

Project Administration Instructions

PAI 3.02
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ELIGIBILITY

A. Introduction

1. This PAI guides ADB staff in determining the eligibility of bidders, sellers, suppliers, and manufacturers of goods and related services or works to be procured and financed by ADB. If in doubt, staff should consult Central Operations Services Office (COSO). Thereafter, staff may with consult the Office of the General Counsel (OGC) on any specific legal issues(s) relating to eligibility, including issues regarding nationality.

B. Determining Eligibility

2. For any ADB-financed procurement transaction, Article 14 (ix) of the ADB Charter gives two requirements for determining eligibility:

- procurement is in member countries of ADB; and
- goods and services are produced in and provided from ADB's member countries.

"Eligibility" concerns fulfilling these two requirements.

C. Procurement in Member Countries

3. Procurement in member countries means

- the supplier¹ must be a national of a member country,
- the place of contract must be in a member country and performance by the supplier must occur in member countries, and
- the purchase price must be incurred in member countries' currencies.

1. Nationality of the Supplier

4. The supplier may be a person, corporation, or group of persons. Generally, nationality is determined by referring to the law of the member country of which a supplier claims nationality. Some criteria for determining nationality follow.

2. Natural Person

5. For a natural person, nationality can usually be established by referring to the person's passport or any other legal test of nationality acceptable to ADB.

¹ A supplier is a person, corporation, or group of persons contractually bound to supply the goods and related services or works purchased, but is not necessarily a manufacturer, and may appoint an agent on its behalf.

3. Corporation

6. For a corporation,² generally only the place of its incorporation needs to be considered. Incorporation means establishing a corporation and is not to be confused with “registration,” which is sometimes required to permit a foreign company to conduct business. A company incorporated in Brazil may be registered in the Philippines to enable it to carry on business there, but it would not be considered a national of the Philippines for the purposes of determining eligibility. A few member countries with a civil law background may prescribe that the location of the center of administration, rather than incorporation, determines the nationality of a corporation. France, Netherlands, and Spain, among others, have civil law systems, but not all countries believe that the central administration's location determines nationality. Issues regarding nationality are to be referred to OGC. The nationality of the owners or shareholders of the corporation is irrelevant. For example, a corporation incorporated in the United States would be an eligible supplier even though it is a wholly owned subsidiary of a Mexican company.

4. Partnerships

7. To be eligible, partnerships that are not incorporated and have individual members must
- be registered in a member country, and
 - have a substantial majority (not less than 60 percent) ownership by nationals of member countries.

5. Joint Ventures

8. To be eligible, joint ventures that are not incorporated and do not have a legal personality independent of their members must
- be registered in a member country, and
 - consist of nationals (individuals, partnerships, or corporations) of member countries.

D. Goods and Services Produced in and Provided from Member Countries

9. The second requirement of eligibility under the Charter is that the goods and related services or works to be procured must be produced in and provided from member countries. This requirement is discussed in three typical contexts of procurement:

- goods and related services, insurance, and freight;
- works; and
- consulting services.

² Corporation refers to an entity having a legal personality of its own, independent of its members. In some countries, corporation describes a company.

1. Goods

10. To be eligible, goods must have been mined, grown, or produced in a member country. That is, the goods should have come into existence in a member country in the form in which they are to be purchased. Goods are produced or deemed to come into existence when, through manufacturing, processing, or substantial and major assembling of components, a commercially recognized product results that is substantially different from its components.

2. Insurance and Freight

11. For a cost, insurance, and freight (CIF) contract, or a carriage and insurance paid to (CIP) contract, ADB is unconcerned whether insurance, freight, or transportation are supplied from a member country. The whole CIF/CIP cost is eligible (provided the goods are produced in and supplied from a member country) since such insurance and freight services are treated as ancillary or an insignificant part of the contract for the supply of goods. However, where goods are shipped free on board (FOB) and ADB is asked to finance transportation and insurance arranged by the purchaser under a separate contract, ADB must be satisfied that those services are supplied from member countries.

3. Works

12. The contractor must be eligible for works contracts in accordance with paras. 4–8. Works contracts include civil works, plant construction, and turnkey contracts. Labor, equipment, and materials for the works under the contract must be supplied from member countries. Sometimes the contractor is required to provide equipment and materials through subcontractors. Such subcontracts must also separately meet the eligibility requirements.

4. Consulting Services

13. The requirement of "production in member countries" for consulting services is satisfied if the services are supplied from member countries as follows.

- The services of an individual consultant are deemed supplied from the member country of which the consultant is a national.
- The services of a consulting firm generally consist of work at the home office of the firm and of field work by a team of individuals assembled by the firm. The home office is to be in a member country under the nationality requirements (paras. 4–8). Nationals of member countries provide the services. Where the consultant subcontracts out portions of the services or is required under the contract to purchase certain items of equipment, such subcontracts or equipment must also separately meet eligibility requirements.

E. Conflict of Interest

14. To be eligible, a bidder must not have a conflict of interest. Bidders found to be in conflict of interest will be disqualified. A bidder may be considered to have a conflict of interest with one or more parties in a bidding process, if they

- have controlling shareholders in common; or
- receive or have received any direct or indirect subsidy from any of them; or
- have the same legal representative for purposes of a bid; or
- have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on a bid of another bidder, or influence the decisions of the purchaser regarding the bidding process; or
- submit more than one bid in the bidding process, except where alternative offers may be permitted under the bidding documents; this does not limit the participation of subcontractors in more than one bid, or as bidders and subcontractors simultaneously; or
- participated as a consultant in preparing the design or technical specifications of the goods and related services or works that are the subject of a bid.

F. Government Owned Enterprises

15. In order to prevent conflicts of interest and encourage competition in ADB-financed procurement, government-owned enterprises in the borrower's country are generally ineligible to bid for, or to be awarded contracts under ADB financing. However, if the integrity and fairness of the bidding process is not threatened, government-owned enterprise may be eligible to participate in ADB-financed procurement provided it meets the following criteria:

- it operates under commercial law, and is legally autonomous from the borrower or the executing agency;
- it is financially independent, as demonstrated by the requirements for separate audited accounts and return of capital, powers to raise capital and obtain its revenue through the sale of goods and services;
- it is managerially autonomous, as evidenced by decision-making authority granted to its management, e.g., for contracting obligations and hiring and terminating the services of personnel;
- it is not a dependent agency of the borrower or the agency executing the project; and
- it meets all bidding and contractual conditions, including the prequalification and postqualification requirements including, financial and technical capabilities, experience and past performance.

G. Other Eligibility Requirements

16. A firm that is under a declaration of ineligibility by ADB will be disqualified. Furthermore, sanctions imposed through a decision of the United Nations Security council may make goods, firms, or individuals ineligible. Refer to PAI 3.01 for treatment of national sanctions (blacklists).

17. For contracts subject to prior review, ADB staff must review the sanction list prior to the approval of contract award. For post review of contract award, the EA must be instructed to consult with ADB before awarding the contract, to insure that the successful bidder is not on ADB's sanction list.

18. The military of a borrowing country will only be considered eligible to act as a supplier, contractor or consultant in exceptional circumstances. Where it is proposed to contract with the military, or include it in a procurement, COSO and OGC should be consulted in advance.