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Id-Divizjoni għall-Fondi u Programmi

Funds and Programmes Division

FCU CIRCULAR 01/2019

To Voluntary Organisations, Non-Governmental Organisations, International Organisations (including Church institutions and Social Partners) and Private Bodies.¹

From Director General – Funds and Programmes Division

Date 19th August 2019

Subject Procurement² of Works, Services and Supplies by Voluntary Organisations, Non-Governmental Organisations, International Organisations (including Church institutions and Social Partners) and Private Bodies in the ambit of EU Funds under the Programming Period 2014-2020

This circular sets out guidance on procedures to be applied by Voluntary Organisations (VOs), Non-Governmental Organisations (NGOs), International Organisations (IOs) (including Church institutions and Social Partners) and Private Bodies (PBs), for the procurement of works, services and supplies co-financed by EU Funds under the Programming Period 2014-2020. This guidance is intended to avoid circumstances which may result in partial or full recovery of funds as per Commission Decision of 14th May 2019 ‘laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement’ (vide Annex 1).

As a Member State of the European Union, Malta is bound to ensure compliance with the provisions of the Treaty on the Functioning of the European Union (the “TFEU”) and secondary legislation promulgated by the European institutions, including the legislative package in the field of public procurement (the “New Public Procurement Directives” – Directive 2014/24/EU on public procurement; Directive 2014/25/EU for entities operating in the utilities sector; and Directive 2014/23/EU on the award of concession contracts).

¹ This Circular is based mostly on the Guidance of the Department of Contracts (DoC). In fact the Circular is meant to lead the specified organisations to refer also to such DoC Guidance which is updated on a regular basis, and not to create separate guidance.

² This Circular includes some guidelines on full and part-time employment.

Despite not governed by National and EU Public Procurement Regulations (PPR), EU Treaty principles and the General Financial Regulation oblige Member States to ensure that public funds (irrespective of whether they are being used by public bodies, VOs, NGOs, IOs or private bodies) are used in a manner that ensures:

- **Best Value for Money,**
- **Transparency,**
- **Sound Financial Management,**
- **Equality of Treatment and**
- **Good Governance.**

The lack of conformity with these rules and principles represents risks for EU funds. Consequently, financial corrections are/will be applied to the irregularities detected in procurements and contracts that do not conform or conform partially to such rules/principles. Adherence to these rules/principles is always thoroughly examined during audits and management verifications, and the purpose of this circular is to limit those instances which may lead to financial corrections.

It is important to note that even for public procurement below the EU thresholds³, contracting authorities/organisations still need to ensure that these principles are fully observed. The Annex to the afore-referred to Commission Decision (of 14th May 2019) stipulates that:

‘In so far as the Directives do not apply, but the procurement falls within the scope of the Treaty and under national public procurement law, these guidelines apply provided that at least one of the following conditions is met:

...

(ii) there is a clear breach of the national public procurement law for the contracts at stake’.

This was also confirmed in case law by the European Court of Justice (ECJ)⁴, in that the Internal Market rules of the EC Treaty apply also to (publicly financed) contracts agreed to by Beneficiaries outside the scope of Public Procurement Directives.

The ECJ stated explicitly that although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the organisations which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty, including adequate advertising.

So even though it is clear that VOs /NGOs /IOs/PBs have different operational dynamics, wherein the acquisition of works, services and supplies is not being equally subject to the application of the Public Procurement Regulations (PPR), there is still an obligation on the VOs /NGOs /IOs /PBs to carry out procurement procedures in full respect of the principles mentioned above and for the Funds and Programmes Division (FPD) to obtain *reasonable assurance* about the eligibility of the expenditure being claimed.

³Refer to Consolidated Versions of the new Public Procurement Directives

⁴ Official Journal C179, 01/08/2006 P. 0002 -0007.

Procurement Procedures

VOs /NGOs /IOs /PBs have to follow the **spirit** of the Public Procurement Regulations (PPR). The procedure for the procurement of supplies, works or services according to the Public Procurement Regulations (LN 352 of 2016 as amended to date) is as follows:

- When the estimated value does not exceed €5,000, public contracts shall be awarded by obtaining hand quotations (a minimum of 3 quotations) **or** by issuing a competitive call for quotations (publication in the government's e-Procurement Platform System [e-PPS])⁵ **or** through a direct contract award at the discretion of the Head of the Contracting Authority taking into consideration the amount involved, the urgency attached to the procurement or restrictions of choice and availability.
- When the estimated value meets or exceeds €5,000, but does not exceed €10,000, public contracts shall be awarded by issuing a competitive call for quotations through the Government's e-PPS **or** through a direct contract at the discretion of the Head of the Contracting Authority taking into consideration the amount involved, the urgency attached to the procurement or restrictions of choice and availability.
- When the estimated value meets or exceeds €10,000 up to €144,000, public contracts shall be awarded after a departmental call for tenders, issued through the Government's eProcurement Platform (e-PPS), unless otherwise authorised in writing by the Director General (Contracts).

