
Construction procurement —

Part 6:

Participation of targeted partners in joint ventures in contracts

Marchés de construction —

Partie 6: Participation des partenaires cibles en co-entreprise dans les contrats

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Contents

Page

Foreword	iv
Introduction.....	v
1 Scope	1
2 Terms and definitions	1
3 Requirements	4
3.1 Contract participation goal	4
3.2 Achieving the contract participation goal	4
3.2.1 General	4
3.2.2 Verification of the status of targeted partners	4
3.2.3 Joint ventures	4
3.3 Contract participation goal credits	5
4 Compliance with requirements	5
4.1 General	5
4.2 Substitutions	6
4.3 Bona fides of targeted partners	6
5 Records	6
5.1 Submission of documentation	6
5.2 Monthly submission of supporting documentation	7
5.3 Certification of credits	7
6 Sanctions	7
Annex A (informative) Commentary	8
Annex B (informative) Preparation of targeting data associated with this part of ISO 10845 for inclusion in the scope of work	17
Annex C (normative) Contract participation goal implementation plan (targeting strategy A)	20
Annex D (normative) Joint venture disclosure form	22
Annex E (informative) Examples of how contractors can fulfil their contract participation goal obligations	30
Annex F (informative) Tendered contract participation goal (targeting strategy A)	31
Annex G (informative) Sample tender evaluation schedule where use is made of this part of ISO 10845	33
Annex H (informative) Contract schedule for targeted enterprises	35
Annex I (informative) Third-party management support	38
Bibliography	42

Foreword

ISO (the International Organization for Standardization) is a worldwide federation of national standards bodies (ISO member bodies). The work of preparing International Standards is normally carried out through ISO technical committees. Each member body interested in a subject for which a technical committee has been established has the right to be represented on that committee. International organizations, governmental and non-governmental, in liaison with ISO, also take part in the work. ISO collaborates closely with the International Electrotechnical Commission (IEC) on all matters of electrotechnical standardization.

International Standards are drafted in accordance with the rules given in the ISO/IEC Directives, Part 2.

The main task of technical committees is to prepare International Standards. Draft International Standards adopted by the technical committees are circulated to the member bodies for voting. Publication as an International Standard requires approval by at least 75 % of the member bodies casting a vote.

Attention is drawn to the possibility that some of the elements of this document may be the subject of patent rights. ISO shall not be held responsible for identifying any or all such patent rights.

ISO 10845-6 was prepared by Technical Committee ISO/TC 59, *Buildings and civil engineering works*.

ISO 10845 consists of the following parts, under the general title *Construction procurement*:

- *Part 1: Processes, methods and procedures*
- *Part 2: Formatting and compilation of procurement documentation*
- *Part 3: Standard conditions of tender*
- *Part 4: Standard conditions for the calling for expressions of interest*
- *Part 5: Participation of targeted enterprises in contracts*
- *Part 6: Participation of targeted partners in joint ventures in contracts*
- *Part 7: Participation of local enterprises and labour in contracts*
- *Part 8: Participation of targeted labour in contracts*

Introduction

Procurement is the process which creates, manages and fulfils contracts. Procurement can, as such, be described as a succession of logically related actions occurring or performed in a definite manner and which culminate in the completion of a major deliverable or the attainment of a milestone. Processes, in turn, are underpinned by methods (i.e. a documented, systematically ordered collection of rules or approaches) and procedures (i.e. the formal steps to be taken in the performance of a specific task), which are informed and shaped by the policy of an organization. Methods and procedures can likewise be documented and linked to processes.

It is becoming increasingly important to consider procurement-related deliverables other than those relating to the primary purpose of the procurement itself, particularly those relating to poverty reduction, job creation, local economic development and local industry development. Key performance indicators relating to the engagement of enterprises, joint venture partners, local resources and local labour in contracts are needed to set targets in contracts or to measure procurement outcomes. Processes, procedures and methods are required to quantify, measure and verify a contractor's performance in relation to such indicators in an auditable manner.

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Construction procurement —

Part 6:

Participation of targeted partners in joint ventures in contracts

1 Scope

This part of ISO 10845 establishes a key performance indicator, in the form of a contract participation goal, relating to the engagement of targeted partners in a joint venture on a contract for the provision of goods, services or engineering and construction works. A contract participation goal may be used to measure the outcomes of a contract in relation to the engagement of targeted partners in a joint venture or to establish a target level of performance for the contractor to achieve or exceed in the performance of a contract.

This part of ISO 10845 sets out the methods by which the key performance indicator can be measured, quantified and verified in the performance of the contract in respect of two different targeting strategies: targeting strategy A and targeting strategy B (defined below).

