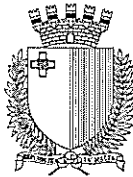


UFFIĊĊJU TAD-DEPUTAT  
PRIM MINISTRU  
MINISTERU GHALL-AFFARIJJIET EWROPEJ

SEGRETARJAT PARLAMENTARI GHALL-  
PRESIDENZA UE 2017 U GHALL-FONDI  
EWROPEJ



MALTA

OFFICE OF THE DEPUTY  
PRIME MINISTER  
MINISTRY FOR EUROPEAN AFFAIRS

PARLIAMENTARY SECRETARIAT FOR THE  
EU PRESIDENCY 2017 AND EU FUNDS

*Id-Divizjoni għall-Fondi u Programmi*

*Funds and Programmes Division*

## RA CIRCULAR 01/14

**To:** Voluntary Organisations, Non-Governmental Organisations and International Organisations (Including Church Institutions and Social Partners)

**From:** Head of the Responsible Authority

**Date:** 6<sup>th</sup> January 2014

**Subject:** Procurement<sup>1</sup> of Works, Services and Supplies by Voluntary Organisations, Non-Governmental Organisations and International Organisations, in the ambit of the SOLID Funds

*(Note: This Memo should be read in conjunction with RA Circular 9/13 dated 1<sup>st</sup> October 2013.)*

This document sets out guidance on procedures to be applied by Voluntary Organisations (VOs), Non-Governmental Organisations (NGOs) and International Organisations (IOs), (including Church Institutions and Social Partners), for the procurement of works, services and supplies co-financed by one of the 4 SOLID Funds, namely the European Refugee Fund (ERF), the European Return Fund (RF), the External Borders Fund (EBF) and the European Fund for the Integration of third-country nationals (IF). This guidance is intended to avoid circumstances which may result in partial or full recovery of funds, as per (i) Guideline SOLID/2011/31/Rev which sets out guidelines for determining financial corrections to be applied for irregularities in the application of EU regulations on contracts co-financed by one of the four SOLID Funds, *and* as per (ii) the chapter 'Financial Corrections' in each of the 4 SOLID Funds' Basic Acts, which speaks of, amongst others, the principles and criteria with respect to financial corrections.

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, VOs or private bodies) are used in a manner that ensures:

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<sup>1</sup> This Memo includes some guidelines on full and part-time employment.

**Best value for money**  
**Transparency**  
**Sound Financial Management**  
**Equality of Treatment**  
**Good Governance**

The lack of conformity with these rules and principles represents risks for the 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 principles. Adherence to these principles is always thoroughly examined during audits and management verifications, and the purpose of this note is to limit those instances which may lead to financial corrections.

It is important to note that even for public procurement below the EU thresholds<sup>2</sup>, contracting authorities/organisations still need to ensure that these principles are fully observed. Moreover, the European Court of Justice (ECJ) has confirmed in its case-law<sup>3</sup> 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 especially in cases of relevance to the internal market.

So even though it is clear that VOs/NGOs/IOs and public sector organisations 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 VO/NGO/IO to carry out procurement procedures in full respect of the principles mentioned above and for the Responsible Authority (RA) to obtain *reasonable assurance* about the eligibility of the expenditure being claimed.

### **Internal Controls**

As recipients of grants from various channels and project holders, VOs/NGOs/IOs are expected to uphold the above-mentioned principles and hence the need to have strong internal controls<sup>4</sup>. Experience for the RA (mainly as a result of management verifications carried out on EU co-funded projects implemented by VOs/NGOs/IOs) has shown that

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<sup>2</sup> Directive 2004/18/EC of the European Parliament and the Council.

<sup>3</sup> Official Journal C179, 01/08/2006 P. 0002 -0007.

<sup>4</sup> Internal controls are methods put in place by a company/organisation to ensure the integrity of financial and accounting information, meet operational and profitability targets and transmit management policies throughout the organization.

these principles are not always upheld to a level which enables the RA to recommend expenditure for certification to the European Commission.