If the contracting authority does not make use of the government's e-procurement platform for the call for quotations or the departmental call for tenders with an estimated value which exceeds €5,000, it must give advice about their publication by means of an advertisement in the Government Gazette⁶.

- In exceptional cases, public contracts valued in excess of €10,000 may be procured through a direct award by any Contracting Authority upon obtaining the prior written approval of the Minister responsible for Finance.

This circular recommends a balanced approach to procurement which is not totally exclusive but at the same time seeks to preserve the main principles of good governance. Decisions ought to be taken depending on the stages reached i.e. application, implementation and reimbursement.

Internal Controls

As recipients of grants from various channels and project holders, VOs /NGOs /IOs /PBs are expected to uphold the mentioned principles and hence the need to have strong internal

⁵ The e-PPS is not available for private organisations to publish competitive calls thereon. However, it is mentioned here to have an idea of the requirements set out by the Public Procurement Regulations which VOs /NGOs /IOs /PBs, have to follow the spirit thereof.

⁶ Similar to the case of the e-PPS, private organisations cannot use the Government Gazette for their procurement. However, once again, this has been included in this circular to have an idea of the requirements set out by the Public Procurement Regulations which VOs /NGOs /IOs /PBs have to follow the spirit thereof.

controls⁷. Experience for the FPD (mainly as a result of management verifications carried out on EU co-funded projects) has shown that these principles are not always upheld to a level which enables the FPD to recommend expenditure for certification to the European Commission.

When an organisation adopts procedures in line with these guidelines, this would be an indicator that the principles in question are being upheld within that organisation. The procurement of works, services and supplies is necessary for the smooth operation of the VO /NGO /IO /PB and for the implementation of projects. Hence, it is of utmost importance that the organisation identifies the right specifications with the budgets at hand, establishes adequate selection and award criteria, manages the tendering process, evaluates offers and awards contracts to the right bidder and through the appropriate procedures.

VOs /NGOs /IOs /PBs are expected to follow reliable criteria in purchasing goods and services required for the needs of the organisation or its projects. It should be noted that the cheapest technically compliant criterion is the preferred option as it allows a stronger and more objective basis for evaluation. The most economically advantageous tender (MEAT) criterion may only be ideal in cases of complex procurement requiring special technical specifications.

To improve on the current practices to date, the FPD is hereby listing some of the most important procurement-related aspects, based on public procurement principles, to ensure that while VOs /NGOs /IOs /PBs get the best value for money, there is better adherence to the principles of transparency, sound financial management, non-discrimination, equality of treatment, mutual recognition, proportionality and good governance, and at the same time acting within the established thresholds.

Aspects to take account of:

1. It is the responsibility of all beneficiaries (even those not falling within the direct remit of the Department of Contracts (DoC)) to seek the advice of the DoC on major procurement issues.
2. Since EU funds co-financing projects are considered to be public funds, these projects are subject to local and external audits, and procurement is one of the elements which auditors focus on.
3. In this regard, it is to be reiterated that the VOs /NGOs /IOs /PBs must follow the spirit of the Public Procurement Regulations (PPR). Thus, even though they are not strictly legally bound by these Regulations, VOs /NGOs /IOs /PBs are expected to use fair and open practices when awarding contracts for which they intend to claim EU and National funds.

⁷ Internal controls are methods put in place by an organisation to ensure the integrity of financial and accounting information, meet operational and profitability targets and transmit management policies throughout the organisation.

Frequently asked Questions and Recommendations

1. Shall I request quotations or issue a tender?

By definition, a tender is “an offer in writing to carry out works, supply goods or services at a fixed price.”

Competitive tendering is used because the process enables the organisation to source products and services from the best suppliers at prices that reflect true market conditions. The process is based on tenderers quoting against specifications that satisfy the buyer’s requirements.

Whether to ask for quotations or issue a call for tenders is merely dependent on the:

- Nature of goods/services;
- Related expenditure.

Emphasizing again the point that the VOs /NGOs /IOs /PBs have to follow the spirit of the Public Procurement Regulations, they should bear in mind that these Regulations stipulate that where the estimated value of the supplies or works or services does not exceed €5,000 (excluding VAT), quotations are to be sought⁸. Where the estimated value exceeds €5,000, one shall act very much in line with the procedure outlined previously⁹. For procurement with an estimated value equal or over €100,000, organisations not subject to Public Procurement Regulations should take all the necessary measures to ensure that the process, as already highlighted, follows the spirit of the Regulations. In such cases, organisations are encouraged to consult and liaise with the FPD prior to undertaking such procurement.

