

GENERAL GUIDANCE ON CPVO PROCUREMENTS-MARCH 2020

For potential tenderers when considering the submission of
a tender in response to a procurement procedure of the
Community Plant Variety Office

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1. DISCLAIMER

This document and the guidance contained within is applicable to all calls for tenders from December 2019.

This document is designed **to help tenderers** with the preparation and submission of offers in response to procurement procedures issued by CPVO.

Tenderers should note that any information contained in this document can in no way be regarded as a commitment on the part of the CPVO to enter into any contract.

CPVO publishes detailed information related to all its procurement procedures on its website: <https://cpvo.europa.eu/en/about-us/procurement>.

This guidance complements the procurement documents for each specific procedure.

The tender specifications describe the service or supply that CPVO intends to purchase, the timetable, how the offers will be evaluated, what the participating tenderers are required to provide as part of their offer and the resulting contractual terms. In case of any inconsistency between these guidelines and individual tender specifications, the individual tender specifications shall prevail.

Further information on the activities of CPVO which may be of interest to tenderers can be found on the Authority's website www.cpvo.europa.eu

2. LEGAL FRAMEWORK

The procurement procedures of CPVO are governed by the following EU Regulations:

- Title VII and Annex I of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

In addition to the above-mentioned legislation, it should be noted that:

- principles arising from the Court of Justice of the European Union's case law in the field of procurement are binding on CPVO;
- the staff of CPVO are bound by the "European Code of Good Administrative Behavior" in their relations with the public. This includes the management of procurement procedures, subject to the restrictions laid down in the above-mentioned legal provisions.

3. BASIC INFORMATION ABOUT CALLS FOR TENDER ISSUED BY THE CPVO

CPVO publishes information related to all its procurement procedures on its website: <https://cpvo.europa.eu/en/about-us/procurement>

3.1. Types of procurement procedure

The type of procedure used by CPVO is selected in accordance with the **expected contract value**. The two types of procedure most commonly used by CPVO are the negotiated procedure and the open procedure. One of the differences between these procedures is the way in which potential tenderers are invited to participate.



3.1.1. Direct contract

In direct contracts the subject, remuneration and length of implementation of the contract are defined at the outset. Once signed, they can be directly implemented without any further formalities or contract procedures.

3.1.2. Negotiated Procedure

The negotiated procedure can be used when the resulting contract is estimated to have a value equal to or below **EUR 139,000**. In this type of procedure, CPVO draws up a shortlist of potential tenderers, based on their field of activity and expertise and the needs of CPVO.

For procedures **between EUR 15,000 and EUR 139,000**, CPVO promotes these prior to launch on its website in its **Annual Work Programs** and offers the possibility to express any interest to participate. The shortlisted candidates (those who have expressed an interest and/or those which have been identified by CPVO) are invited to submit an offer and only offers received from these candidates are evaluated. The minimum number of candidates to be invited to participate in a negotiated procedure is dependent upon the value of the call.

- Above EUR 60,000 and equal to or below EUR 139,000 = Minimum five candidates must be invited
- Above EUR 15,000 and equal to or below EUR 60,000 = Minimum three candidates must be invited
- EUR 15,000 and below = Minimum one candidate must be invited

If CPVO considers that the offers received can be improved, including financial offers, negotiations can be carried out on equal terms for all tenderers.

Prior expression of interest in being invited to a negotiated procedure

Since the CPVO wants to keep cooperation opportunities as open as possible, it is possible for you to express an interest in being invited to (one of) these negotiated procedures by sending an email to procurement@cpvo.europa.eu with the following information.

- *Full name of company (if expression of interest is on behalf of a company) and the contact person responsible with details or Full name of individual (if expression of interest is from a private individual)*
- *Full postal address*
- *Email address to which the invitation should be sent*
- *Domain of interest*

Expressing interest is not binding to the CPVO to either consult the private individual or company having expressed an interest or to sign a contract.

3.1.3. Open Procedure

The open procedure is most frequently used when the resulting contract is estimated to have a value **above EUR 139,000**, but it can also be used for contracts below that value.

All CPVO open procedures are published in the Official Journal of the European Union, through a contract notice. Each procedure is posted on CPVO's website where a link is provided to the e-Tendering portal through which tenderers can access the procurement documents (invitation letter, tender specifications, draft contract and other annexes). In an open procedure, CPVO does not draw up a shortlist or send specific Invitation Letters to potential tenderers. Participation in this procedure is open on equal terms to all interested entities as described in the section on 'participation' below.



Participation

Participation in CPVO's public procurement procedures is open on equal terms to all natural and legal persons coming within the scope of the EU Treaties. Procurement procedures of CPVO are not covered by the WTO Multilateral Government Procurement Agreement (GPA). Tenderers established in third countries (non-EU countries) do not have the right to participate in procurement procedures unless international agreements in the field of public procurement grant them the right to do so. In case there is no such agreement, or the agreement does not apply to the kind of contracts put out to tender, tenderers of third countries are not entitled to participate.

