

European Space Programme

ANNEX I.H – Part 1

Criteria for assessment of participating conditions

HISTORY OF CHANGES		
Version	Publication date	Changes
0.1		



IMPORTANT NOTICE

For prime contractors in tenders presenting security activities or members of the core team (as defined in the tender specifications) and subcontractors (as defined in the tender specifications and in the Financial Regulation) involved in security sensitive activities (mentioned as entity/activities subject to participation conditions in the rest of the document) the participation of the tender EUSPA/OP/18/26 is “open to economic operators fulfilling the following three cumulative conditions”.

a) legal entities established in a EU Member State with their executive management structures established in that EU Member State.

- For the purpose of this tender economic operators are considered to be established in the EU when they are formed in accordance with the law of an EU Member State, and have their central administration, registered office and principal place of business in an EU Member State (if legal persons) or they are nationals of one of the EU Member States (if natural persons).
- ‘Executive management structure’ means the body of the legal entity appointed in accordance with national law and which, where applicable, reports to the chief executive officer or any other person having comparable decisional power, and which is empowered to establish the legal entity's strategy, objectives and overall direction, and oversees and monitors management decision-making

b) economic operators committing to carry out all relevant activities in one or more EU Member States; and

c) legal entities not being subject to control by a third country or third country entity.

- For the purpose of this paragraph ‘control’ means the ability to exercise a decisive influence over a legal entity directly or indirectly through one or more intermediate legal entities

This document provides the criteria for the assessment of the requirements under a), b) and c) above and the supporting elements to be provided by the Tenderers.

This document is accompanied with Annex I.H - Part 2 excel template to be filled by each tenderer, member of the core team and/or subcontractor subject to the participating conditions, in accordance with this document.

GENERAL INSTRUCTIONS

The declaration/information/supporting documents the Tenderer shall provide in accordance to this document shall be provided at the time of submission of the tender proposal and shall refer to circumstances existing at the time of submission. Unless otherwise provided in the tender specifications, any declaration established by companies subject to participation conditions in accordance with this document shall **be signed by a legally appointed representative with powers to represent the company**.

Entities not compliant with the participating conditions referred above may issue a request for waiver in accordance with the tender conditions **at the time of submission of the tender proposal**.

All the information provided in application of this document including the information provided in Annex I.H - Part 2 will be treated according to Article 339 of the [TFEU](#)¹.

Any tenderer, member of the core team or subcontractor involved in a tender proposal and subject to the participating condition (hereinafter referred as “entity”) can also submit the information marked “Confidential” or “Business secrets” if it is considered that its interest would be harmed if any of this information is disclosed. In this case, the entity should give reasons as to why this information should be covered by the obligation of professional secrecy. If an entity deems the information provided in or with Annex I.H - Part 2 is too sensitive to be delivered via the prime tenderer or another member of the core team, it can:

- either provide it as a password-protected² zip archive within the global application³ and provide the associated password separately at the following email address : tenders@euspa.europa.eu . In such case, it should mention the name of the encrypted zip archive and the name of the tender concerned in the email;
- or contact EUSPA at tenders@euspa.europa.eu to identify the appropriate way of transmission prior to the deadline for submission of the proposal. EUSPA will acknowledge reception by email and the applicant will communicate this proof to the prime tenderer or member of the core team in charge of the submission, who will need to include it in the submitted proposal.

Nota : Annex I.H - Part 2 is a macro-enabled Excel file. It also allows to attach supporting documents directly in the Excel file in order to ease further exploitation. It is recommended to use .pdf attachments (even though Word attachments are also possible). Do not worry if, once a file is attached, a “strange” icon is displayed: this is “normal”. Once you have completed Annex I.H - Part 2, you will need to press the validation button: this will first perform some completeness and format checks and, if the validation is successful, export the file in various formats (.xlsm, .xlsx and .pdf). **You will need to provide the .xlsx and .pdf files with your application (pdf is needed because of the signature). Please verify that the attachments are properly accessible from the saved .xlsx file before submitting your**

¹ Article 339 of the TFEU: “The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.”

² Use AES-256 encryption method. You can use free and open-source software such as 7-zip to do so.

³ i.e. as a password-protected zip archive inside the single password-protected master zip archive containing Part A sup, Part B, the eight Annexes and all other supporting documents.

application. This export at the end of the process is without prejudice to your ability to save intermediate drafts of the file using the usual “save as” Excel function: just make sure you are saving the file as .xlsm in order to allow further use of the macros. If you encounter any issue with the use of Annex I.H - Part 2, please contact EUSPA at tenders@euspa.europa.eu .

ESTABLISHMENT AND EXECUTIVE MANAGEMENT STRUCTURE IN AN EU MEMBER STATE (CONDITION A)

Required evidence:

- Place of establishment of the ‘legal entity’:
 - o An extract from the relevant register proving that the registered office of the entity is one of the EU Member States;
- the ‘executive management structures’ of the entity to be in an EU Member State:
 - o An extract from the relevant register proving that the head office or executive management structure is in one of the EU Member States. In case of the lack of such information disclosed in the register, the proof may encompass: any official document, including the instruments of constitution, and memorandum and articles of association if they are contained in a separate instrument, a resolution or a decision, or in the case of the lack of thereof, the declaration under oath/sworn statement that the ‘executive management structures’ is in one of the EU Member States ;

ACTIVITIES IN AN EU MEMBER STATE (CONDITION B)

Entities subject to participating conditions shall declare, describe and locate all infrastructure, facilities, assets and resources, which will be used for the implementation of the activities subject to participation conditions. This may for example include location of offices, laboratories, testing facilities, but also the software and human resources required/involved. **In case the usage of space assets or services or the usage of cloud facilities or services is required to carry out the action, they need to be specified**, including the place of establishment of the company(ies) owning and/or operating the related systems.