One would be committing an irregularity if one splits items - which could have been easily acquired through one tender - into smaller lots with the purpose of avoiding issuing a tender.

In the case of quotations, these have to be comparable offers from unrelated suppliers. Experience has shown that quotations are only comparable if the Request for Quotations (RfQ) is clear, standardized, sufficiently detailed and leaving minimal room for interpretation, particularly as regards to size, quantity, material, colour, dimensions, speed, etc. VOs /NGOs /IOs /PBs should also follow the spirit of Contracts Circular no. 19/2013 which, to increase opportunities in the public procurement market to new and emerging companies especially Small and Medium sized Enterprises (SMEs), has eliminated the use of experience as part of the selection criteria in the procurement process (vide Annex 2). Such specifications should be established beforehand by the VOs /NGOs /IOs PBs according to the assessed needs. RfQs should also include a deadline by when offers are to be received. This is to make sure that the submitted quotations can be evaluated on a *like-with-like* basis and in as much an objective manner as possible.

⁸ However, in the case of Migration and Security Funds, a single quotation direct from the open market, without any call for quotations/tender, would suffice.

⁹ In the case of Migration and Security Funds, contracts with a value less than €100,000 but higher than €5,000 (exclusive of VAT) shall be awarded on the basis of the request for at least three quotations (offers).

The organisation should select the cheapest technically compliant offer where procurement does not warrant the MEAT criterion. Any clarifications made to or received from the suppliers, should be also documented to ensure an adequate audit trail.

Finally, the organisations should also bear in mind that under the newly published public procurement regulations the threshold for the publication of quotations has decreased from €120,000 to €10,000.

2. Where should a tender be advertised?

VOs /NGOs /IOs /PBs should ensure adequate publicity of tenders such as on local newspapers, on news portals and/or on popular websites (when necessary). The related costs, as long as they are reasonable and proportionate to the activity and the amount involved, can be funded through the project if approved in the Grant Agreement

3. For how long should a tender remain on the market?

When establishing the time limits for the receipts of tenders and requests to participate, VOs /NGOs /IOs /PBs responsible for the tendering process shall take into account the nature of the goods/services being procured, the complexity of the tender specifications and eventual contract *and* the level and intensity of the preparations needed by potential bidders to finalise their tender document to be submitted. The organisations should consider also the minimum time limits set out in the PPR. The ultimate aim should always be to maximize competition as much as possible.

As a guideline, the following are the minimum time limits as set in the PPR catering for open procedures where tenders do not exceed the €144,000 threshold:

Open Procedure: The minimum time limit for the receipt of tenders is that of 20 days from the date of publication. In cases of extreme urgency, this time limit can be reduced to 15 days with the prior approval of the head of the organisation responsible for the tendering process.

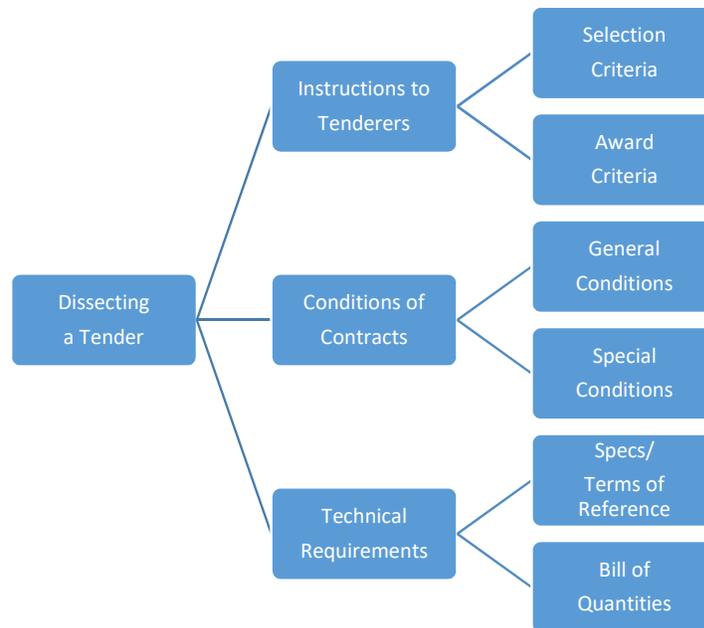
4. How much can we charge for collecting a tender document?