When applying the rules of access to the market, it is the country where the tenderer is established which should be considered. As regards a natural person, it is the State in which the person has his/her domicile.

Currently, tenderers from the following third countries are considered eligible based on signed and ratified international agreements in the field of public procurement:

Republic of North Macedonia, Albania, Montenegro, Serbia, Bosnia and Herzegovina, Kosovo, Iceland, Norway and Liechtenstein.

International public-sector organizations (e.g. United Nation bodies, World Bank, International Monetary Fund etc.) are entitled to participate in procurement procedures of CPVO where such participation is explicitly announced in the procurement documents.

Please note the above list is not exhaustive and is subject to updates. In case of queries regarding eligibility to apply, please submit your question via the appropriate method as indicated in the Invitation Letter for that specific call for tenders. Additionally, each tender specification may define an exceptional ad hoc admission of tenderers from non-eligible countries to participate in a call for tenders, without creating a precedent for future calls.

The rules of access to the market apply to single tenderers as well as partners in a joint tender. It is to be noted that the rules of access to the market do not apply to subcontractors, i.e. a group of eligible tenderers or a single tenderer could choose a subcontractor from a non-eligible country.

Nature of contractual relationship resulting from contract award

When preparing an offer, tenderers should take full account of the procurement documents which include: Invitation Letter, Tender Specifications, including its annexes, for example the Draft Contract, as they will define and govern the contractual relationship (including contract type and duration) to be established between CPVO and the successful tenderer.

3.1.4. Framework Contract

Sometimes the contractual relationship between CPVO and the successful tenderer will be governed by a special type of contract known as a "framework contract". A framework contract establishes a mechanism for the future repetitive acquisition of supplies, services or works, when the contracting authority can define the subject matter of the procurement but does not know when and what quantity it will need during a certain period of time.

Only the implementation of the framework contract through specific contracts/order forms is binding for CPVO and the signature of a framework contract does not impose an obligation on CPVO to conclude specific contracts/order forms with a framework contractor.

Actual orders will be placed only after the framework contract is signed, in the form of "**specific contracts**" or "**order forms**" concluded in pursuance of the framework contract.

A **single framework contract** is a contract concluded with only one economic operator, detailing the basic terms for a series of specific contracts/order forms to be concluded over a given period, particularly regarding the duration, subject, price and implementation modalities.

Sometimes, CPVO may prefer to conclude **multiple framework contracts in cascade** with a number of contractors. A system of priority would be established whereby specific contracts or order forms would be



placed with the first priority contractor. If the goods and/or services are unavailable from the first priority contractor, the specific contract or order forms would then be placed with the second priority contractor and so on.

CPVO may also conclude **multiple framework contracts with reopening competition**, with a number of contractors where not all the terms are laid down in the framework contract and without a system of priority being established among the contractors. CPVO shall reopen competition and ask all the contractors to compete on the basis of more precisely formulated terms. Any resulting specific contract will however be based on the multiple framework contract and will not deviate from it so much that it may be considered to be entirely different from the multiple framework contract.

In a multiple framework contract with reopening competition, CPVO will invite all multiple framework contractors to make a specific offer, in accordance with the time limit foreseen in the multiple framework contract, according to the specific terms which CPVO shall define for the individual assignment. Among the offers that fulfil the minimum requirements, CPVO would then award the specific contract to the contractor who has submitted the best offer on the basis of the award criteria set out in the tender specifications for the "reopening" competition.

4. SHOULD I SUBMIT AN OFFER?

It is important that you make an informed decision about whether or not to commit resources to the submission of an offer. CPVO will not reimburse expenses incurred in the preparation and submission of offers, including expenses related to site visits, attending clarification meetings or opening sessions. In order to make an informed decision about submitting an offer, you should carefully consider the following:

4.1. Subject matter of the contract

You should read carefully the subject matter of the contract mentioned in the contract notice published in the Official Journal, and also described fully in the tender specifications. Pay particular attention to the minimum capacity requirements and whether you are able to meet these alone or through reliance upon the capacities of other entities.

4.2. Value of the contract

In case of direct contracts, the value is fixed and expressed as a price in the contract signed as a result of the call for tenders.

In case of framework contracts, the tender specifications contain indications on the maximum volume of goods and/or services which may be purchased under the framework contract. Although CPVO always tries to give its best estimate in good faith, tenderers should be aware that any information on maximum ceiling is purely indicative and shall not be binding on CPVO and should not be considered as a warranty as to the probable value of the framework contract.

In any case however, the maximum ceiling of the framework contract will not be exceeded.