One indicator that shows that these principles are upheld within an organisation is by adopting a procedure in line with these guidelines. The procurement of works, services and supplies is necessary for the smooth operation of the VO/NGO/IO and for the implementation of projects. Therefore it is of utmost importance that the organisation identifies the right specifications with the budgets at hand, establish adequate selection and award criteria, manage the tendering process, evaluate offers and award contracts to the right bidder and through the appropriate procedures.

VOs/NGOs/IOs are expected to follow reliable criteria in purchasing goods and services required for the needs of the organisation or its projects.<sup>5</sup> 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, the RA is hereby listing the important procurement-related aspects, based on public procurement principles, to ensure that while VOs/NGOs/IOs 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 respect for the established thresholds.

**Important:**

1. It is the responsibility of ALL Beneficiaries (even those not falling within the direct remit of the Department of Contracts (DoC) such as VOs, Local Councils and other Schedule 3<sup>6</sup> entities) to seek the advice of the DoC on procurement issues;
2. Since projects co-financed through SOLID Funds are considered to be public funds, they are subject to local and external audits just like any other projects, and procurement is one of the elements which auditors focus on.
3. In this regard, the organisations to which this memo is addressed must follow the spirit of the Public Procurement Regulations and the instructions for the different thresholds delineated in RA Circular 9/13. Thus, even though they are not strictly legally bound

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<sup>5</sup> During a recent audit on Malta's Cohesion Policy 2007-13, it was noted that the marks awarded for technical aspects in tendering procedures with the 'Most economically advantageous tender' (MEAT) as the award criterion sometimes outweighed the financial aspects disproportionately. In the instance observed, the Beneficiary allocated 90% for the technical side, against the 10% awarded for the financial element. This is considered too low. The financial aspect is a very important determinant in any competitive procurement procedure and should therefore be warranted a reasonable weight.

<sup>6</sup> of Legal Notice 296 of 2010.

by the Regulations, VOs/NGOs/IO are expected to use fair and open practices when awarding contracts for which they intend to claim EU and National funds.

## 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.

Where the estimated value of the procurement is expected to be under €5,000 (exclusive of VAT), VOs/NGOs/IOs can request a single quotation direct from the open market.

Where the estimated value of the procurement is equal to or higher than €5,000 but less than €100,000 (exclusive of VAT), VOs/NGOs/IOs can request at least three 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. These specifications should be known beforehand by the Beneficiary VO/NGO/IO according to 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. The organisation should select the cheapest technically compliant offer. Any clarifications made to or received from the suppliers, should be also documented to ensure an adequate audit trail.

Where the estimated value of the procurement is equal to or exceeds €100,000 (exclusive of VAT), VOs/NGOs/IOs should issue a call for tenders which should be given adequate advertisement (see next question).

In any case, the bidders shall be independent from any individuals involved in the preparation/implementation of the project and/or those drafting the tender document.<sup>7</sup> VOs/NGOs/IOs should also seek to have a process of appeal and that the appeals committee (albeit small) should be different from the committee that has evaluated the tender (the latter has to be independent from the initial board and independent from the person or the team of individuals that drafted the tender).

## **2. Where should a tender be advertised?**

VOs/NGOs/IOs should ensure adequate publicity of tenders such as on local newspapers, on news portals and/or on popular websites (where necessary). Such 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.

VOs/NGOs/IOs are also encouraged to make use of their own media such as their own website.

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

This depends on the nature of the goods/services being procured, the complexity of the tender specifications and the level and intensity of preparations needed by the potential bidders to finalise the tender document. The ultimate aim should always be to maximize competition as much as possible. However, when the estimated value of the tender does not exceed €120,000 it is best practice to allow for a minimum of three weeks. On the other hand if the value exceeds €120,000 it is best practice to allow for a minimum of 52 days.