In line with the Department of Contracts (DoC) policy the FPD recommends that tender documents are put online to ensure greater opportunities for economic operators to participate in tenders. If all services related to a call for tenders are provided online, apart from having the document available 24 x 7, the bidders would not need to physically call at the offices of the VOs /NGOs /IOs in order to obtain a copy of the tender document.

So the FPD recommends that there should not be any fee for accessing a tender document (either through online means or by physically collecting it).

5. What should a tender document include?

This depends on the nature and magnitude of the activity. VOs /NGOs /IOs /PBs are encouraged to make use of the Department of Contract's Public Procurement Templates and adapt them to their needs. Basic elements of the tender document should include (not exhaustive) the objective of the tender (i.e. why it is being issued), who can apply followed by eligibility and selection criteria, duration of the contract, expected output and results, award criteria and other contractual obligations such as payment schedule, guarantees, variations, etc.



In relation to the selection and contract award criteria, failure to state all of these criteria in the tender document or tender notice, *or* applying unlawful contract selection and award criteria, may lead to a recovery of a percentage of the value of the contract (in some cases 25%). In the most serious cases, this may go up to 100% especially when there is deliberate intention to exclude certain bidders.

Important

- VOs /NGOs /IOs are to ensure that contracting reflects the project proposal and must be in line also with the Grant Agreement;
- Clauses making reference to National and EU laws, Labour Law, Data Protection Act and Freedom of Information Act, and Gender Equality should be inserted in the tender document;
- VOs /NGOs /IOs /PBs are recommended to take the necessary steps to ensure that environmental sustainability is also incorporated into the procurement. Tender drafting

teams shall contact the contact person at the Ministry for the Environment, Sustainable Development and Climate Change (MSDEC) for further advice prior to finalizing the tender document¹⁰;

- VOs /NGOs /IOs /PBs are to bear in mind that it is now a Government-wide Procurement Policy – Procurement Policy Note #34 - that in EU-funded call for tenders whose estimate value exceeds €100,000 (excluding VAT) and/or whose implementation is longer than 4 weeks, the payment of an advance payment (pre-financing payment) is mandatory. This advance payment will be made against a pre-financing bank guarantee (vide Annex 3). In such context, it is to be reiterated that VOs /NGOs /IOs /PBs are to follow the spirit of such policy. It is pertinent to add also that pre-financing should not be provided on components which are of a recurrent nature such as maintenance;
- Tenders are opened in a transparent manner with at least three members of the VOs /NGOs /IOs /PBs being present for the tender opening session. The tender opening session should ideally take place just after (same day) the expiry of the deadline to submit bids.
The board shall, where possible, be composed of a Chairman, a Secretary (non-Voting Members) and three (or an odd number of more than one) evaluators. The evaluators could include technical experts related to the field of expertise associated with the technical specifications included in the tender (these experts can also be financed by the project if approved in the Grant Agreement and are to be contracted in a fair and transparent manner). The Head of Finance within the organisation should ideally participate in the evaluation (perhaps as Advisor) in order to guide the evaluators on the procurement procedures.
VOs /NGOs /IOs /PBs are encouraged to refer to DoCs Manual titled ‘Standard Operating Procedures: Guidelines for Tender Evaluation Committees’ – this can be found on DoC’s website www.contracts.gov.mt under Resources section. The current version at the time of issuing this Circular is also annexed to this Circular (vide Annex 4);
- The list of tenders received, together with the respective prices, is made public (VOs /NGOs /IOs /PBs notice board and/or website) immediately after opening and scheduling;
- All evaluation board members and any appointed technical experts should sign a declaration of confidentiality and impartiality;
- Deadlines must be strictly respected;
- Selection and Award criteria must be clearly stipulated in advance and tenders are to be evaluated only on those pre-established criteria. No other criteria can be used for the evaluation of the tender. Experience cannot be used as an award criterion;

¹⁰ At the time of writing this document, the contact persons are Ms Giulia Buhagiar (telephone number: 22926325) and Mr Kristian Sultana (telephone number: 22926236), Green Public Procurement, MSDEC. Email: gpp@gov.mt