4.3. Lots

When a procurement procedure is divided into lots, this is explicitly mentioned in the contract notice and tender specifications. In this case, unless stated otherwise in the contract notice and tender specifications, tenderers may submit offers for one or more lots.

Each individual lot is assessed by CPVO independently of any other lot. Offers which cover only part of one lot or declared as being conditional on the award of any other lots within the particular procurement procedure are not permitted. CPVO reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.



4.4. Variants

Unless specifically stated otherwise in the tender specifications, departures from any technical or financial requirements of the tender specifications, or from any contractual conditions, are not permitted.

CPVO will disregard any variants described in an offer, and further reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.

4.5. Submitting tenders as a group of companies and/or using subcontracting

A **joint tender** is an offer submitted by a group of two or more economic operators.

Subcontracting is when the contractor enters into a legal commitment (subcontracts) with one or more economic operator(s) in order to deliver part of the work, service or supplies described in the tender specifications.

Unless stated otherwise in the contract notice and/or the procurement documents, joint tenders from a group of economic operators and subcontracting are allowed in response to a procurement procedure issued by CPVO. Offers may even combine both approaches. The offer must clearly state whether each entity involved is acting as a partner in a joint tender or as a subcontractor. This also applies where the various companies involved belong to the same group, or even where one is the parent company of the others.

4.5.1. Joint tenders from a group of economic operators

For submission of an offer, CPVO does not require a group of economic operators to take any specific legal form; it can be a permanent, legally established grouping or one which has been constituted for a specific procurement procedure. However, the selected group may be required to adopt a given legal form after it has been awarded the contract if this change is necessary for proper performance of the contract. Such a requirement would be announced in the procurement documents.

Joint tenders must clearly identify each member of the group and who has been appointed as the lead partner. They shall indicate which service provider will be carrying out which tasks.

Provided a contract is concluded, CPVO will treat all contractual matters (e.g. payments) exclusively with the lead partner, whether or not the tasks are performed by another member of the group.

Members of a joint tender assume **joint and several liability** towards CPVO for the performance of the contract as a whole. Statements in the offer seeking to limit the liability of each member of the group or specifying that more than one contract should be signed if the joint tender is successful, are incompatible with the principle of joint and several liability.

CPVO will disregard any such statement contained in a joint tender, and further reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.

Joint tenders will be evaluated as follows:

- The exclusion criteria and grounds for rejection from the procedure will be evaluated in relation to each legal entity of the group individually. Every member of the group shall provide a declaration of honor on exclusion criteria and will be requested to provide the supporting evidence in case of award for contracts above the EU Public Procurement directive thresholds;
- The selection criteria regarding the legal, economic, financial, technical and professional capacity will be evaluated on a consolidated basis unless specified differently in the procurement documents;
- The award criteria will be evaluated in relation to the offer as a whole.



In case of contract award to a group of economic operators in a joint tender, CPVO will sign the contract with the lead partner who will be duly authorized by the other group members to sign on their behalf via a power of attorney. The CPVO power of attorney is published as an annex to the draft contract. The signed power of attorney will form part of the contract.

Any change in the composition of the partners in a joint tender during the procurement procedure may lead to the rejection of the tender. Any change in the composition of the partners in a joint tender after the signature of the contract may lead to the termination of the contract.

4.5.2. Offers proposing the use of subcontractors

Tasks detailed in the technical specifications may be subcontracted to other service providers unless stipulated otherwise in the contract notice or tender specifications, e.g. CPVO may specify that certain critical tasks cannot be subcontracted.

The following shall not be considered subcontracting:

- a) Use of workers posted to the contractor by another company owned by the same group and established in a Member State ("intra-group posting"¹).
- b) Use of workers hired out to the contractor by a temporary employment undertaking or placement agency established in a Member State ("hiring out of workers"²).
- c) Use of workers temporarily transferred to the contractor from an undertaking established outside the territory of a Member State and that belongs to the same group ("intra-corporate transfer"³).
- d) Use of staff without employment contract ("self-employed persons working for the contractor") to perform substantially the same tasks as the staff with employment contract ("employees"), without the tasks of the self-employed persons being particular well-defined parts of the contract.
- e) Use of suppliers and/or transporters by the contractor, in order to perform the contract at the place of performance, unless the economic activities of the suppliers and/or the transporting services are within the subject of the call for tender.
- f) Performance of part of the contract by members of an EEIG (European Economic Interest Grouping), when the EEIG is itself a contractor or a group member.

The persons mentioned in points a), b), c) and d) above will be considered as "personnel" of the contractor as defined in the contract.

The contractor retains full liability towards CPVO for performance under the contract as a whole.

Accordingly:

- CPVO will treat all contractual matters (e.g. payments) exclusively with the contractor, whether or not the tasks are performed by the subcontractor;
- Under no circumstances can the contractor of CPVO avoid liability towards CPVO on the grounds that the subcontractor is at fault.

