

NOTE NO 6

Using flexible procedures in situations of conflict and fragility

SPECIAL CIRCUMSTANCES CALL FOR SPECIAL RESPONSES

Topic overview

Situations of conflict and fragility are complicated and fast changing. In addition to the variety of modalities and instruments that allow the EU both to react rapidly and develop the basis for long-term transition and change, there is a need for flexible procedures within these instruments and modalities — as highlighted by the EC (then the Commission of the European Communities) in its [2007 Communication](#) on an EU response to situations of fragility.

Each year and in response to emergencies, the EC establishes a crisis declaration list. For countries on the crisis list and where justified, grants can be awarded without a call for proposals, and negotiated procedures used for the procurement of services, supplies and works. In this way, the procurement of essential goods and services can be hastened and undertaken in situations where normal procedures would not work. Additional elements of flexibility can be applied (Box 1); it is also possible to apply for derogations that are available for non-crisis countries — such as rules of origin and nationality, proof of non-reimbursement of taxes, etc.

SUMMARY

- It is good practice to use some form of enhanced competition rather than none at all.
- Flexible procedures are used in crisis situations, but often, because of the crisis, they are not necessarily faster or less complicated than the normal procedures followed in non-crisis situations.
- The use of flexible procedures is usually more demanding rather than less demanding of expertise and familiarity with procurement and negotiation skills.
- Flexible procedures are not common even within crisis declaration countries, but when used strategically they can provide significant benefits.
- The use of flexible procedures introduces new risks and puts a decision burden on those involved.

BOX 1 Additional elements of flexibility for crisis situations

- **Annual programming.** In a crisis situation, grants can be made that were not foreseen in the annual programme.
- **Retroactivity.** In a crisis situation, expenditure incurred by a beneficiary before the date of submission of an application may be eligible for EU financing (although a grant may not be awarded retroactively for actions already completed).
- **Co-financing.** In a crisis situation, the demand for co-financing of grants can be relaxed if needed for the action to be carried out.

In 2012/13, 38 countries were on the crisis declaration list. During 2012, EU Delegations for the African, Caribbean and Pacific countries on the list signed 1 348 contracts, of which 213 (about 16 %) used some form of flexible procedures. Contracts using flexible procedures accounted for around 22 % of the total value of contracts signed in 2012.

Key issues

Issues and dilemmas that have arisen in trying to apply flexible procedures include the following.

- **Using flexible procedures is not necessarily quicker or simpler.** Flexible procedures do not necessarily reduce the work burden on Delegation staff. It cannot

BOX 2 Good practice: increased competition

Although the contracting authority is entitled to apply a direct award/negotiated procedure following a declaration of crisis, the relevant authority may decide to:

- invite more than one candidate to the negotiated procedure or direct award, rather than just one — for example, in the case of grants, a restricted call for proposals is published, and, after evaluation of the concept notes is received, a negotiation process is started with the different applicants, as opposed to going to a second proposal stage;
- apply competitive negotiated procedures above the thresholds (as provided for in Points 3.4.2, 4.5 and 5.6 of the Practical Guide to Contract Procedures for EU External Actions (PRAG) or with additional, duly justified flexibilities, etc.);
- apply normal open or restricted procedures (as provided for in the PRAG or with additional duly justified flexibilities, such as shortest deadlines, limitation of the number of tenderers, etc.).

be expected that use of flexible procedures in crisis situations will necessarily be faster or simpler than use of normal procedures in non-crisis situations. A crisis will generally make any type of procedure more difficult and more time consuming. The advantage of flexible procedures is that they make it possible to procure contracts or award grants in circumstances where normal procedures would make their timely achievement very unlikely or even impossible.

- **A crisis declaration gives the option of using flexible procedures, but justification is still required case by case.** Flexible procedures add a justification burden to the preparation process. Declaration of a crisis situation is necessary but not sufficient; each contract needs a justification of why the specific circumstances of the country or the project do not allow an increased level of competition beyond single-source negotiation or direct award — i.e. less justification than required by normal procedures but more than the minimum allowed for under flexible procedures (Box 2). There has been a tendency to both under-respond and over-respond to this justification requirement.

