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*Funds and Programmes Division*

## MA Circular 01/2015

To: Project Leaders  
From: Head of the Managing Authority  
Date: 23<sup>rd</sup> February 2015  
Subject: Public Procurement Guidance for Practitioners on the Avoidance of Errors.

Public Procurement accounts for around 19% of the EU GDP and around 46% of ESI Funds. Reaching such extent it is therefore important that Public Procurement guidance is followed; this increases transparency and hence limits the risk of fraud and corruption, increases competition in EU markets and increases value for money. Both the European Court of Auditors as well as national audits are reporting an increasing number of irregularities on Public Procurement. Public Procurement errors are the single most common cause of administrative irregularities and financial corrections across all EU Funds.

Beneficiaries must aim to obtain a significant reduction of irregularities in public procurement contracts. This should be done through preventive actions including spreading knowledge of EU Public Procurement rules amongst all stakeholders, investing in training and in good practise exchange and better preparation of tenders and projects; this will surely reduce the error rate.

A Technical Working Group on Public Procurement was established by the European Commission in September 2013 in order to improve coordination and avoid fragmentation and to prepare and deliver an action plan to improve Public Procurement performance during 2014-2020 programme. The Public Procurement guidelines for practitioners were created to avoid a number of errors on EU funded projects. The guidelines include a toolkit of resources addressing specifying topics on what to do and what not to do during procurement and contract implementation. (See Annex 1)

These guidelines are a step by step description of the public procurement processes including highlighted areas of typical mistakes and how to avoid them, explanations of how to handle each situation, a list of 25 most common serious errors and 12 toolkit documents on specific topics with best practise case studies and templates.

Public Procurement Guidance for practitioners through different stages:

### 1. Preparation and planning

The purpose of this stage is to design a basis for an eventual robust process for the delivery of the required works, services or supplies. A competitive tender process carried out in an open, objective and transparent manner should achieve best value for money in public procurement.

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Essential principles to be observed in conducting procurement for a public contract include: non-discrimination, equal treatment, transparency, mutual recognition, proportionality, freedom to provide service and freedom of establishment for potential tenderers from all EU member states. If this part of the tender process is done correctly then the rest of the tender should flow without difficulty. Good planning should minimise the risk of needing contract modifications and variations. The biggest and most common errors on contracts result from inadequate planning. The contracting authority must be able to demonstrate that the procurement was planned appropriately to deliver the required outputs following procedures that are in line with the relevant public procurement rules. Important attention should be given to treat all bidders equally.

## 2. Invitation to bid

The purpose of this stage is to attract competitively priced bids to deliver a contract with outcomes meeting the needs of the contracting authority. A fundamental tenant of EU public procurement law is that all contracts above a certain threshold value should be published in a standard format at the EU level, so that all economic operators in member states have the possibility to tender for contracts for which they consider they can meet the requirements. If the procurement is above the EU threshold (and therefore falls within the Public Procurement Directives) it is mandatory to publish a Contract Notice. Many contracting authorities mix up the selection stage and criteria with the evaluation stage. These are 2 separate parts of the procurement process – selection (of bidders) and evaluation (of the bids). These are quite distinct and not to be confused. At the selection stage the aim is to select those bidders capable of doing the job. The evaluation stage assesses the best bid received from the selected bidders. It is essential to establish appropriate selection and award criteria at the procurement planning stage.

Once the contract notice has been published it cannot be amended otherwise a cancellation is required. In actual fact only minor changes to the formal requirements are allowed. If any minor changes occur in the tender phase it is recommended to extend the deadline for submission of the tender.

## 3. Submission and Selection of bids

The purpose of the submission and selection phase is to ensure that compliant bids are received and selected according to the rules and criteria established in the tender dossier. Communication with tenderer before submission of the offer must only be in writing, with the same information sent to all tenderers. The answers to any questions asked by a tenderer must be anonymised and circulated to all tenderers with clear cut-off dates. Communication with the tenderers after the deadline for submission of offers is limited to clarification of the



offer only in Open and Restricted Procedures. Any dialogue relating to the substance of an offer is not acceptable.