If a subcontractor provides the whole or a very large part of the financial capacity OR executes the whole or a very large part of the tasks, CPVO may demand that that the subcontractor signs the contract as well. In this case CPVO will check that the subcontractor is not in a situation of exclusion and that it has access

¹ Article 1, 3, (b) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

² Article 1, 3, (c) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

³ Article 3, (b) of Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer



to the market. Additionally, tenderers may be requested to state the value of the contract that they propose to subcontract and/or the percentage of subcontracting foreseen.

Subcontractors in the offers will be evaluated as follows:

The exclusion criteria and grounds for rejection from the procedure will be evaluated in relation to each proposed subcontractor individually, only if explicitly requested in the procurement documents. CPVO reserves the right to request a declaration of honor on exclusion criteria from a subcontractor, even if not explicitly requested in the procurement documents and, in case of contract award, may also request supporting evidence from the subcontractor;

The selection criteria regarding the legal, economic, financial, technical and professional capacity will be evaluated on a consolidated basis unless specified differently in the procurement documents. The evidence must be included in the offer for subcontractors only if the capacity of those subcontractors is necessary to satisfy the minimum capacity requirements;

The award criteria will be evaluated in relation to the offer as a whole.

During the procurement procedure, if a subcontractor does not meet the exclusion or selection criteria, the contracting authority will request their replacement with a new subcontractor.

Any change in subcontracting including the introduction of new subcontractors must be in line with the provisions of the contract. During the execution of the contract, the contractor needs the express written permission of CPVO to replace a subcontractor.

5. WHAT SHOULD AN OFFER CONSIST OF AND HOW SHOULD IT BE SUBMITTED?

5.1. Negotiated procedures

Submission of tenders in response to a negotiated procedure are submitted **via email** to the address indicated in the invitation letter.

Tenders may be submitted in any of the official languages of the European Union.

Precise details about how to submit an offer to CPVO and the documents and information which should be included with your offer are set out in the procurement documents for the specific negotiated call.

5.2. Open procedures

Submission of tenders in response to an open call for tenders are submitted **exclusively via the electronic submission system** (e-Submission). Tenders submitted in any other way (e.g. e-mail or by letter) will be disregarded. A tender may be submitted in any of the official languages of the European Union.

Prior registration needed (once for all) : Creation of a Participant Identification Code (PIC)

In order to submit a tender using e-Submission, tenderers (each member of the group in the case of a joint tender) will need to register in the European Commission's [Participant Register](#) - an online register of organisations participating in EU calls for tenders or proposals. On registering, each organisation obtains a Participant Identification Code (PIC, 9-digit number) which acts as its unique identifier in the above register. Instructions on how to create a PIC can be found in the PIC-management [Quick Guide for Economic Operators](#). Tenderers already registered in the Participant Register shall reuse their existing PICs when preparing tenders in e-Submission.

Compulsory electronic submission of tenders - Use of e-Submission platform

Upon submitting a tender, you will receive a tender reception confirmation provided by e-Submission with the official date and time of receipt of the tender (timestamp) which constitutes proof of compliance with



the time-limit for receipt of tenders. A tender received after the time-limit for receipt of tenders will automatically be rejected.

Submitted tenders shall contain all the information and documents required by the CPVO at the time of submission as set out in the procurement documents. The following documents shall be dated and signed, either by hand or by applying an advanced electronic signature based on a qualified certificate, by an authorized representative of the signatory:

- Declaration(s) on honour on Exclusion and Selection Criteria (template available with the tender specifications).
- The tender report (a document generated by e-Submission and listing all the documents included in the tender, to be signed by the tenderer or the group leader in case of a joint tender).

When the declaration(s) on honour and/or the tender report are signed by hand, a scanned copy must be attached to the tender in e-Submission. The hand-signed originals must be sent by letter at the latest on the first working day following the electronic submission of tender. Only the originals of the declaration on honour and the tender report are to be sent by letter, not other documents.

After submitting a tender, but before the deadline for receipt of tenders, a tenderer may definitively withdraw its tender, or withdraw it and replace it with a new one. In these cases the tenderer must send a withdrawal/replacement notification, clearly specifying the call for tender's reference and the e-Submission ID of the tender⁴ being withdrawn/replaced. The notification must be dated, signed by the tenderer or the group leader in case of a joint tender and sent as follows:

- if signed using an advanced electronic signature based on a qualified certificate: by e-mail sent before the deadline for receipt of tenders to the contracting authority's e-mail address indicated under Heading I.1 of the contract notice;
- if signed by hand: by letter, with an advanced scanned copy by e-mail, both sent before the deadline for receipt of tenders to the contracting authority's postal/e-mail address indicated under Heading I.1 of the contract notice.

