional qualifications required and some methodological aspects

See Annex IV of the draft contract "CVs and classification of experts" and additional requirements under point 12.2 (selection criteria) below.

The team of experts proposed must include experienced lawyers and persons with expertise in socio-economic evaluation of social legislation. The team must have sufficient specialist expertise in the relevant fields (including the areas of transfers of undertakings, insolvency and socio-economic evaluation of social legislation) and the ability to analyse complex legal and socio-economic aspects. The team must also have adequate linguistic capacity allowing for successful accomplishment of the tasks required.

The contractor is to appoint one of the senior experts as the study coordinator. He/she will be responsible for contacts with the European Commission and will attend all meetings, accompanied by other experts as appropriate.

The overall quality of work shall be ensured throughout by a small group of senior experts designated by the contractor. At least one of the members of the group has to be a lawyer and have experience (of at least four years) in dealing with legal issues in the areas of transfers of undertakings and/or insolvency. At least one of the members has to have experience (of at least four years) in socio-economic evaluation of social legislation. Provided that one senior expert has the required experience (of at least four years) in both dealing with legal issues - in the areas of transfers of undertakings and/or insolvency - and socio-economic evaluation of social legislation, he or she can be designated by the contractor instead of the small group of senior experts. The group (or the designated expert) will have a real, close and continuous involvement at all stages in the design, management and supervision of the whole range of tasks. The group (or the designated expert) will be responsible to ensure that the experts covering the Member States concerned by the study provide high quality, comparable information used in the report. The contractor will verify the sources of information provided by its experts, and ensure a thorough quality check of any material provided or service rendered.

7. Time schedule and reporting

The duration of the tasks shall not exceed 11 (eleven) months from the entry into force of the contract.

All reports (and other documents, e.g. questionnaires) should be in English.

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

7.1. Specific deadlines for the performance of tasks:

Inception report

Within **5 (five) weeks** of the date of the entry into force of the contract, and following the kick-off meeting with the European Commission, the contractor will submit to the European Commission¹⁵ (Unit EMPL B/2) an inception report which will consist of a detailed outline of the approach/methodology to be used and a detailed work schedule for the remaining period. The inception report should enable the Commission to validate the finalized research methodology before the start of the data and information collection phase. It will contain, among others:

- a detailed presentation of data collection tools and an explanation of how the contractor intends to respond to the detailed specific tasks and questions presented in point 5.2 above;
- a list of persons, institutions, enterprises to be contacted and/or interviewed as part of the information collection process;

¹⁵ Official receipt date by DG EMPL, attested by its Archive Department, Internal Mail Service stamp.

- a list of illustrative case studies from which a number, as set out in point 5.2 above, will be chosen;
- a literature review at EU level and a (preliminary) list of relevant literature and surveys at national level;
- an indicative provisional structure for the three required reports based on the better understanding of the research that the contractor has developed during the inception phase. The structure will be subject to change on the basis of the progress of the work and future discussions with the Commission.

Interim report

Within **5 (five) months** of the date of the entry into force of the contract, the contractor will submit to the European Commission¹⁶ (Unit EMPL B/2) an interim report describing progress in relation to the timetable laid down, together with a summary of results obtained so far and the work programme planned for the following period.

Draft final report

Within **9 (nine) months** of the date of the entry into force of the contract, the contractor will submit to the European Commission¹⁷ (Unit EMPL B/2) a draft final report, which will include the elements referred to in point 5.2 above. The report should be in English. The European Commission will examine the draft final report and notify the contractor of possible objections or comments to be made within 40 (forty) days of receipt of this draft final report.

Final report

The contractor will have to present to the European Commission the final report, which will include the elements referred to in point 5 of the present technical specifications, within 11 months of the date of the entry into force of the contract, taking into account, where appropriate, the objections or comments made by the European Commission. The aforementioned final report 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 four meetings with the Commission in Brussels: one to kick off the study, one to discuss the inception report within 25 days after receipt of the report, one to discuss the interim report within 25 days after receipt

¹⁶ Official receipt date by DG EMPL, attested by its Archive Department, Internal Mail Service stamp.

¹⁷ Official receipt date by DG EMPL, attested by its Archive Department, Internal Mail Service stamp.

of the report and one to discuss the draft final report within 30 days after receipt of the report.

7.2. Other requirements

i) Publicity and information requirements

In accordance with the General conditions, all contractors are under the obligation to acknowledge that the present service has received funding from the 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. In the context of the European Union's Programme for Employment and Social Solidarity – PROGRESS, the following formulation shall be used:

This (publication, conference, training session etc) is commissioned by the European Union Programme for Employment and Social Solidarity - PROGRESS (2007-2013).