NOTE Annex A contains commentary on the clauses in this part of ISO 10845. Annex B provides guidance on how to develop the targeting data for a procurement document using this part of ISO 10845.

2 Terms and definitions

For the purposes of this document, the following terms and definitions apply.

2.1

allowance

amount provided for in the contract by the employer relating to one or more of the following:

- a) the performance by the contractor of work or services that are foreseen but cannot be accurately specified at the time the contract is entered into;
- b) work or services to be performed, or goods provided, by a subcontractor who is either nominated by the employer or selected by the employer in consultation with the contractor after the award of the contract;
- c) provision for price adjustment for inflation; or
- d) other budgetary provisions intended to cover employer risks

2.2

commercially useful function

performance of real and actual work, or the provision of services, in the discharge of any contractual obligation which includes, but is not limited to, the performance of a distinct element of work which the enterprise has the skills and expertise to undertake and the responsibility for management and supervision

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2.3

contract amount

financial value of the contract

- a) at the time of the award of the contract, exclusive of all allowances and any value added tax or sales tax which the law requires the employer to pay to the contractor (targeting strategy A); or
- b) upon completion of all contractual obligations, exclusive of any value added tax or sales tax which the law requires the employer to pay to the contractor (targeting strategy B)

2.4

contract participation goal

CPG

amount equal to the sum of the participation parameters in respect of each targeted partner multiplied by the contract amount of the contract, expressed as a percentage of the contract amount, associated with the targeting strategy that is identified in the targeting data

2.5

contractor

person or organization that contracts to provide the goods, services or engineering and construction works covered by the contract

[ISO 10845-1:2010, definition 3.12]

2.6

control

possession and exercise of legal authority and power to manage the assets, goodwill and daily operations of an enterprise, and the active and continuous exercise of appropriate managerial and financial authority and power in determining the policies and directing the operations of the said enterprise

2.7

employer

person or organization intending to or entering into the contract with the contractor for the provision of goods, services, or engineering and construction works

[ISO 10845-1:2010, definition 3.17]

2.8

employer's representative

person authorized to represent the employer and named as such in the contract data or targeting data

2.9

joint venture

association or consortium of enterprises in which expertise, property, capital, efforts, resources, skills and knowledge are combined in order to perform the contract or a portion thereof

2.10

main contractor

contractor who subcontracts part of his contract

[ISO 6707-2:1993, definition 3.8.13]

2.11

ownership

legal right of possession, including the right of disposition, and sharing in all the risks and profits commensurate with the degree of ownership interest or shareholding, as demonstrated by an examination of the substance, rather than the form, of ownership arrangements

2.12**participation parameter**

fraction of the contract which may be used to represent the value of the contribution and the value of the commercially useful function performed by the targeted partners

2.13**targeted partner**

person or organization engaged in the performance of the contract at main contract level as a joint venture partner and defined as the target group in the targeting data

2.14**targeted partner declaration affidavit**

affidavit, of the format provided for in the procurement documents, which confirms the bona fides of a targeted partner

2.15**targeting data**

data, provisions and variations applicable to a particular contract

NOTE See A.2.15 and Annex B.

2.16**targeting strategy**

an approach which is pursued to make a contract participation goal an obligation of contract

2.16.1**targeting strategy A**

targeting strategy which

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- a) involves the granting of tender evaluation points by the employer in the evaluation of tender offers in return for the tendering of a contract participation goal or an undertaking to attain a specified contract participation goal at the time that tenders are evaluated, or
- b) requires a contractor to achieve a minimum specified goal in the performance of a contract, or
- c) involves both (a) and (b)

2.16.2**targeting strategy B**

targeting strategy which

- a) involves the payment of a financial incentive to a contractor for the attainment of a specified contract participation goal, or
- b) requires the contractor to record and report on the quantum of work generated for targeted labour

NOTE Targeting strategy A bases the contract participation goal on the tendered amount minus allowances, i.e. on the expenditure which the contractor can commit to at tender stage. This strategy allows the employer to adjust the contract participation goal to take account of any failure to achieve such goal in the performance of the contract due to factors which are beyond the contractor's control or are unforeseen at tender stage. Targeting strategy B measures the contract participation goal based on the final contract value. Targeting strategy A accordingly measures the performance of contractors in the engagement of targeted labour in relation to that which can be committed to at tender stage, whereas targeting strategy B does so in relation to that which is finally achieved.