6. WHAT ARE THE IMPLICATIONS OF SUBMITTING AN OFFER?

6.1. Acceptance of CPVO's contractual terms and waiver of own business terms

Submitting an offer in response to a procurement procedure launched by CPVO shall be deemed to imply that tenderers:

- **accept** all the terms and conditions stipulated in the tender specifications and all other documents related to the procurement including the draft contract; and
- **waive** their own terms of business such that any resultant contractual relationship shall be governed exclusively by the terms of the contract.

CPVO will disregard any qualification, disclaimer or intention to the contrary and further reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.

⁴ The e-Submission ID of the tender can be found on the left-hand side of the screen of the tender in e-Submission as well as in the tender reception confirmation.



6.2. Period of validity

Unless the tender specifications stipulate a different time period, tenderers will be bound by their offer for **9 months** from the closing date for offer submission.

6.3. Guarantees

Only on a case by case basis and following risk analysis may CPVO require one of four types of guarantee (tender guarantee, guarantee for pre-financing, performance guarantee or retention money guarantee). If and when such guarantees are requested, it will be announced in the procurement documents along with conditions for the release of the guarantee. The costs of any such guarantee shall be borne by the tenderer/contractor.

6.4. No obligation on CPVO to award

When awarding a contract, CPVO undertakes to compare the offers in the light of the criteria laid down in the contract notice and/or the tender specifications. However, publishing a procurement procedure does not oblige CPVO to award the contract to a tenderer simply because their offer fulfils those criteria. CPVO also reserves the right to decide not to award the contract to any tenderer and to cancel the procedure at any time before award. CPVO is not liable for any compensation in such circumstances.

6.5. VAT

As a **general rule**, the CPVO is exempt from all taxes and duties, including VAT, in accordance with Articles 3 and 4 of the Protocol 7 of the Treaty on the Functioning of the European Union on the privileges and immunities of the European Union.

However, the applicable rules on the VAT exemption method (reimbursement or direct exemption) differ depending on the Country where the services and supplies are purchased from.

- For supplies and services *purchased in France* where the CPVO has its seat, Invoices must be VAT included and specify separately amounts not including VAT and amounts including VAT.
- For supplies and services, else then 'electronically supplied services', *purchased outside France but within the EU*, Invoices must be exempt from taxes and duties, including VAT. The CPVO shall provide exemption certificates upon validation from the French Ministry of individual proforma invoices for each individual purchase. In any case, it is up to the contractor (or leader's in case of joint tenderers) to complete the necessary formalities with the relevant authorities.
- For '*electronically supplied services*' purchased outside France but within the EU, the Invoices must be issued with French (20%) VAT included. Indeed since January 2015, telecommunications, broadcasting and electronically supplied services are always taxed in the country of the customer (France for the CPVO).

In all cases, Invoices must contain the contractor's (or leader's in the case of a joint tender) identification data, including its place of taxation, the amount in Euro and the date, as well as the Contract reference and where applicable, purchase order form or specific contract.

6.6. Applicable Law

Unless the tender specifications stipulate otherwise, contracts resulting from a procurement procedure issued by CPVO shall be governed by Union law, complemented, where necessary, by the national substantive law of France.

Any dispute between the parties in relation to the interpretation, application or validity of the contract which cannot be settled amicably shall be brought before the General Court of the European Union.



6.7. Protection of personal data

As an EU Agency, CPVO is subject to Regulation (EU) 2018/17255, forming the primary legal basis for measuring the lawfulness of personal data processing. The applicability of this Regulation in the context of public procurement procedures and resulting contracts of CPVO has the following implications:

- As data Controller, CPVO shall ensure that personal data contained in your offer and/or handled in the context of the procurement procedure (e.g. names of individuals, CVs, contact details, financial details of individuals, declarations of interest) is processed in compliance with the Regulation. More detailed information on the processing of personal data in the context of procurement procedures of CPVO is available in the Privacy Statement on our website;
- The selected Contractor acts as a processor of CPVO with regard to personal data handled under the Contract in the sense of Article 29 of the Regulation. In accordance with this provision, the Contractor:
 - o shall only process personal data on documented instructions of CPVO as the data Controller,
 - o shall only process personal data within the territory of the European Union and the European Economic Area and not leave that territory,
 - o ensures that the personal data are held in data centres located with the territory of the European Union and the European Economic Area,
 - o ensures that access to data are only given on a need to know basis and only to authorised persons established in a country which has been recognised by the European Commission as providing adequate protection to personal data,
 - o shall not change the location of data processing without the prior written authorisation of the contracting authority,
 - o shall ensure that any transfer of personal data under the relevant contract to third countries or international organisations fully comply with the requirements laid down in Chapter V of Regulation (EU)2018/1725,
 - o ensures that persons processing personal data have committed themselves to confidentiality,
 - o undertakes appropriate technical and organizational measures to ensure the confidential and secure processing of personal data needed for the implementation of the Contract,
 - o deletes or returns to CPVO all personal data after the end of the provision of services,
 - o makes available to CPVO all information necessary to demonstrate compliance with the obligations pursuant to the Regulation and allows for or contributes to audits and inspections by or on behalf of CPVO,
 - o notifies personal data breaches to CPVO,
 - o when engaging a subcontractor, shall impose the same obligations with regard to personal data protection.