This programme is implemented by the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment, social affairs and equal opportunities area, and thereby contribute to the achievement of the Europe 2020 Strategy goals in these fields.

The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries.

For more information see: <http://ec.europa.eu/progress>

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

ii) Reporting requirements

PROGRESS is implemented through a results-based management (RBM). The Strategic Framework, developed in collaboration with the Member States, social partners and civil society organisations, sets out the intervention logic for PROGRESS-related expenditure and defines PROGRESS' mandate and its long-term and immediate outcomes. It is supplemented by performance measures which serve to determine the extent to which PROGRESS has delivered the expected results. See in Annex the overview of PROGRESS performance measurement

framework. For more information on the strategic framework, please visit PROGRESS website <http://ec.europa.eu/social/main.jsp?catId=659&langId=en>.

The Commission regularly monitors the effect of PROGRESS-supported or commissioned initiatives and considers how they contribute to PROGRESS outcomes as defined in the Strategic Framework. In this context, the Contractor will be asked to dedicatedly work in close cooperation with the Commission and/or persons authorised by it to define the expected contribution and the set of performance measures which this contribution will be assessed against.

The Contractor will be asked to collect and report on its own performance to the Commission and/or persons authorised by it against a template which will be annexed to the contract/service order/. In addition, the Contractor will make available to the Commission and/or persons authorised by it all documents or information that will allow PROGRESS performance measurement to be successfully completed and to give them the necessary rights of access.

8. Payments and standard contract

See Article 1.4 and II of the attached draft contract.

Payments under the Contract shall be made in accordance with Article II.4 of the draft contract. Payments shall be executed only if the Contractor has fulfilled all his contractual obligations by the date on which the invoice is submitted. Payment requests may not be made if payments for previous periods have not been executed as a result of default or negligence on the part of the Contractor.

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 report,
- 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 30% 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,
- 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.

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".

9. Prices

Under the terms of Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Communities, the latter are exempted 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,
- 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),
- Expenses for the shipment of equipment or unaccompanied luggage, directly connected with performance of the tasks specified in Article I.1 of this Contract,
- Any translation expenses,

- Unavoidable expenses necessary to the achievement of the Contract.

Part B: Reimbursable expenses

Not applicable

Total price = Part A

The total price may not under any circumstances exceed **250,000.00 €**

Tenderers should note that any bid exceeding these limits will not be considered.

10. 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 contract¹⁸. 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 11 and 12 must be supplied by every member of the grouping.

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

11. 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;

¹⁸ 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.

- 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 Communities' financial interests;*
- f) *they are currently subject to an administrative penalty referred to in Article 96(1)¹⁹.*

(...)

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

¹⁹ "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.
 (...)"

administrative authority in the country of origin or provenance showing that those 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 whom 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.

12. Selection criteria

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

12.1. Economic and financial capacity:

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

(i) the tenderer (or all partners of the consortium together) must provide proof of a turnover of at least twice the amount of the contract in the last financial year for which accounts have been closed.

(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.

12.2. Professional and technical capacity:

The tenderer's professional and technical capacity will be assessed on the basis of the following:

- (a) Solid experience of analysis in the fields of transfers of undertakings and/or insolvency and/or in socio-economic evaluation of social legislation;
- (b) The team of experts proposed must be composed of the following:
 - senior experts (including the coordinator), who must satisfy the requirements for at least Level II experts (see the table in Annex IV of the draft contract), this will require distinguished academics and/or practising lawyers and/or practitioners with: proven expertise and at least 10 years professional experience with at least 4 years experience in dealing with legal issues - in the areas of transfers of undertakings and/or insolvency - and/or in socio-economic evaluation of social legislation;
 - other experts forming part of the team responsible for providing the service, who must satisfy the requirements for at least Level III experts (see the table in Annex IV of the draft contract), this will require experienced lawyers and/or academics and/or practitioners with: proven expertise and a minimum of 5 years professional experience of which at least 2 years experience in dealing with legal issues - in the areas of transfers of undertakings and/or insolvency - and/or in socio-economic evaluation of social legislation;
- (c) The team must have adequate linguistic capacity allowing for efficient accomplishment of the tasks required.
- (d) Proven ability (on the basis of past experience) on the part of the co-ordinator to perform the management and coordination of large-scale contracts and studies at European level;
- (e) Sufficient knowledge of languages on the part of the coordinator to ensure communication with the Commission (in English) and the experts, and good drafting skills and very good knowledge of English on the part of experts responsible for drafting the reports;