- The evaluation stage shall be divided in three different sets of criteria, excluding the price factor: Exclusion Criteria (administrative compliance); Selection Criteria (administrative compliance); Award Criteria (technical compliance). These stages are sequential: if a tenderer does not satisfy all the requirements of a particular stage, the bid is deemed non-compliant and not considered for further evaluation in the successive stages;
- Any replies to clarifications sought from interested bidders during the tendering process are to be considered as part and parcel of the tender document and communicated to all interested bidders;
- Rectifications may be sought in respect of incomplete/non-submitted administrative information pertinent to the documentation as outlined in the same tender document. Nonetheless, the VOs /NGOs /IOs /PBs should ensure a level playing field for everyone;
- Any clarifications sought from bidders and replies received during the evaluation process are attached to the evaluation report;
- Clarifications may be sought on points of a technical nature on submitted information to enable a proper evaluation of any tender, which, however, would at that stage have already been declared to be basically compliant. Clarifications are NOT construed to allow for missing/incomplete technical/financial documentation to be submitted, nor to permit a reconsideration or renegotiation of the original tender submission. It is to be reiterated that VOs /NGOs /IOs /PBs should ensure a level playing field for everyone;
- The evaluation report is sufficiently detailed and provides a clear picture of how the recommendation for award was reached. It should also be signed (by all Evaluation Committee members) and dated. Each page should also be endorsed. The Evaluation Report and its findings must be justifiable, defensible and supported by demonstrable evidence: it is auditable at various internal and external levels. It is advisable that the template for the Evaluation Report downloadable from the website of the DoC be used. This can be found on DoC's website www.contracts.gov.mt under Resources section. It is annexed to this Circular (vide Annex 5);
- The minutes of the meeting/s where the decision for award is taken (apart from the evaluation report), are signed, properly filed and attached to the evaluation report;
- Results must be published (on a notice board at the VOs /NGOs /IOs /PBs premises and/or website) and both successful and unsuccessful bidders informed in writing citing relevant reasons relating to the rejection of the tender and information relating to the appeals' procedure;
- Where resort to tenders has been made, the tenderers should be given the opportunity to file a notice of objection with the Review Board. Adequate time (ten calendar days following the date on which the contracting authority has proposed its award decision) should be allowed for appeals to be lodged. This procedure should be documented in the Tender Document, with the conditions for appeal explained also in the rejection letter sent to the non-selected bidders. If an objection is filed, the award of contract is to be suspended until the Review Board communicates its decision. The VOs /NGOs

/IOs /PBs should oversee that no undue influence is exerted by parties having an interest in the evaluation;

- A contract must be signed between the Beneficiary and the contractor outlining the deliverables, contract duration and payment schedules, amongst others. Any items or components of the contract that are not approved in the Grant Agreement will not be paid for by the project.

Basic Contract Form



It is important that the contract establishes the order of priority of the above documents; this is to be made in the first document which is the highest ranking. The documents in the above Chart are listed in the order of priority.

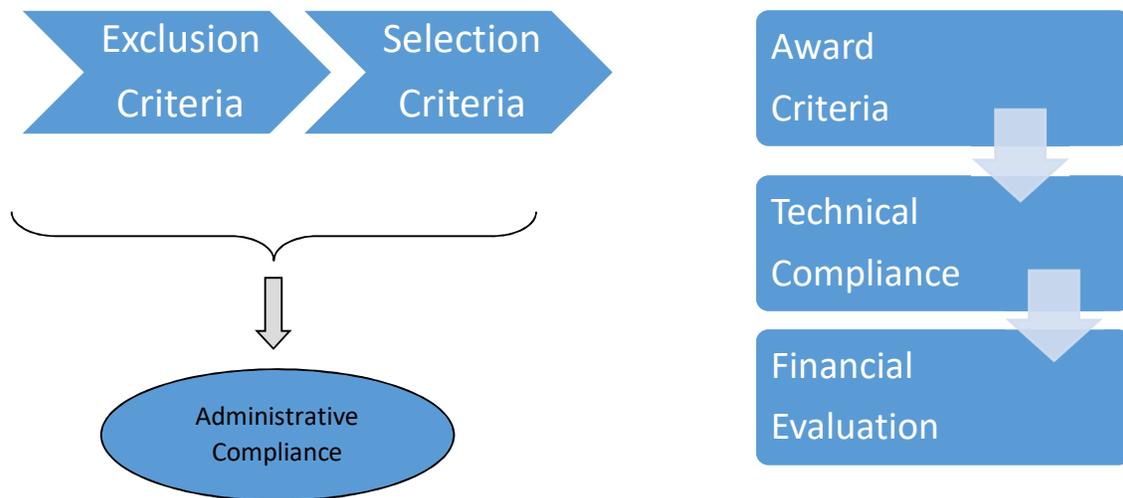
- The contract shall clearly indicate that the contract is co-financed by EU Funds¹¹. Information on publicity can be obtained from the Manual of Procedures, the FPD's website or by contacting the respective unit within the FPD as the Managing/Responsible Authority. It is important that the contractor is not only aware of the source of funding of the contract but also that the contract is bound by the respective requirements. Here, it is pertinent that the VOs /NGOs /IOs /PBs refer to the visibility guidelines outlined;
- Contracts must be awarded according to the specifications as published in the tender document – modifications would imply direct award of a contract. Any prolongation of the duration of a contract of services or supplies must be well documented, approved by the Head / Governing Body of the VOs /NGOs /IOs /PBs and communicated immediately to the FPD;
- The contract shall clearly indicate the contractor's name (and no variant). The contractor must provide the financial identification form which should contain the name