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

In line with the Department of Contracts (DoC) policy the RA 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 VO/NGO/IO offices in order to obtain the tender document.

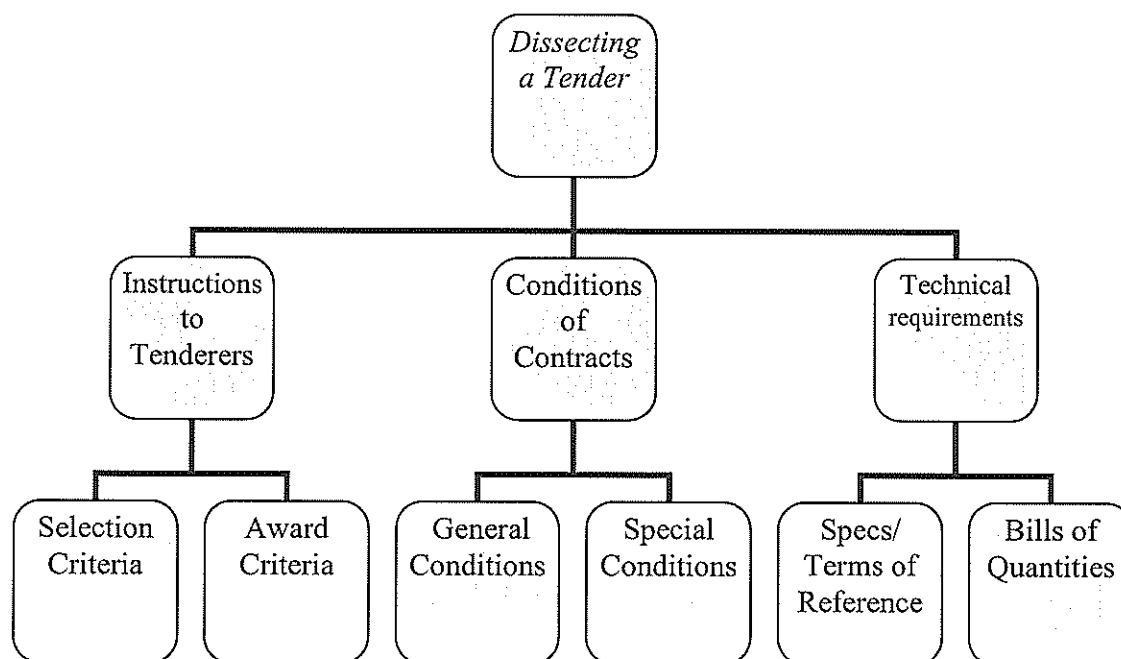
So the RA recommends that there should not be any fee for accessing a tender document (either through online means or by physically collecting it).

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<sup>7</sup> Every effort should be taken so that persons involved in drawing up the tender shall not be in the team of Evaluators.

## 5. What should a tender document include?

This depends on the nature and magnitude of the activity. VOs/NGOs/IOs 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 documents or tender notice, *or* applying unlawful contract selection and award criteria, may lead to a 25% recovery of the value of the contract. 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 is in line with the approved project proposal and must be in line also with the Grant Agreement;
- In line with DoC policy, the preferred option in awarding a tender should be the cheapest offer which satisfies the administrative and technical criteria;

- Clauses making reference to National and EU laws, Labour Law, Data Protection and Freedom of Information, and Gender Equality should be inserted in the tender Document;
- VOs/NGOs/IOs 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 Sustainable Development, the Environment and Climate Change (MSDEC) for further advice prior to finalizing the tender document<sup>8</sup>;
- Tenders are opened in a transparent manner with at least three members of the VO/NGO/IO committee 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 (these can also be financed by the project if approved in the Grant Agreement and are then subsequently also contracted in a fair and transparent manner) related to the field of expertise associated with the technical specifications included in the tender. 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;<sup>9</sup>
- The list of tenders received, together with the respective prices, is made public (VO/NGO/IO 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 are 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;
- 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

<sup>8</sup> At the time of writing this document, the contact person is Mr Joseph Camilleri, EU Funds Manager, MSDEC. Email [joseph.k.camilleri@gov.mt](mailto:joseph.k.camilleri@gov.mt); Tel: 22926232.