6.8. Confidentiality and public access to documents

In the general implementation of its activities and for the processing of procurement procedures in particular, CPVO observes Regulation (EC) No. 1049/2001 of the European Parliament and Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁵ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.



6.9. Agreement to deliver the goods/services in accordance with the contract

Contracts concluded following a public procurement procedure cannot be subsequently modified. Changes are limited to administrative issues such as modification of bank account or to circumstances caused by external and unforeseen factors.

Deadlines for deliverables set in the contract are binding and could result in the successful tenderer having to pay liquidated damages for each day of delay if the deadlines set are not respected.

The contract also provides the possibility for CPVO to reduce the contract price in proportion to the failure to deliver in the agreed level of quality as set out in the contract.

7. IS CONTACT BETWEEN CPVO AND TENDERERS ALLOWED?

Contact between CPVO and tenderers outside the strict requirements of the procedure are prohibited save in exceptional circumstances and under the following conditions only:

7.1. Before the closing date for offer submission:

At the request of the tenderer, CPVO may provide additional information solely for the purpose of clarifying specific issues arising from the tender specifications. Should a tenderer have a question they should proceed as follows:

- **Negotiated procedures** – the question should be submitted to the email address indicated in the invitation to tender;
- **Open procedures** – the question should be submitted using the e-tendering portal in Tenders Electronic Daily (TED). Access to the e-tendering portal is via a call specific link published on the CPVO website under each specific open call for tenders.

CPVO is obliged to reply to requests for additional information as soon as possible and no later than six calendar days before the deadline for the receipt of tenders. CPVO is not bound to reply to requests for additional information made less than six working days before the closing date for offer submission.

CPVO may also, of its own accord, inform tenderers of any error, inaccuracy, omission or other clerical error in the text of the contract notice, invitation to tender letter or technical specifications and their annexes.

In the interests of fairness and equal treatment, any additional information will be sent in an identical manner simultaneously to all tenderers:

- **Negotiated procedures** – via email sent simultaneously to all invited candidates;
- **Open procedures** – published on the e-tendering portal in TED. Accordingly, for open procedures tenderers should use the e-tendering portal to register for updates and receive published answers to clarifications and possible changes such as an extension of the deadline.

Any additional information provided by CPVO should be regarded as an integral part of the tender documentation.

7.2. After the closing date for offer submission:

- If clarification is required by CPVO or if obvious clerical errors in the offer need to be corrected, CPVO may contact the tenderer, provided the overall terms of the offer are not materially modified as a result.
- If the reply clearly contradicts or modifies the original offer, CPVO may reject the offer.



In the event of a negotiated procedure, CPVO reserves the right to open further negotiations with the tenderer on the technical and/or financial offer made, in order to adapt them to the requirements set out in the tender specifications or any additional document and in order to find the most economically advantageous tender. However negotiations may not concern the minimum (compulsory) technical or administrative requirements in the tender specifications. During negotiations equal treatment of all tenderers will be ensured.

8. THE OPENING OF OFFERS

CPVO is required to formally appoint an opening committee for all calls above 139,000 EUR in value. In case of an open procedure, a public opening meeting will be held to open all offers on the date and at the time and place indicated in the contract notice and invitation to tender.

The Opening Committee will work under conditions of confidentiality and absence of conflict of interest and will sign a declaration confirming these conditions.

In an open procedure, each tenderer may send one representative to the opening session. If the tenderer wishes to attend the opening, they should notify CPVO, via e-mail, of the name of the individual who will attend the opening, no later than two working days before the opening session.

The tenderers representative will be required to sign an attendance sheet and CPVO reserves the right to require the representative to provide proof of identity. Further details for attending the opening session are provided in the invitation letter.

The public part of the opening session will be strictly limited to checking whether each offer received is compliant with the following requirements:

- the closing date for the receipt of offers specified in the tender specifications is respected;
- the offers are electronically protected until the official opening

9. HOW ARE OFFERS ASSESSED?

CPVO is required to formally appoint an Evaluation Committee for all calls exceeding 139,000 EUR.

The offers will be assessed by an Evaluation Committee working under conditions of confidentiality and absence of conflict of interest and will sign a declaration confirming these conditions.

Once the evaluation is completed, the Evaluation Committee will draw up a report for the responsible authorizing officer, who will take the final decision on the award of the contract.

Offers complying with the formal requirements checked during the opening session will be assessed in light of the criteria explicitly announced in the tender specifications. The exclusion, selection and award criteria will be assessed in the order announced in the tender specifications.