¹¹ Specifying the actual EU Fund.

of the contractor's bank and bank address, the account number and any other relevant information, wherein remittance should be affected. In the case of a joint venture or consortium, it is important to inform the contractor that remittance will be made only against an invoice of the joint venture or consortium. The Contractor must also provide the relevant Performance Guarantee and the relevant Pre-Financing Guarantee (where applicable);

- The VOs /NGOs /IOs /PBs relationship/obligations rest solely with the contractor indicated in the contract (and not with any sub-contractors {if there are any});
- In order to fulfil the principle of mutual recognition, the contract shall be signed by all contracting parties, thus implying that all agree with the terms and conditions set in the contract. Each page of the contract shall be initialled by all parties.

Evaluation Flowchart



What you must avoid:

- Brand discrimination: the choice should be based solely on the award criteria irrespective of brand names;
- Prejudice: all offers must be benchmarked against the tender requirements, not one against the other (with an offer being assessed against the one preceding it);
- Assumptions: if there are unclear issues, one cannot assume that the tenderer will deliver/abide with tender requirements and obligations;
- Being circumstantial and vague in one's argumentations/recommendations: these will be subject to scrutiny by the MA/RA, the Financial Control Unit (FCU), the Internal Audit and Investigations Department (IAID), National Audit Office (NAO), EU Commission, etc.;

- Procrastination: evaluation requires commitment; a proper evaluation should not take longer than required - in any case the tender validity period must be kept in mind;
- Splitting of tenders: As a general rule, the same type of works, services or supplies should be in one tender. Practically speaking, if one tenderer can supply all, it should not be split. This should be treated on a case by case basis taking into consideration the nature of the activity involved;
- Accepting bids having seemingly trivial non-conformity items to pre-set conditions : some bids will have to be rejected because of seemingly trivial issues (e.g. a tender guarantee of €2,450 was submitted instead of the required €2,540; a tender being submitted five minutes late) – if it was required in the tender document, it has to be as requested!
- Incorrect use of templates: In drawing up a tender and eventually when drafting the contract, the appropriate tender/contact template should be used without mixing up between a supply, service or works;
- Change in criteria: During evaluation, the evaluators should ensure that the (selection and award) criteria specified in the tender document are the ones used in the adjudication process.

Any technical advice acquired at evaluation stage should never supersede the specification set in the tender document. Contracted goods, works and services should be the same as included in the tender submissions.

The VOs /NGOs /IOs /PBs are entreated to refer also to the ‘General Rules Governing Tenders for NGOs (version 1.1)’ published by the Department of Contracts in June 2018 (which are currently in force, as these may be updated in due course) and, where applicable, abide with the conditions contained therein. Such document is also annexed to this Circular (vide Annex 6).

6. What happens following signature of contract?

The VOs /NGOs /IOs /PBs should continuously monitor that the contract obligations are being respected by the contractor. The FPD stresses the importance that has to be placed on the responsibility of the beneficiary, more specifically of the project leader, to ensure that a contractor is abiding by the obligations stipulated in the contract. Should a contractor fail to meet the contractual obligations, the project leader should bring this to the attention of the contractor, in writing. Should the contractor continue to fail to meet the contractual obligations, the beneficiary should refer the contractor to penalties contemplated in the contract.

In this regard the VOs /NGOs /IOs /PBs could at the same time consult the Department of Contracts for advice. It is important to note that it is the beneficiary and not the FPD that initiates the procedure for implementing the necessary penalties. Penalty payments notified and recorded are to be deducted accordingly when processing payment claims and the contractor must be notified accordingly of all procedures taken.

The project leader is responsible to alert all concerned that a contractor is not abiding by the terms and conditions stipulated in the contract. The beneficiary must also inform the FPD immediately, without prejudice to the provisions in the Manual of Procedures on irregularities and fraud.

It is therefore important that safeguards such as bank guarantees are put in place to recover funds in the case of advance payments. It is important to note that the VOs /NGOs /IOs ARE NOT TO RETAIN MONEY AT THE END OF A CONTRACT. Retention money throughout the implementation of a contract is allowed, however, all money must be released upon completion of a contract.