Attention is drawn to the fact that, in order to be eligible, all the infrastructure, facilities, assets and resources of the entity subject to participation condition needed to carry out the action must be located in one or more Member States (which includes the outermost regions of the Member States) at the moment of submission of the Tender and throughout the entire duration of the resulting contract.

Required evidence: the declaration under oath/sworn statement

ASSESSMENT OF CONTROL (CONDITION C)

Introduction

Tenderers are informed that the notion of control will be assessed with regard to the whole entity and is not limited to the control of the entity as regards the activities which relate to the subject matter of the tender

Any public entity⁴ is automatically considered to be controlled by the state in which it has a registered office . Any other entity subject to participation condition shall fill and sign Annex I.H - Part 2.

Each entity subject to participating conditions has to assess how ‘control’ is exercised in its entity, and whether there is a possibility that a ‘third country’ or a ‘third-country entity’ influences strategic decisions.

How is ‘control’ by a ‘third country’ or ‘third-country entity’ assessed?

‘Legal entities’ are to assess the ‘control’ by a third-country entity by checking the and providing the contracting authority with supporting evidences for the following elements:

- a) Ownership structure and specific rights (*i.e.* shareholders rights)
- b) Corporate governance
- c) Commercial links conferring control
- d) Financial links conferring control
- e) Other sources of control

The information that the entity will provide as part of the proposal (contained in Annex I.H - Part 2) will be used by EUSPA to assess if it is subject to ‘control’ by a ‘third country’ or by a ‘third-country entity’.

Given the variety of individual situations where decisive influences may exist, the contracting authority may request additional evidence during the evaluation phases as regards legal or factual control.

a) Information on the legal entity

Evidence to be provided in Annex I.H - Part 2 regarding the ‘legal entity’

The entity subject to participating conditions need to provide:

- information regarding the entity,
- Report/minutes of the last three shareholders meetings

⁴ Public entities are considered those entities where the only involved bodies in their decision making process are the authorities of one or more Member States, or one of some their territorial division.

b) Ownership structure and specific rights (i.e. shareholders rights)

Evidence to be provided in Annex I.H - Part 2 regarding ownership structure and specific rights.

The entity subject to participating conditions need to provide:

- information on the nationality of the individual ultimate owners⁵ that detain at least 5% of the capital or voting rights in the 'legal entity';
- Information on the rights attached to the shares detained;
- the instruments of constitution, and memorandum and articles of association if they are contained in a separate instrument, shareholders' agreements, or other relevant documents regarding the taking of decisions within the company
- a graph that includes :
 - the different ownership layers up to their ultimate owners.
 - For each layer, the existence of third-country individual or third-country entity controlling that intermediate layer, up to the ultimate owners of all the layers involved.

Additional evidence that may be requested during the evaluation process regarding ownership structure and specific rights.

- Evidence on the absence of third-country 'control' of each intermediate layer, up to the ultimate owner, according to the graph describing the chain of control of the 'legal entity',
- Copy of ID card or passport of the ultimate owner(s).

c) Corporate governance

Evidence to be provided in Annex I.H - Part 2 regarding corporate governance:

- Description of the decision-making bodies and their composition;
- The relevant rules regarding election, appointment, nomination or tenure of members of the decision-making bodies;

⁵ Ultimate owners are always natural persons (except in cases of public entities) who ultimately control the legal entity. Such control can be direct or indirect :

- When 'legal entity' shares are directly "owned" by individual shareholders (natural persons that own and control the company, and act under its own name), those shall be considered a ultimate owners.
- When a 'legal entity' shares are indirectly owned by ultimate owners, several ownership layers can exist between the 'legal entity' shareholders and the ultimate owners (the natural persons that "own" and control the company).

In case of a nominee, fund, trust or any other institutional investment instrument (or arrangement) holding the shares, the requirement of not being subject to 'control' by a 'third country' or by a 'third-country entity' may be satisfied at the level of the nominee, trustee, or other register owner, provided that the latter is an EU national or a national from an associated country and that it exercises decisive influence over that instrument or arrangement (i.e. takes the investment decisions).

- The decision-making procedures.

d) Commercial links conferring control

Evidence to be provided in Annex I.H - Part 2 regarding commercial dependence:.

- Information on companies or individuals of ‘third countries’ that have a contractual relationship with the ‘legal entity’ which can give them ‘control’ over it. If this commercial relationship is with a company or individual of the ‘third country’ that is a shareholder, the relevant information about the shareholder(s) needs to be included

Additional evidence that may be requested regarding commercial dependence.

Cooperation agreements with third-country customers or suppliers (including shareholders if relevant), when they could confer ‘control’ over the company.

e) Financial links conferring control

Evidence to be provided in Annex I.H - Part 2 regarding financial dependence :

- Information on shareholders providing financing to the company, indicating the type of financing and nature and degree of ‘control’.

Additional evidence that may be requested regarding financial dependence:

In case of third-country or third-country entity shareholder that provides financial contribution, any supporting document (loans, instruments of constitution, agreements) that justify the financial contribution.

f) Other sources of control

There might be other sources of ‘control’ specific to each case. Annex I.H - Part 2 shall be filled with all the information about any other means, process or link ultimately conferring ‘control’ to a ‘third country’ or ‘third-country entity’.