9.1. Exclusion Criteria

The sole purpose of the exclusion criteria is to determine whether an operator is eligible to participate in the procurement procedure and whether an operator may be awarded the contract. The only criteria which are applied are those set out in Article 136 of the Financial Regulations.

Between EUR 15,000 and 139,000 : Signed and dated Declaration on Honor on Exclusion Criteria to be submitted with the offer.

For any call with a value **between EUR 15,000 and EUR 144,00**, tenderers must provide a signed and dated Declaration on Honor on Exclusion Criteria, certifying that they are not in one of the exclusion situations listed in the template available on the CPVO website. CPVO reserves the right however to request such a declaration for calls with a value equal to or below EUR 15 000 EUR.



Declarations should be completed for the legal entity and for natural persons with power of representation, decision making or control over the legal entity.

A declaration is required from the tenderer and each member of the group in case of a joint tender. If a declaration is required from subcontractors, in the case of subcontracting, this will be specifically requested in the tender specifications.

Above EUR 139,000 : Exclusion criteria evidence to be submitted by winning tenderer at the stage of contract award

Where the contract to be awarded as a result of the procurement procedure is of a value higher than the thresholds for application of the procedures under Directive 2014/24/EU (**above EUR 139,000**), the CPVO will ask the awarded tenderer to provide further evidence to prove they are not in one of the exclusion situations listed above. Supporting evidence is always required but is only requested once the winning tenderer has been identified and prior to contract award. Details of the supporting evidence to be provided will be communicated in the award letter to the winning tenderer.

Additional information on the different certificates frequently requested across EU Member States to evidence tenderers are not in a situation of exclusion is available at <http://ec.europa.eu/markt/ecertis/searchDocument.doc>

9.2. Selection Criteria

9.2.1. Declaration on Honor on meeting the Selection Criteria

The tenderer's capacity to perform the contract is assessed based on their proven;

- Legal capacity
- Economic and financial capacity
- Technical and professional capacity

Tenderers are required to submit a **Declaration on Honor on meeting the Selection Criteria**. The precise details of all documents required to prove the above-mentioned capacities are stated in the tender specifications. The documents provided by tenderers to prove that they meet the selection criteria will be used solely to assess their capacity to perform the contract and will not be considered when offers are evaluated against the award criteria.

In the selection criteria phase, evaluation focuses on the quality of the track record of the tenderer and not on the quality of the offer. Accordingly, information related to the technical proposal or the financial offer should not be introduced in this part of the offer.

For calls with a value equal to or below 139,000 EUR, CPVO may dispense with the requirement for documentation in relation to selection criteria, according to its assessment of the risks involved.

However, if evidence demonstrating the economic and financial capacity is not requested, no prefinancing shall be made by CPVO.

9.2.2. Declaration of absence of Conflict of Interest (CoI).

For some calls only defined by the CPVO, in order to demonstrate that tenderers are not subject to a professional conflicting interest which may affect the performance of the contract and for which they might potentially be excluded, the tenderer is required to submit a Declarations of absence of conflict of interest. The template can be found on the CPVO website.



9.2.3. Compliance with minimum requirements:

Each offer will also be assessed for compliance with the minimum requirements of the tender specifications. Tenders are considered not to meet the tender specifications and therefore to be rejected if they:

- do not comply with minimum requirements laid down in the tender specifications;
- propose a solution different from the one that is imposed;
- propose a price above the fixed maximum set in the specifications or in the contract notice;
- are submitted as variants, when the contract notice or the specifications do not authorize them;
- do not comply with applicable obligations under environmental, social and labor law established by Union law, national law and collective agreements or by the international environmental, social and labor law provisions listed in Annex X to Directive 2014/24/EU and compliance with data protection obligations resulting from Regulation (EU) 2016/679 and Regulation (EU) 2018/1725.

The tenderer will be informed of the ground for rejection without being given feedback on the content of the tender other than on the non-compliant elements.

9.3. Award Criteria

The evaluation committee will evaluate the offers against the award criteria stated in the tender specifications. No criteria other than those stated in the tender specifications will be used.

9.3.1. Quality evaluation (quality award criteria)

The quality evaluation of the offers will be based on the criteria listed in the tender specifications. To ensure the quality evaluation takes full account of the needs of CPVO, CPVO will assign a weighting to each criterion and stipulate a minimum threshold for each criterion and/or for the quality award criteria as a whole.

At the end of the quality evaluation, each offer will be assigned an overall quality score and it will be determined whether or not the minimum quality threshold was met.

9.3.2. Financial evaluation (price award criteria)

The financial offer of those tenderers whose technical offer met the minimum quality threshold for the quality award criteria will be considered for the identification of the most economically advantageous tender, provided the financial offer is made within the maximum budget specified in the tender specifications.

