

**Annex to TNC-GCF Procedure
Granting and Awarding GCF Funds –
Guideline on Dispute Resolution during the procurement phase**

GENERAL PRINCIPLES AND INTRODUCTION:

Background

As required by the **TNC-GCF Procedure – Granting and Awarding GCF Funds** and the **TNC Purchasing SOP**, there will be events in which TNC conducts open, or semi-open, competitive processes for the selection of a grantees/subawardees/contractors. Worldwide, it is not uncommon for these processes to result in complaints or conflicts between and among TNC and proponents.

TNC will make reasonable attempts to avoid these conflicts, and to solve them, provided that the fairness and the perception of fairness of the competitive process is not negatively affected, that no third-party rights are affected, and that TNC does not unnecessarily burdens or limits legal rights in the context of potential or existing litigation. TNC will maintain open communication with any participant lodging a complaint or potential dispute, pursuant to the **TNC-GCF Procedure – Granting and Awarding GCF Funds**.

Please note that the potential contractor/grantee and participants in the procurement process may have access to the TNC-GCF Grievance Mechanism under the TNC-GCF Performance Standards of the Environmental and Social Management System. In such cases, the procedures and requirements of the Grievance Mechanism will have to be observed, without prejudice to implementing reasonable actions to minimize the adverse effects over the procurement process or TNC's rights in the context of existing or potential litigation.

Available Dispute Resolution Procedures

[Internal TNC]

TNC, notwithstanding its non-profit status; its denomination as non-governmental organization, multinational organization, international organization or other similar denominations; or its role as grantee, implementing partner, contractor, recipient or partner of government agencies or multilateral organizations; is a private entity (both in the United States, its states and each country in which it has branches or affiliates) and does not have any of the protections, privileges, immunities or jurisdictional advantages that governments, government agencies or multilateral organizations may have. TNC may sue and be sued in any competent court of law with jurisdiction over the matter. This applies also to procurement processes. A dispute between TNC and a potential or existing grantee/vendor will normally be subject to the jurisdiction of courts of law.

This principle is generally applicable to GCF-Funded Projects implemented by TNC even if TNC is managing or disbursing GCF funds. In principle TNC, no matter its role in a GCF-Funded Project, will not have special procedural rights or defenses against potential contractors and grantees in case of a procurement dispute. Any participant may seek redress in local courts of law pursuant to applicable laws. TNC does not limit these rights in the context of a procurement process.

[Internal TNC] Unless TNC is conducting work in a jurisdiction with no legal and judicial infrastructure with strong track record of denial of justice, TNC considers that local courts or

arbitration tribunals are the natural and normal venues to solve procurement disputes, without prejudice to any normal, reasonable and good faith attempts to solve a dispute amicably or, when necessary, use alternative dispute resolution mechanisms available under applicable laws.

[Internal TNC]. TNC is open to communication with procurement process participants as described in the **TNC-GCF Procedure – Granting and Awarding GCF Funds**.

TNC Approach and Analysis

TNC does not have automatic triggers to initiate judicial action or settle claims. Any decision will be analyzed on a case-by-case basis, depending on factors such as type of claim, type of default, probability of success, estimated financial loss, available evidence, probable outcomes, applicable law and jurisdiction, cost-benefit analysis (time, expenses, reputation, etc.), donor requirements, moral hazard, and other relevant factors that Legal, with the support of Grants, Finance, the Business Unit and other relevant TNC divisions, may take into consideration. Any decision regarding litigation and settlements shall observe the **Use of Outside Counsel and Litigation SOP**.

APPLICABLE SOPs, RELEVANT GUIDELINES AND INTERNAL DOCUMENTS FOR POTENTIAL OR EXISTING LITIGATION:

In the context of existing or potential judicial litigation or settlement negotiations related to procurement disputes, TNC has a series of internal policies, procedures and practices. The main SOPs and references are:

Use of Outside Counsel and Litigation

Duties of TNC Attorneys with Respect to Litigation

Duties of TNC Paralegals with Respect to Litigation

Legal Holds – Guidance for Legal staff

Legal Holds – Guidance for non-Legal staff

Guidelines for contractual default and termination (GCF specific)

DISPUTES WITH POTENTIAL CONTRACTORS/GRANTEES

Requests for proposals (RFP), open or close bidding or similar open procurement process may be a source of disputes and claims by bidders and participants, even if they are not awardees and don't become contractor or vendors.

As a private entity, TNC is not subject to public procurement laws. However, it has internal procedures and recommendations for these processes, such as **TNC-GCF Procedure – Granting and Awarding GCF Funds** and the **Purchasing SOP**. [Internal TNC] It is good practice to manage expectation and avoid misunderstandings. In this context, the following recommendations should be observed when structuring a Competitive Selection Process (CSP).

- TNC mission and values must orient the terms of the CSP and of any communication with bidders and potential bidders.
- Observe local best practices for the sector and for the type and value of the award or contract.
- Be concise, neutral and objective regarding formal and technical requirements.
- Set a definite timeline and a definite list of documentary requirements and try to strictly follow it. These documents should be sufficient for you to conduct legal, financial, and operational due

- diligence on bidder but not be unreasonably burdensome.
- Timely respond to questions and comments by bidders. Ideally, any response should be shared with all bidders.
 - Ideally, create an open forum where all bidders and potential bidders can raise questions and comments.
 - Do not be as specific to limit participation to one or few obvious bidders, nor as general to allow for inadequate participation.
 - Reserve the right to terminate the CSP at any moment but do so only if objective circumstances merit it.
 - Reserve the right to modify the terms and conditions of the CSP, but try not to do it unless strictly necessary, and if a change occurs, grant any bidder the opportunity to present a new amended bid.
 - Reserve the right to disqualify any bidder for any objective reason (other than for purely clerical errors that don't reflect purely on the bidder). Be reasonable in the use of this prerogative and provide the bidder reasonable and commensurate time and alternatives to cure the defect.
 - Do not share information about bids with other bidders.
 - Be open regarding the process and pros and cons of a bid, but do not share information about your evaluation procedure with any bidder (including the awardee or a bidder asking about its own bid, strengths and weaknesses).
 - In the near term after the award, do not make substantial changes to the scope of services, or terms and conditions of the contract, unless strictly necessary.