3 Requirements

3.1 Contract participation goal

The contractor shall enter into a joint venture agreement at a main contract level with one or more targeted partners in the performance of the contract to the extent that the total monetary value of such engagements, exclusive of any value added tax or sales tax required by law, is sufficient to achieve the contract participation goal for the targeting strategy specified in the targeting data.

The contractor shall, in the case of targeting strategy A, submit details of his plan to achieve the contract participation goal, on the contract participation goal implementation plan form contained in Annex C, and details of the joint venture on the joint venture disclosure form contained in Annex D within five working days of being instructed to do so. If no instructions are given, these plans shall be submitted five working days before the submission of the first claim for payment.

NOTE The information contained in the contract participation goal implementation plan facilitates, in the first instance, the monitoring of the performance of the contractor in terms of his contract participation goal obligations and, in the second instance, the making of any adjustments to compensate for quantitative underruns, the elimination of items, etc. (see Clause 6).

3.2 Achieving the contract participation goal

3.2.1 General

A contractor shall achieve the contract participation goal by entering into a joint venture agreement with one or more targeted partners as set out in 3.2.3.

3.2.2 Verification of the status of targeted partners

Contractors shall submit completed targeted partner declaration affidavits in respect of each and every targeted partner whose contribution shall be counted towards the contract participation goal. These documents shall, unless otherwise stated in the targeting data, be submitted to the employer's representative before the submission of the first claim for payment.

3.2.3 Joint ventures

3.2.3.1 General

Contractors shall develop joint venture agreements with targeted partners in order to fulfil contract participation goal obligations.

Credits towards the achievement of the contract participation goal shall only be granted subject to compliance with the following requirements:

- a) the targeted partner shares in the following aspects of the joint venture in an appropriate and meaningful manner, consistent with reasonable business practices:
 - 1) ownership,
 - 2) control,
 - 3) management responsibilities,
 - 4) risks, and
 - 5) profits;

- b) the targeted partner is responsible for a clearly defined portion of the contract; and
- c) the targeted partner performs part of the defined portion of the work for which he is responsible, using his own resources or resources hired by him independently of his non-targeted partners.

3.2.3.2 Participation parameter

The participation parameter shall be equated to the lesser of

- a) the financial value of the work for which the targeted partner is responsible, and
- b) twice the financial value of the work which the targeted partner carries out using his own resources or resources hired by him independently of his non-targeted partners,

expressed as a fraction of the contract amount.

EXAMPLE If targeted partners within a joint venture have, in total, a participation parameter of 0,15 in a contract with a contract amount of USD 10 million, the targeted partners are responsible for work to the certified value of at least USD 1,5 million ($0,15 \times \$ 10 \text{ million}$). Work to the value of at least USD 750 000 (50 % of USD 1,5 million) is carried out using their own resources or resources hired by them independently of their non-targeted partners.

3.2.3.3 Joint venture disclosure forms

Details of any joint ventures developed with targeted partners shall be disclosed on the joint venture disclosure form (see Annex D) and shall be submitted five working days before the submission of the first payment certificate or as otherwise agreed, in writing, with the employer.

3.3 Contract participation goal credits

Credits towards the contract participation goal shall be granted by summing the products of the contract amount and the participation parameters of targeted partners within the joint venture and reducing this amount to a percentage of the contract amount subject to compliance with the requirements of 3.2.3.

Where all joint venture parties enjoy targeted partner status, such joint ventures shall be credited with a contract participation goal of 100 %, provided that each targeted partner has a participation parameter of 0,10 or more.

Credits shall be denied should targeted partners not adhere to statutory labour practices or fail to perform commercially useful functions.

NOTE Annex E provides illustrative examples as to how a contractor can fulfil his contract participation goal obligations.

4 Compliance with requirements

4.1 General

The contractor shall enter into written contractual agreements with all the targeted partners cited in the contract participation goal implementation plan and shall, as soon as is practicable, furnish the employer's representative with copies of such agreements. The contract to be performed by the targeted partners shall, in the case of targeting strategy A, thereafter neither be reduced in scope nor terminated without the prior written approval of the employer's representative, which shall not be unreasonably withheld or delayed.

4.2 Substitutions

Where targeting strategy A applies and in the event that, through no fault of the contractor, a targeted partner is found to be

- a) unable to perform,
- b) unable to perform on time, or
- c) unable to produce acceptable work, or
- d) unwilling to perform the work required, or
- e) not fit to perform the service,

the contractor shall notify the employer's representative of the apparent necessity to reduce or terminate such a targeted partner's contract, citing the reasons therefor.