Means of proof

- (a) A list of members of the study team (including a listing of those designated as the coordinator and the senior expert(s) responsible for the overall quality of work – see point 6 above) responsible for providing the requested services, together with their CVs which include level of linguistic skills (the model CV, preferably to be used, is shown in the Annex II to the specifications and the model list of experts to be provided is shown in Annex IV of the draft contract);
- (b) A list of principal services or studies provided in the relevant policy domains over the past five years, with sums, dates and recipients (whether public or private) identified;
- (c) A declaration by the co-ordinator certifying the competence of the team to carry out the study, including their respective professional and linguistic capabilities;
- (d) Published work accredited to the members of the expert team attesting the tenderer's solid experience of analysis in the fields of transfers of undertakings and/or insolvency and/or in socio-economic evaluation of social legislation;

13. Award criteria

The contract will be awarded to the bid offering the best quality/price ratio, taking account of the following criteria:

a) Quality of the offer

- Approach - Depth of conceptual understanding of the nature of the assignment, its context and the results to be achieved; clarity, creativity and quality of the approach to the tasks to be performed. (30 points)
- Methodology – Relevance and coherence of the methodology for organising the research work, including the collection, verification, analysis, drafting and presentation of information in the area of the study; notably as to the various steps envisaged, the documentary efforts to be undertaken, the way to integrate different national systems, examples and aspects of the analysis into the conceptual approach and final outcome. (40 points)
- Work Organisation - The quality of the strategy for organising the work, in particular the allocation of tasks, the way to address administrative and logistical tasks involved, the way to ensure the coordination of the team, the quality of results and the implementation of the work plan in the defined timetable. (30 points)

b) 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.

14. Content and presentation of bids

14.1. Content of bids

Tenders must include:

- all information and documents necessary to enable the Commission to appraise the bid on the basis of the selection and award criteria (see points 12 and 13 above);
- the declaration on honour duly signed by the legal representative
- 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 and the list of classification of experts in accordance with annex IV of the model contract;
- 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;
- in case of sub-contractors: letter of intend signed by each sub-contractor;
- in the case of tenders from consortia: 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).

14.2. 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 9, 10, 11 and 12 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.

Annex I

Exclusion criteria (Article 93(1) FR)	Supporting documents to be provided by applicants, tenderers or tenderers to who the contract will be awarded		
	Procurement (Article 93(2) FR; Article 134 IR)		
1. Exclusion from a procurement procedure, Article 93(1) FR : <i>« Candidates or tenderers shall be excluded from participation in a procurement procedure if:</i>			
1.1. (subparagraph a) <i>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 regulations¹;</i>	Recent extract from the judicial record or recent equivalent document issued by a judicial or administrative authority in the country of origin or provenance or Where no such certificate is issued in the country concerned : 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		
1.2. (subparagraph b) <i>they have been convicted of an offence concerning their professional conduct by a judgment which has the force of res judicata²;</i>	Cf. supporting documents for Article 93(1)(a) FR above		
1.3. (subparagraph c) <i>they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify;</i>	Declaration by the candidate or tenderer that he is not in the situation described		
1.4. (subparagraph d) <i>they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed³;</i>	Recent certificate issued by the competent authority of the State concerned confirming that the candidate is not in the situation described or Where no such certificate is issued in the country concerned : 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		
1.5. (subparagraph e) <i>they have been the subject of a judgment 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 interests⁴;</i>	Cf. supporting documents for Article 93(1)(a) FR above		
1.6. (subparagraph f) <i>they are currently subject to an administrative penalty referred to in Article 96(1)⁵. »</i>	Declaration by the candidate or tenderer that he is not in the situation described		

¹ See also Article 134(4) IR : Depending on the national legislation of the country in which the candidate or tenderer is established, the documents referred to in paragraphs 1 and 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.

² Cf. footnote n° 1.

³ Cf. footnote n° 1.

⁴ Cf. footnote n° 1.

⁵ Article 96(1) FR: 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;

Exclusion criteria (Article 94 FR)	Supporting documents to be provided by applicants, tenderers or tenderers to whom the contract will be awarded		
	Procurement	Grants	
2. Exclusion from a procurement or grant award procedure Article 94 FR : <i>« Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:</i>			
2.1. (subparagraph a) <i>are subject to a conflict of interest;</i>		Statement by the applicant, tenderer or bidder confirming the absence of conflict of interests, to be submitted with the application, bid or proposal	
2.2. (subparagraph b) <i>are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information»⁶.</i>		No specific supporting documents to be supplied by the applicant, tenderer or bidder It is the responsibility of the authorising officer, represented by the evaluation committee, to check that the information submitted is complete ⁷ and to identify any misrepresentation	

(b) contractors who have been declared to be in serious breach of their obligations under contracts covered by the budget.