- **Approval is not guaranteed and if ultimately not provided can lead to much greater delays.** As the head of the Delegation approves actions managed by the Delegation, it is prudent to check in advance whether there is agreement in principle to the use of flexible procedures before discontinuing procurement through normal procedures.
- **The documentation burden with flexible procedures might be greater.** The documentation burden can be greater because there is an additional need to document the negotiation process and make the appropriate coding in the Common External Relations Information System (CRIS). It appears from the 2013 stock-taking exercise that insufficient documentation of the negotiation process and inaccurate coding in CRIS were quite common.
- **Use of flexible procedures requires great familiarity with normal procedures.** In many ways, flexible procedures require at least, if not greater, in-depth insight into procurement practices if they are to be used swiftly and well. It can be more difficult and require greater experience to negotiate a good contract or to award a direct grant than to go through normal procedures of tender or call for proposal. Greater familiarity with the market and more judgement are needed. Flexible procedures can be more difficult to use than normal procedures for inexperienced staff. These procedures are more demanding because they require strong contract negotiation skills.
- **Use of flexible procedures introduces new risks and puts a decision burden on those involved.** The use of flexible procedures introduces risk of the wrong agent or partner being chosen because the process of selection is not as rigorous. Using flexible procedures for selection is done in the full knowledge that the risk of less rigorous selection is less than the risk arising from no action or delayed action, which would be the result of following normal procedures. This is a difficult judgement, and in some cases individuals may feel they are safer and more protected from criticism when not taking action.
- **There are potential drawbacks to using flexible procedures.** Flexible procedures can lead to low-quality contracts or grant partners with unnecessarily high budgets, especially if it is realised that there is no competition or option for the Delegation. There can also be unintentional bias in the selection. The use of some form of increased competition (see Box 2) is one way of improving quality and price. It can also be useful to place more attention on the terms of reference and task description, and to assign more resources to the monitoring of the grant or contract.

Case studies

The following case studies shed light on some of the issues outlined above and point to specific examples where Delegations have found innovative solutions even in the most difficult circumstances.

Sudan: Provision of technical assistance to support implementation of the Primary Education Retention Programme

SOURCE	DEVCO Stock-taking Exercise on the Use of Flexible Procedures 2013
CONTEXT, CHALLENGES AND OPPORTUNITIES	<p>After the secession of South Sudan in 2011, the Sudanese government in Khartoum suffered a dramatic cut in its resources and had to prepare a revised budget; this made drastic cuts to transfers to the states, in particular on development expenditure and social sectors.</p> <p>The core challenge was that, unless quick remedies were introduced, many children would not go to school in 2013 and 2014, especially in states where education performance was already low (i.e. Red Sea, Kassala, Gedaref, South Kordofan and Southern Blue Nile States). Also, there was a risk of unrest resulting from limited implementation of the promised peace dividend in terms of support for basic services.</p> <p>The Delegation was funding UNICEF and Save the Children to implement the Primary Education Retention Programme (PERP) in five selected states, targeting around 440 000 children. Technical assistance was required to assist the Sudanese authorities in:</p> <ul style="list-style-type: none"> • introducing evidence-based planning and management; • developing an understanding of the causes and risks of drop-outs; • preparing retention action plans. <p>In terms of impact, the Delegation expected a significantly lower rate of student drop-out from P1 to P8 in areas covered by the PERP compared with other areas.</p>
ACTIONS TAKEN	<p>After protracted and difficult negotiations with the Education Ministry on implementing modalities and in view of the urgency due to government budget cuts, the Delegation decided that a full formal tender was no longer possible and decided to use a negotiated procedure instead.</p> <p>The Delegation established criteria for selection, and invited eight firms to submit an offer. The Delegation negotiated with the best provider to improve the proposal. The overall contract value was EUR 1 415 680.</p>
LESSONS LEARNED	<ul style="list-style-type: none"> • Use of flexible procedures was justified on the grounds that the normal contract procurement process would take too long — even though some of the delay was due to the government itself delaying decision-making. • A form of improved competition can be viable rather than a pure single-source negotiation. • The flexible procedures had the desired impact, and up to 440 000 children who would otherwise have dropped out of school were enrolled in school in 2013 in five conflict-affected states of Sudan.