In the event that the employer approves the contractor's request to restructure the joint venture formation, the contractor shall either provide a substitute targeted partner to take over the contract, or engage a targeted partner within the joint venture on another aspect of the contract so as to secure the required credits to achieve the contract participation goal. The contractor shall, in such circumstances, submit to the employer details of the nature and value of the contract which shall be performed by such a targeted partner.

The contractor may only restructure the joint venture and enter into agreements with substitute targeted partners for the purpose of securing credits towards the contract participation goal, with the employer's approval, which will not be unreasonably withheld.

The employer may, at his sole discretion and upon the basis of evidence submitted by the contractor in support of fruitless efforts made in good faith to secure substitute targeted partner participation, grant a waiver in respect of contract participation goal obligations.

NOTE Subclause 4.2 is only applicable where targeting strategy A applies.

4.3 Bona fides of targeted partners

Where, in the case of targeting strategy A, an enterprise under contract was initially considered to be a targeted partner but is later discovered not to be so, or is found not to be creditable towards contract participation goals, the employer may consider a partial waiver of the contractor's obligations towards the achievement of contract participation goals in respect of such a targeted partner, should the contractor satisfactorily demonstrate that he was justified in believing the enterprise to be a targeted partner and that eligibility standards were not violated.

5 Records

5.1 Submission of documentation

The contractor shall submit all the documentation required in terms of 3.1, 3.2.2, 3.2.3, 4.1 and 5.2 in a timely manner and, together with a programme of activities, a schedule which indicates clearly the expected delivery dates of goods provided by targeted partners or the commencement and completion dates of work and services to be performed by all the targeted partners engaged on the contract. This schedule shall be updated by the contractor whenever a change in programme occurs.

5.2 Monthly submission of supporting documentation

The contractor shall prepare and submit monthly to the employer's representative, on or before the date specified in the targeting data, in a form approved by the employer's representative, the following:

- a) a brief report which describes the commercially useful functions performed by the targeted partners in the performance of the contract, both over the interim period and on a cumulative basis; and
- b) a schedule reflecting the estimated total value of the goods to be provided and work and services to be performed, the cumulative value of the goods provided or work and services performed (or both) and the value of goods provided or work and services performed (or both) over the period for which payment is claimed in respect of each and every targeted partner.

Should random inspections conducted by the employer's representative on targeted partner activities indicate that such partners are not performing in accordance with the requirements of this part of ISO 10845, the contractor shall provide, in addition to the monthly reporting requirements, separate weekly resource returns and any other relevant information in respect of such targeted partners in a format approved by the employer's representative.

5.3 Certification of credits

The employer's representative shall certify the value of the credits counted towards the contract participation goal whenever a claim for payment is issued to the employer, and shall notify the contractor of this amount.

6 Sanctions

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In the event that, and where targeting strategy A applies, the contractor fails to substantiate that any failure to achieve the contract participation goal was due to

- a) quantitative underruns, <https://standards.iteh.ai/catalog/standards/sist/33a9a646-97e5-4b2e-9c84-c93ccee2871d/iso-10845-6-2011>
- b) the elimination by the employer of items included in the contract participation goal, or
- c) any other reason beyond the contractor's control which may be acceptable to the employer,

the sanctions provided for in the contract shall apply.

NOTE 1 The contract establishes the sanctions that apply. These can be set out in a tender evaluation schedule, the scope of work or contract data. Sanctions where tender evaluation points are granted in respect of a tendered CPG or where a minimum CPG is specified (i.e. targeting strategy A) are usually applied in the form of

- a) financial penalties, typically formulated on the difference between the contracted contract participation goal and the contract participation goal achieved in the performance of the contract;
- b) the rejection of claims for payments as being incomplete, should the appropriate supporting documentation not be provided; and
- c) the issuing of completion certificates only after the certificates described in 5.3 are received.

NOTE 2 No sanctions in the form of financial penalties are applied where the CPGs are only used to measure and report on the quantum of economic activity generated by a contract for targeted enterprises (i.e. targeting strategy B). The sanction where financial incentives are applied is simply that the incentive is not paid if the target is not attained.

Annex A (informative)

Commentary

NOTE 1 This annex includes background information on this part of ISO 10845, guidance on its use and suggestions on good practice. The clauses in the commentary refer directly to the respective clauses in this part of ISO 10845, e.g. A.1 refers to Clause 1.

NOTE 2 This part of ISO 10845 can be incorporated into procurement documents by reference, usually in the scope of work or a tender evaluation schedule (see ISO 10845-2).