In this regard if VOs /NGOs /IOs /PBs feel the need to have some money retained for specific safeguards, they are to insert a clause in the tender dossier whereby the Contractor will be paid all funds due upon completion of the contract (i.e. at provisional acceptance stage). Should retention money be deemed necessary (e.g. if the beneficiary generally applies 10% retention money until final acceptance), the tender and the contract should stipulate that the 10% will be paid to the Contractor upon completion (i.e. in the last invoice) but against a bank guarantee of an amount equivalent to the value of the retention money.

For EU-funded projects, this guarantee is recommendable, so if there is a need for retention money, it is advisable that this be included as a condition in the special conditions within the tender document. This is necessary to safeguard public funds. Apart from the retention guarantee, the performance guarantee must be kept valid until final acceptance. Bank guarantees of EU-funded projects whose VAT is an eligible cost must not cover the VAT element.

7. What happens in case of variations?

All changes of a financial nature are variations. They can be *additional works* which were not included in the contract and therefore there is no rate in the BOQ, or *repetition of similar works* (also called new works) where there is already a rate in the BOQ and only the quantity is increased. Variations can also take the form of reductions (e.g. a reduction in the scope of a contract).

In case of variations to contracts, the VOs /NGOs /IOs /PBs must inform the FPD immediately – and before any commitment is taken – in view of budgetary limitations within the allocation to the project as stipulated in the Grant Agreement between the MA/RA (FPD) and the Beneficiary. The VOs /NGOs /IOs /PBs must present a detailed report to the MA/RA (FPD) explaining the additional costs encountered together with a sound justification (if necessary including also those of any technical supervisor engaged for the project) and recommendations. The MA/RA (FPD) will not consider any requests for variations unless there is an explanation of the causes that led to the variation, the effect on the total cost of the tender and any effect on the recurrent expenditure. In addition, the beneficiary must explain the unforeseeable events that prevailed and specify whether such a variation could have been avoided. Requests for variations must be sent to the attention of the Director General Funds and Programmes, and must be signed by the project leader. The FPD reviews the documentation submitted by the beneficiary and makes the necessary recommendations based on the justification presented. It should be made clear that even though the FPD may approve a budget change, in doing so it will be relying entirely on the technical assessment and information and relative approval by the beneficiary and this remains the VOs /NGOs /IOs /PBs responsibility.

Assuming approval to use funds has been granted by the FPD, it is the responsibility of the VOs /NGOs /IOs /PBs to ensure that adequate organisational structures and separation of duties exist in the approval. The DoC can be contacted informally for advice. VOs /NGOs /IOs /PBs

are to approve such variations only in exceptional and well justified cases that could not have been foreseen in advance¹². The approval of additional costs (i.e. new items which are not part of the original contracts) for works, services or supplies can never exceed 50% of the original contract value.

In all cases, additional costs shall be considered eligible only if funds are available. The FPD reserves the right to refuse awarding further funds, even in justifiable cases.

Some changes in the contract may necessitate an addendum (formal change recorded in a contractual manner) to the original contract between the VOs /NGOs /IOs /PBs and contractor. It is recommended that the VOs /NGOs /IOs /PBs make sure that any changes to the contract are well documented and approved by the legal representative of the organisation and the manager of the organisation, who is generally responsible for procurement. Contracts and subsequent addenda are generally signed by both the VO /NGO /IO /PBs as well as the contractor and should clearly establish the changes as well as the effective date of the change and any other implications on any other part of the contract such as budget, payment schedule and overall validity period of the contract.

8. What is the difference between Contract of Service and Contract for Service?

It is imperative that VOs /NGOs /IOs /PBs distinguish between the two when they require services for project management, architectural, supervisory etc. It is highly advisable that, prior to publication, the beneficiary consults the Department of Contracts and the Department of Industrial and Employment Relations to identify which procedure to apply when considering the VOs /NGOs /IOs /PBs particular requirements.

The option of a contract of service (employment) as opposed to a contract for service (outsourcing)¹³ may have to be applied depending, amongst others, on the nature of the service required, level of autonomy allowed, the duration and frequency of delivery, and time (office hours or not) and location of delivery requested.

In the case of VOs /NGOs /IOs /PBs, any external call for recruitment through a contract of service (i.e. on the payroll of the BENEFICIARY), the applicable national employment procedures shall apply.

Distinguishing between the two options i.e. whether to employ someone or issue a call for services through procurement, might be tricky. Misguided publications of calls may lead to recoveries. VOs /NGOs /IOs /PBs are therefore recommended to take into consideration the provisions of Subsidiary Legislation 452.108 'Employment Status National Standard Order' on employment status, which sheds light on the distinction between a contract of service and a contract for service.