⁶ Cf. Article 146(3) of the FR Implementing Rules: « ...the evaluation committee or the contracting authority may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within the time limit it specifies. » and Article 178(2) of the FR Implementing Rules: « The evaluation committee or, where appropriate, the authorising officer responsible may ask an applicant to provide additional information or to clarify the supporting documents submitted in connection with the application, in particular in the case of obvious clerical errors »

⁷ Cf. footnote n°6

ANNEX II – MODEL CV FOR THE PRESENTATION OF EXPERTS

Personal information	
Surname(s) / First name(s)	Surname(s) First name(s)
Nationality	(remove if not relevant)
Date of birth	(remove if not relevant)
Gender	(remove if not relevant)
Relevant professional experience	Add separate entries for each relevant professional experience (specify dates, number of months spent in the project of professional activity, description of tasks and employer/commissioner, starting by the most recent)
Education and training	
Dates	Add separate entries for each relevant training you have completed, starting from the most recent. (remove if not relevant)
Title of qualification awarded	
Principal subjects/occupational skills covered	
Name and type of organisation providing education and training	
Personal skills and competences	
Mother tongue	Specify mother tongue (if relevant add other mother tongue(s))
Other language(s)	
Self-assessment	
Language	
Language	
Other relevant skills and competences	Replace this text by a description of these competences and indicate where they were acquired. (Remove if not relevant)
Additional information	Include here any other information that may be relevant. (Remove heading if not relevant)

OVERVIEW OF PROGRESS PERFORMANCE MEASUREMENT FRAMEWORK

PROGRESS Ultimate Outcome

Member States implement laws, policies and practices in a manner that contributes to the desired outcomes of the Social Agenda

PROGRESS works towards its ultimate outcome by helping strengthen the EU's support for Member States' efforts to create more and better jobs and to build a more cohesive society. PROGRESS seeks to contribute to (i) an **effective legal regime** in the EU in relation to the Social Agenda; (ii) **shared understanding** across the EU with regard to Social Agenda objectives; and (iii) **strong partnerships** working towards Social Agenda objectives.

In operational terms, support provided by PROGRESS facilitates (i) provision of analysis and policy advice; (ii) monitoring and reporting on the implementation of EU legislation and policies; (iii) policy transfer, learning and support among Member States; and (iv) relaying to decision-makers the views of the stakeholders and society at large.

Legal Regime

Outcome:

Compliance in Member States with EU law related to PROGRESS areas.

Performance Indicators

1. Transposition rate of EU law on matters related to PROGRESS policy areas
2. Effectiveness of application in Member States of EU law on matters related to PROGRESS policy areas.
3. EU policies and legislation are grounded in thorough analysis of situation and responsive to conditions, needs and expectations in Member States in PROGRESS areas
4. Extent to which PROGRESS-supported policy advice feeds into the development and implementation of EU legislation and policies
5. Cross-cutting issues are addressed in PROGRESS policy sections
6. EU policies and legislation display a common underlying logic of intervention in relation to PROGRESS issues
7. Gender mainstreaming is systematically promoted in PROGRESS

Shared Understanding

Outcome:

Shared understanding and ownership among policy/decision-makers and stakeholders in Member States, and the Commission, of objectives related to PROGRESS policy areas.

Performance Indicators

1. Attitudes of decision-makers, key stakeholders and general public regarding EU objectives in PROGRESS policy areas
2. Extent to which national policy discourses or priorities reflect EU objectives
3. Extent to which principles of good governance (including minimum standards on consultation) are respected in policy debate
4. Extent to which the outcomes of policy debates feed into the development of EU law and policy.
5. Greater awareness of policy-and decision-makers, social partners, NGOs, networks regarding their rights/obligations in relation to PROGRESS policy areas
6. Greater awareness of policy-and decision-makers, social partners, NGOs, networks regarding EU objectives and policies in relation to PROGRESS policy areas

Strong Partnerships

Outcome:

Effective partnerships with national and pan-European stakeholders in support of outcomes related to PROGRESS policy areas.

Performance Indicators

1. Existence of common ground/consensus among policy and decision-makers and stakeholders on EU objectives and policies
2. Identification and involvement by the EU of key actors in a position to exert influence or change at EU and national levels
3. Effectiveness of partnerships in relation to outcomes related to PROGRESS policy areas.
4. Number of individuals served or reached by networks supported by PROGRESS.
5. Extent to which advocacy skills of PROGRESS-supported networks have improved
6. Satisfaction of EU and national authorities with the contribution of networks
7. Extent to which PROGRESS-supported networks take a cross-cutting approach