<sup>9</sup> VOs/NGOs/IOs are encouraged to make reference to DoC's Manual for Evaluation Committees. This can be found on DoC's website ([www.contracts.gov.mt](http://www.contracts.gov.mt)) under Resources; Templates. It is also annexed to this Guidance Note.

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 VO/NGO/IO 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. The VO/NGO/IO 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;
- The minutes of the meeting/s where the decision for award is taken, are signed, properly filed and attached to the evaluation report;
- Results must be published (on a notice board at the VO's/NGO's/IO's premises) 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 (recommended 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, a Review Board shall be set up independently



from the Evaluation Board and award of contract suspended until the board communicates its decision;

- When an appeal is submitted, the award process should be completely suspended. The Review Board's decision is final and binding, and the award procedure will proceed in accordance with the decision taken;
- 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*

The Contract

Special Conditions pertinent to this contract

Any General Conditions as applicable

Copy of tender specifications and conditions

Contractor 's Technical Offer

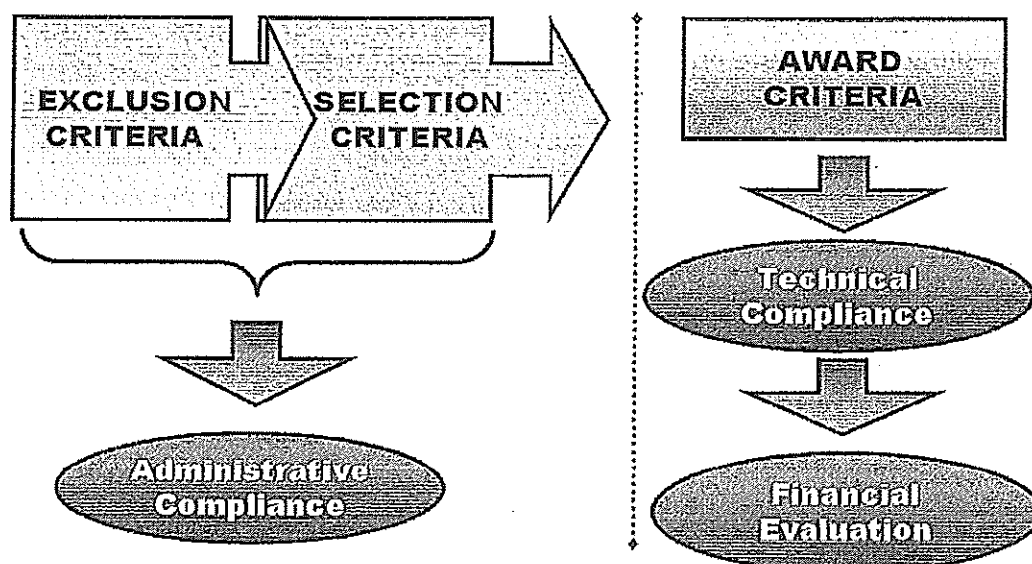
Contractors' Financial Offer / Bill of quantities

Addenda and clarification correspondence

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 through one of the four SOLID Funds. Information on publicity can be obtained from the Manual of Procedures, the Funds and Programmes Division's (FPD) website or by contacting the respective unit within the FPD as the 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 SOLID Fund requirements. Here, it is pertinent that the VO/NGO/IO refers to the visibility guidelines outlined in the Manual of Procedures;
- 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 VO/NGO/IO and communicated immediately to the RA;
- 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 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 VO's/NGO's/IO's 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 RA, CA, IAID, NAO, 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;
- Trying to be practical in tight situations: 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.*

## **6. What happens following signature of contract?**

The VO/NGO/IO should continuously monitor that the contract obligations are being respected by the contractor. The RA 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 Beneficiary could at the same time consult the Department of Contracts for advice. It is important to note that it is the Beneficiary organisation and not the RA that initiates the procedure for implementing then 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 RA immediately, without prejudice to the provisions in the MoP 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 Beneficiaries 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 Beneficiaries 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 to 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 also cover the VAT element.