Particular attention should be given to article 3(1):

¹² Supplementary contracts awarded without adequate competition in the absence of reasons of extreme urgency brought about by unforeseeable events or (for contracts of works and services) in the absence of unforeseen circumstances justifying them, may lead to a recovery of up to 100% of the value of the contracts attributed without adequate competition.

¹³ In this case this should follow the above-mentioned procurement principles.

3. (1) Subject to the provisions of sub-article (2), when considering the employment status of a person who is nominally self-employed and is prima facie not considered as an employee, it shall be presumed that there is an employment relationship and that the person for whom the service is provided is the employer and that the provisions of the Act and of the regulations or orders issued thereunder apply to that relationship if at least five of the following criteria are satisfied in relation to the person performing the work:

(a) he depends on one single person for whom the service is provided for at least 75% of his income over a period of one year;

b) he depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;

(c) he performs the work using equipment, tools or materials provided by the person for whom the service is provided;

(d) he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;

(e) he cannot sub-contract his work to other individuals to substitute himself when carrying out work;

(f) he is integrated in the structure of the production process, the work organisation or the company's or other organisation's hierarchy;

(g) the person's activity is a core element in the organisation and pursuit of the objectives of the person for whom the service is provided; and

(h) he carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.

Given the above article, should a person meet five of the listed criteria then he/she is considered to have an employment relationship. Should the employer or employee want to be exempted from this relationship then they should write to the Director of the Industrial and Employment Relations Department [Art. 3(2)].

If a VO /NGO /IO /PB employs a person through an employment contract, a clause should be inserted in the contract that the employment of this person is only for a specified period (in line with the lifetime of the programme or before). The beneficiary must also ensure compliance with other relevant legislation. The FPD and the European Commission are not responsible for any employment related disputes that may arise during or after project implementation. Terms and conditions of an employment contract should strictly conform to those issued in the respective Terms of Reference (ToRs) and Call for Applications. **9. What are the obligations for full-time or part-time employment with tasks solely related to the operation of the beneficiary or as part of a project?**

If a beneficiary employs a person on an employment contract to work solely on a project funded through EU Funds, the Beneficiary shall ensure that the person being engaged works solely on the project and does not undertake any unrelated work within the Beneficiary operations. The time spent on the project should also be well documented and regular task based reports may be provided. In this regard the VO /NGO /IO /PB should abide with the requirements laid out in FCU Circular 05/2018 'Recording of working hours' together with its Annex.

Conclusion¹⁴

It is important that the VOs /NGOs /IOs /PBs ensure that there is increased transparency and competition in use of EU funds. Failure to abide by these principles/guidelines may lead to recovery of funds. Arguments that the VOs /NGOs /IOs /PBs can be “excused” for committing mistakes and that they are on a learning curve due their small size and inexperience is not justifiable and are thus subject to financial corrections just like any other beneficiaries.

It is to be noted that with respect to all other expenses (not covered by this Circular) one has to refer to the respective procedure.

Adequate guidance has been provided by the FPD and will continue to be provided to ensure that these principles are observed.

Apart from following this note, VOs /NGOs /IOs /PBs are highly encouraged to go through the Public Procurement Regulations for guidance.

As stated, for ease of reference, together with this circular, we are also enclosing, amongst others, a copy of the EC Guidelines for financial corrections to be applied for irregularities in procurement (Annex 1) so that VOs /NGOs /IOs /PBs are more aware of the risk involved in case any of the above-mentioned principles and procedures are not followed. A copy of the ‘Standard Operating Procedures – Guidelines for tender evaluation committees’ which can be found on the DoC website is also being enclosed (Annex 4) –also downloadable from <https://contracts.gov.mt/en/Resources/Documents/Standard%20Operating%20Procedures%20for%20Evaluation%20Committees%20V1.1%20April%202019.pdf> VOs /NGOs /IOs /PBs are encouraged to follow such procedures during the evaluation of tenders. Annex 5 features the template for the evaluation report which VOs /NGOs /IOs /PBs are advised to use. The last annex enclosed (i.e. Annex 6) comprises the ‘General Rules Governing Tenders for NGOs (version 1.1)’ which VOs /NGOs /IOs /PBs are entreated to apply in those cases where it is applicable to their context.

In case of difficulties, kindly contact your respective contact person at the Funds and Programmes Division.

As a final note, I would like to express my gratitude to all VOs /NGOs /IOs /PBs for their cooperation with the Funds and Programmes Division.

Mr Raphael Scerri
Director General - Funds and Programmes Division

¹⁴ The information provided in this Circular is not intended to substitute or to be considered as a legal advice. Nothing contained herein should be relied or acted upon without the benefit of legal advice based upon the particular facts and circumstances presented, and nothing herein should be construed otherwise.