A.1 Commentary on scope

The purpose of this part of ISO 10845 is to standardize the manner in which targets (contract participation goals) are set and measured in relation to the participation of targeted partners in joint ventures at the main contract level in goods, engineering and construction works or service contracts. These targets, in addition to measuring and reporting on a key performance indicator which reflects the quantum of involvement in the workings of the joint venture by targeted partners through the performance of the contract, can, depending upon prevailing legislation, be used to

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- a) reserve a portion of the contract work for specified target groups through the setting of minimum contract participation goals,
 - b) establish the basis for the awarding of preferences in proportion to the quantum of the CPG that is tendered, or
 - c) establish performance targets for the payment of financial incentives relating to the attainment of key performance indicators.

It should be noted that (a) and (b) above can be used in combination with each other should tender evaluation points be granted for tendering a contract participation goal which exceeds a minimum value.

Public sector procurement is frequently governed by local and international laws. Employers should be aware that they are responsible for the correct application of this part of ISO 10845 and ensuring that such application is consistent with prevailing legislation. Compliance with this part of ISO 10845 cannot confer immunity from legal obligations. If doubt exists, legal advice should be sought.

NOTE Annex F provides an example of a tendered contract participation goal calculation. Annex G provides an example of a tender evaluation schedule which enables this part of ISO 10845 to be used for tender evaluation purposes. Annex I provides information on the use of this part of ISO 10845 to provide third-party management support to fledgling contractors.

A.2 Commentary on terms and definitions

A.2.13 Targeted partner

A.2.13.1 General considerations

Targeted partners can be targeted upon the basis of

- a) locality (domicile),

- b) status as a small, medium, or micro-enterprise,
- c) ownership, operational responsibilities and control (or a combination thereof) by marginalized population groups, or
- d) a combination of (a), (b) and (c).

Targeting can either be on a generic or an area-bound (localized) basis, e.g. business enterprises owned by women (generic), or business enterprises within a geographical region (area-bound).

The formulation of definitions for targeted partners can determine the success, or otherwise, of secondary procurement policies, as the business environment can respond to, and structure itself around, such policies. For example, a loose definition can promote fronting (practices which are against the spirit or provisions of this part of ISO 10845) which can, ultimately, undermine the integrity and intent of a policy. An ambiguous definition can promote collusion between procurement officers and suppliers (“gatekeeping”), as discretion invariably needs to be exercised to determine whether or not a business is a targeted partner. Too wide a definition can promote tokenism, as businesses that have some sort of the desired characteristics are permitted to derive benefit from the policy. Too tight a definition, on the other hand, can promote a culture of elitism, as too few businesses qualify. An inappropriate definition can promote the status quo and give a false impression of business empowerment.

Definitions for targeted partners should be contractually enforceable and mirror the intent of the secondary procurement policy. Poor definitions are often indicative of ill-defined policies.

A.2.13.2 Ownership of targeted partners

Ownership, including the right of disposition and sharing in the risks and profits commensurate with the degree of ownership, is, from a procurement point of view, particularly important in privately-owned companies as this issue lies at the heart of any programme of economic empowerment.

Ownership of publicly-listed companies is usually not a relevant characteristic, except where concessions are granted, as such companies are rarely able to exercise control over who acquires shares. In public sector concessions, however, ownership can be used to allow disadvantaged communities to acquire shares in new ventures, particularly in fields in which no empowerment companies are operating. This often presents challenges to empowerment consortia, who have to raise the necessary capital to purchase such shares up front. Various innovative mechanisms, including “buy back” options and the financing of such share purchases until such time as dividends and earnings from operating the concession can redeem the loans, are frequently used to enable empowerment companies to take advantage of the opportunities presented.

It is important to clearly define what constitutes ownership for an empowerment company in a given situation. It is also important to examine interlocking ownership between empowerment companies to establish factors such as control and independence.

The level of ownership necessary to constitute an empowerment company, as such, should also be carefully considered, as well as how, in practice, it can be monitored. The level of ownership in small businesses should be such that it is significant and is not readily open to manipulation.

A.2.13.3 Control of targeted partners

Control of businesses lies at the heart of empowerment initiatives. Control of an enterprise by a disadvantaged group of individuals is fundamental to empowerment. Ownership is often linked to control but this is not, in all instances, feasible or even desirable. In publicly-listed companies it might not be possible and in consortia arising from concessions, it might be too onerous. Control over an enterprise, from an empowerment perspective, should result in the policies implemented being effective, both in terms of business success and employee empowerment.

Control of a business should centre around the authority and power to manage the assets, goodwill and daily operations of the business, the determination of policies and the directing of business operations. Indicators of control include ownership, management responsibilities, and the assumption of risk. Factors such as who