

FSR Annex

regarding the application of Regulation (EU) 2022/2560 in respect of Foreign Subsidies to the Competition

Applicant/Tenderer Note: Where the Particulars state that EU Regulation 2022/2560 (the Foreign Subsidies Regulation) applies to the Competition, this Annex forms part of the Suitability Assessment Questionnaire or the Invitation to Tender (as applicable).

EU Regulation 2022/2560 – the Foreign Subsidies Regulation

Applicants/Tenderers (as the case may be) should be aware of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market - the Foreign Subsidies Regulation (the “FSR”).

The FSR requires Applicants/Tenderers (as well as its subsidiaries and holding companies, and main subcontractors and main suppliers, being those whose products or services relate to key elements of the contract or exceed 20% of the value of the contract) to notify the Contracting Authority whether they are subject to qualifying foreign subsidies.

The following is a high level summary of the FSR, but is not warranted in terms of accuracy and Applicants/Tenderers should review the FSR itself and the associated Implementing Regulation 2023/1441 of 10 July 2023 (the “Implementing Regulation”), as well as any applicable EU guidance, for a definitive explanation of the position.

The FSR applies to contracts with an estimated value of €250m or above. Where the competition is divided into lots, the FSR applies where the aggregate value of all lots is €250m or greater and the value of the lot or lots for which the Applicant/Tenderer is bidding is €125m or above¹.

The FSR applies to foreign financial contributions which arise where a third country (i.e. any country other than the EU member states – for example the United Kingdom is a “third country” for these purposes) provides (directly or indirectly) a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law and in fact, to one or more undertakings or industries.

It shall include:

- (a) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
- (b) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
- (c) the provision of goods or services or the purchase of goods or services.

A financial contribution provided by a third country shall include a financial contribution provided by:

- (a) the central government and public authorities at all other levels;

¹ This may apply to Reserved Specialist tenders.

- (b) a foreign public entity whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy; or
- (c) a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.

An **FSR Notification** shall be required where the foreign financial contributions from any third country have a value of €4million or above per third country (the "Notification Threshold") in the three years prior to the date of the FSR Notification.

An **FSR Declaration** shall be required where foreign financial contributions from any third country do not reach the Notification Threshold in the three years prior to the date of the FSR Declaration.

The FSR requires that all Applicants/Tenderers make either:

- a) An FSR Notification in the form of Annex II - Form FS-PP of the Implementing Regulation detailing foreign financial contributions received; or
- b) An FSR Declaration in the form of completed sections 1, 2, 7 and 8 of Annex II - Form FS-PP of the Implementing Regulation declaring that notifiable foreign financial contributions meeting the relevant threshold have not been received.

Where FSR applies to the tender, **all Applicants/Tenderers** are therefore required to include a completed Form FS-PP (or part thereof, as may be applicable) in their suitability assessment or tender submission (as may be applicable).

The Contracting Authority is required to transmit all FSR Notifications and FSR Declarations received to the European Commission, who may take various steps as set out in the FSR. The Contracting Authority will not conclude the public contract with any preferred Tenderer who is in receipt of a qualifying foreign subsidy until the European Commission has concluded its review or investigation. Where the European Commission has determined that a contract may not be awarded to a particular Tenderer by virtue of a distorting subsidy, the Contracting Authority may award the contract to the Tenderer having submitted the next ranked Tender.

The Contracting Authority is also entitled to make inquiries of Applicants/Tenderers to determine whether a Tenderer is in receipt of a foreign financial contributions, and may also communicate to the European Commission any suspicions that it has that an Applicant/Tenderer may be in receipt of an undisclosed foreign financial contributions.

Applicants/Tenders may complete the FS-PP form by completing Annex II to the Implementing Regulation available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2023.177.01.0001.01.ENG

Alternatively, Applicants/Tenderers may use an online version of the form provided by the European Commission to create a pdf form. Further information is available at:

[Foreign Subsidies Regulation - European Commission \(europa.eu\)](https://ec.europa.eu/eas/foreign-subsidies-regulation)

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