In most CPVO tenders the most economically advantageous tender will be identified by comparing the overall quality score of the offer with its price, in accordance with the formula set out in the tender specifications. The offer with the highest value obtained using this formula will be regarded as the most economically advantageous tender.

Please note that the tender specifications further specify the exclusion, selection and award criteria and accordingly you are strongly recommended to refer to those tender specifications for more details on all evaluation steps.

10. HOW ARE THE RESULTS COMMUNICATED?

During the evaluation period, CPVO will not provide any information on an on-going procurement procedure. If a tenderer is not contacted, this should not be regarded as either a positive or negative sign. Tenderers will be informed of the outcome of the procurement procedure as outlined below.



10.1. Notification of results

As soon as the authorizing officer has made a decision about to whom the contract should be awarded, a notification letter will be sent simultaneously to all tenderers by e-mail. The letters to unsuccessful tenderers will state the grounds on which the decision was taken.

In case of a contract value exceeding the relevant thresholds of the Public Procurement Directive (EUR 139,000), CPVO undertakes not to sign the contract until a period of at least ten calendar days has elapsed following the electronic dispatch of the notification letters, so that unsuccessful tenderers have sufficient time to react if necessary.

10.2. Requests for additional information

If tenderers are notified that their offer has not been successful, they may request additional information by letter or e-mail. CPVO will reply within fifteen calendar days of receiving a written request and provide the name of the successful tenderer, the characteristics, relative advantages and the price of the successful tender. However, only those tenderers who are not in an exclusion situation and whose tender is compliant with the procurement documents will be provided with additional information. CPVO is not free to disclose any information affecting the commercial interests of other tenderers.

10.3. Award Notice

Once the contract is signed, CPVO will publish an award notice in the Official Journal summarizing the results of the procurement procedure, where the contract value exceeds the relevant threshold of the Public Procurement Directive of 139,000 EUR.

For contracts with a value below the Directive (except very low value contracts equal to or below EUR 15,000), CPVO is obliged to publish on its website (www.CPVO.europa.eu), a list of contracts concluded during the previous year with values above EUR 15,000 and equal to or below EUR 139,000. The list must be published by 30th June each year.

11. AS CONTRACTOR, AM I SUBJECT TO POSSIBLE CHECKS AND AUDITS?

The CPVO and the European Anti-Fraud Office (OLAF) may check or require an audit on the implementation of any contract. This may be carried out either by OLAF's own staff or by any outside body authorised to do so on its behalf.

Such checks and audits may be initiated at any moment during the provision of the services and up to five years starting from the last payment made in accordance with the contract.

The audit procedure is initiated on the date of receipt of the relevant letter sent by the CPVO. Audits are carried out on a confidential basis.

As contractor, you should:

- keep all original documents stored on any appropriate medium, including digitized originals if authorised under national law, for a **period of five years** starting from the last payment made in accordance with the contract.
- grant the CPVO's staff and outside personnel authorised by the CPVO the appropriate right of access to sites and premises where the contract is implemented and all the information, including information in electronic format, needed to conduct such checks and audits.
- ensure that the information is readily available at the moment of the check or audit and, if so requested, that information is handed over in an appropriate format.



On the basis of the findings made during the audit:

- a provisional report will be drawn up and sent to the contractor who has 30 days following the date of receipt to submit observations. The contractor will receive the final report within 60 days following the expiry of the deadline to submit observations.
- the CPVO may recover all or part of the payments made in accordance with the contract and may take any other measures which it considers necessary.

In addition, the European Anti-Fraud Office may carry out investigations, including on the spot checks and inspections, to establish whether there has been fraud, corruption or any other illegal activity under the contract affecting the financial interests of the CPVO. Findings arising from an investigation may lead to criminal prosecution under national law.

The Court of Auditors and the European Public Prosecutor's Office and, for the processing of personal data, the European Data Protection Supervisor, **have the same rights** as the CPVO, particularly right of access, for the purpose of checks, audits and investigations".

12. REMEDIES

Tenderers may lodge an appeal against the contract award decision. This must be done within two months of the decision which is contested. The court responsible for hearing appeal procedures is the General Court of the European Union:

General Court of the European Union
Rue du Fort Niedergrünewald
L-2925 Luxembourg
Tel.: (352) 4303-1 Fax: (352) 4303 2100
E-mail: GeneralCourt.Registry@curia.europa.eu
www.curia.europa.eu

The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union. A complaint must be made within two years of the date upon which the facts on which your complaint is based became known. Additionally, you must have already contacted CPVO regarding this complaint before contacting the European Ombudsman.

The European Ombudsman
1 Avenue du President Robert Schuman
CS 30403
FR – 67001 Strasbourg Cedex
Tel.: +33 (0)3 88 17 23 13 Fax: +33 (0)3 88 17 90 62
www.ombudsman.europa.eu