The time and place for delivery of the tenders cannot be changed. The first task of the evaluation committee is to check all bids to ensure that they are compliant i.e. they have followed the instructions to tenderers to the letter. If they have not, they should be immediately rejected as non compliant and an explanation should be given to the bidder as to why it has been rejected. All tender submissions should be kept as confidential and in safe custody. Many contracting authorities have a formal opening ceremony for tenderers and this is recommended as good practice. At least 2 persons should be present to record the tender details and members of the public can be invited. If an offer does not fulfil the selection or the minimum requirements then the offer must be rejected.

#### 4. Evaluation of bids

The purpose of this stage is to determine the winning bidder by strictly applying the published award criteria. Never amend the award or evaluation methodology midway through the procurement process. Clarifications cannot change the already submitted bid in relation to substantial information such as selection documents, pricing, quality and service elements. All communication with bidders must be fully documented. Post tender negotiations including all negotiations with tenderers on fundamental aspects of contracts, including variations which are likely to distort competition, are not permitted. The evaluation committee must arrange for the tender evaluation results to be presented to the steering committee. A full and comprehensive report on the process and outcome of the evaluation committee deliberations must be recorded and kept on the contract file. This report should be clear and sufficiently detailed to demonstrate how the decision to award the contract was taken.

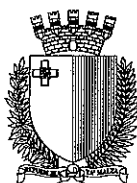
#### 5. Award

When the contracting authority has decided to whom the contract should be awarded all bidders must be informed of the results. After the standstill period and assuming that no complaint has been filed, the contract can be signed. Failure to publish the Contract Award Notice is a relatively common error that can be eliminated through the use of checklists and key stage controls. As soon as it is noticed that the Contract Award Notice has not been published, contracting authorities should take immediate action to ensure that it is published. As soon as a contract has been awarded, the contracting authority must store and file all documents covering the tender evaluation stage including all the bids received and the evaluation report.

#### 6. Contract Implementation

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The purpose of this stage is to ensure that the contract is satisfactorily implemented in accordance with the outcome of the tender process. For a balanced relationship, the staff administering the contract on behalf of the contracting authority should be experienced and competent as those of the contractor. There must be monitoring, provision of feedback and regular meetings between the contractor and the contracting authority ensuring the fulfilment of the contract and avoid unexpected conflicts. Modifications of contracts and award of additional works to an existing contractor is one of the common and serious errors. If additional works/services are essential then a new contract should be tendered other than in very specific circumstances and with strict limits on the additional value.



**Annex 1: Top10 tips to avoid public procurement errors.**

DON'T.....	PLANNING TENDERING SELECTION EVALUATION AWARD IMPLEMENTATION	DO.....
Launch a procurement process without adequate planning, approval and control systems in place		Spend sufficient time planning, choosing the correct procedure and documenting decisions/checks.
Split contracts so that they fall below the threshold for publication or avoid grouping contracts for the same works/services/supplies within your organization.		Look at all options for appropriate contract packaging to achieve efficiency and value-for-money, including checking for bundling similar contracts within your organization.
Start a procurement process without advertising either nationally and/or in OJEU		Publish the Contract Notice in the OJEU for all contracts with total value (not the grant amount) above the relevant thresholds
Launch a tender without clearly stating the selection and award criteria (including weightings) in either the Contract Notice or Tender Specification		Check whether contracts below thresholds have potential cross-border interest and advertise accordingly
Try to accelerate timetables faster than the minimum time limits defined in EU Directives		Strictly follow the minimum time limits in Directives and national rules for all stages of the bidding process.
Apply Selection/Award Criteria that are discriminatory or not related/proportionate to the contract's subject matter.		Design selection (of eligible bidders) and award (of best bids) criteria appropriate to the subject matter of the contract, and use advisors.
Evaluate tenderers using unlawful selection/award criteria or modify Evaluation Criteria after the opening of tenders.		Apply procedures that are transparent and fair to all bidders from bid opening through to announcement of the winning tenderer, strictly applying published selection/award criteria
Allow anyone with a potential conflict of interest (Col) to be involved in preparing or evaluating a tender.		Ensure that everyone with influence over the tender design or award of a contract has signed a Col declaration.
Move into mobilisation/implementation without a sufficiently long standstill/remedies period.		Use the standstill period to prepare a contract mobilisation and implementation plan.
Modify the contract or award supplementary contracts for Works/Services/Supplies where this is substantial or exceeds 50% of the of the original contract value.		Tender any additional works that arise through unforeseen circumstances or fully justify why this is not possible according to criteria set out in the Directives.

Regards,

Raphael Scerri

Head Managing Authority