Democratic Republic of Congo: Gender-based violence initiative

SOURCE	DEVCO Stock-taking Exercise on the Use of Flexible Procedures 2013
CONTEXT, CHALLENGES AND OPPORTUNITIES	<p>The problem of gender-based violence in the Democratic Republic of the Congo is particularly serious and persistent, despite the signing of peace agreements and the return to some degree of stability. The United Nations Population Fund stated that around 1 100 rapes are reported every day and that, in some areas, three-quarters of the women have been attacked. It is urgent to make progress in tackling the problem, as more attacks take place every day that progress on this issue is delayed.</p>
ACTIONS TAKEN	<p>The EU agreed in July 2012 with the Democratic Republic of the Congo authorities on a new multi-sectoral approach. In August, a formulation study began; this was concluded by October. A negotiated procedure was used to sign a contract with a specialist company for EUR 77 814 to conduct the formulation study. The recommended programme has four components:</p> <ul style="list-style-type: none"> • contribute to changes in behaviour and thinking, leading to a new perception of masculinity and femininity; • strengthen the economic power of women, in partnership with men; • strengthen the capacity of state actors to intervene and coordinate action against sexual violence; • support security and judicial state functions in offering a more protective framework against gender-based violence.
LESSONS LEARNED	<ul style="list-style-type: none"> • It is possible to justify launching a quick start to a formulation study; in this case, the reason was the ongoing violence against women and the need to implement both long- and short-term measures as soon as possible. • The time lapse from agreement with country authorities and finalisation of the study was just four months, showing the degree to which the use of flexible procedures served its purpose in hastening action. • The expected impact: the incidence of sexual violence was reduced in Kinshasa and Bandundu (fewer women and children were attacked).

Chad: Programme for local development and management of natural resources

SOURCE	EU Delegation to Chad
<p>CONTEXT, CHALLENGES AND OPPORTUNITIES</p>	<p>Chad hosts the world's fifth largest population of refugees. In 2012–13, Chad was hosting over 344 000 refugees fleeing conflict in Darfur, Sudan and the Central African Republic — some refugee camps had been in place for more than 10 years.</p> <p>Chad's stability is affected by various conflicts at most of its borders. The eastern border is volatile because of the conflict in Darfur. The Libyan crisis remains a source of insecurity at the northern border, particularly in the border region with Niger where there is rampant arms trafficking and where the effect of instability in northern Mali is also felt. There is an ever-present risk that the Islamist sect Boko Haram, rampant in Nigeria (west border), will make Chad a base. The border with the Central African Republic is also unstable.</p> <p>Food/nutritional crises and epidemics (cholera, measles, meningitis) are frequent and an additional source of fragility for a large segment of the population. In some post-conflict areas (e.g. Tibesti), there are mines and other explosive remnants of war that threaten human lives and livestock.</p> <p>The situation of permanent insecurity and other sources of fragility, together with the limited capacity of the state and low capacity of NGOs, severely limits the effectiveness of external support.</p>
<p>ACTIONS TAKEN</p>	<p>Flexible procedures were used in Chad to prevent the failure of interventions due to low technical capacity, poor governance, and the poor administrative capacity of NGOs and service providers to respond to calls for proposals and tenders. Use of flexible procedures allowed the EU to do the following.</p> <ul style="list-style-type: none"> Engage partners and NGOs already in place that were known to be good performers even if they were not able to raise the normal level of co-financing — in this case, 80–90 % of financing was provided by the EU. This flexibility in co-financing extended the range of NGOs that could be engaged, which in turn enabled the EU to: <ul style="list-style-type: none"> → plan a smooth handover from humanitarian actions carried out under ECHO in a transition from relief, towards rehabilitation and development; → ensure continuity and coordination with actions carried out by the thematic programmes — e.g. the thematic programme on food security. Engage highly specialised NGOs on de-mining operations; Purchase equipment outside of the eligible countries, thus reducing the costs and time of delivery as well as making better use of spare parts and services available on the local market (this derogation was available in practice under normal rules without resorting to flexible procedures); Shorten the period for administering calls for proposals by reducing the number of steps requiring external approval and shortening the period for submission. <p>An example was the direct engagement of COTONTCHAD through negotiations. This led to the speedy supply of 600 tons of cottonseed to farmers before planting deadlines and at a cost that did not exceed earlier levels.</p>

LESSONS LEARNED

- Flexible procedures can ensure better continuity with humanitarian aid and with complementary actions carried out under thematic programmes, e.g. the food security programme.
- Under flexible procedures, it is possible to set up limited competition to ensure value for money — an example here was the careful, well-documented negotiation with a single supplier for cotton seed, which led to both quicker supply and a lower price. Another example is the issuing of a call for proposals with shortened approval stages and time for submission; such measures can significantly reduce the normal time span for such calls.