## 7. What happens in case of variations?

In case of variations to contracts<sup>10</sup>, the VO/NGO/IO must inform the RA immediately – and before any commitment is taken – in view of budgetary constraints within the allocation to the project as stipulated in the Grant Agreement between the RA and the Beneficiary VO/NGO/IO. The VO/NGO/IO must present a detailed report to the RA 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 RA 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 VO/NGO/IO 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 RA reviews the documentation submitted by the VO/NGO/IO and makes the necessary recommendations based on the justification presented. It should be made clear that even though the RA may approve a budget change, in doing so it will be relying entirely on the technical assessment and information and relative approval by the VO/NGO/IO and this remains the VOs/NGOs/IOs responsibility.

Assuming approval to use funds has been granted by the RA, it is the responsibility of the VO/NGO/IO 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 are to approve such variations only in exceptional and well justified cases that could not have been foreseen in advance.<sup>11</sup> As in the case of bodies governed by the Public Procurement Regulations, the approval of additional costs (i.e. new items which are not part of the original contracts) for works and services can never exceed 50% of the original contract value. In the case of supplies, modifications cannot be carried out after the lapse of three years from the signature of the Contract.

In all cases, additional costs shall be considered eligible under the General Programme Solidarity and Management of Migration Flows 2007-2013 only if funds are available. The RA 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 VO/NGO/IO and contractor. It is

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<sup>10</sup> 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, and *repetition of similar works* (also called *new works*) where there is already a rate in the BOQ and **only the quantity** is increased.

<sup>11</sup> 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.

recommended that the VO/NGO/IO makes sure that any changes to the contract are well documented and approved by the legal representative of the organisation and the financial controller of the organisation, who is generally responsible for procurement. Contracts and subsequent addenda are generally signed by both the VO/NGO/IO 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 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 VO's/NGO's/IO's particular requirements.

The option of a contract of service (employment) as opposed to a contract for service (outsourcing)<sup>12</sup> 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, any external call for recruitment through a contract of service (i.e. on the payroll of the organisation), 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 are therefore recommended to take into consideration the publication of Legal Notice 44 of 2012 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):

*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 there under 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;*

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<sup>12</sup> In this case this should follow the above mentioned procurement principles.

- (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 meets 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 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 completion of the project). The Beneficiary must also ensure compliance with other relevant legislation. The RA 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 project?**

If a Beneficiary employs a person on an employment contract to work solely on a project funded through the General Programme Solidarity and Management of Migration Flows, the Beneficiary shall ensure that the person being engaged works solely on the project and does not undertake any unrelated work within the Beneficiary organisation. The time spent on the project should also be well documented and regular task based reports should be provided.

#### **Conclusion<sup>13</sup>**

By way of conclusion, it is important that the VOs/NGOs/IOs ensure that there is increased transparency and competition in use of EU funds. Failure to abide by these

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<sup>13</sup> The information provided in this Circular is not intended to substitute or to be construed 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.

principles/guidelines may lead to recovery of funds. Arguments that the VOs/NGOs/IOs 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. VOs/NGOs/IO are bound by the same obligations just like any other Beneficiary under the SOLID Programme.

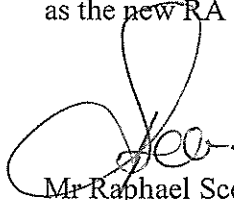
Adequate guidance has been provided by the RA and will continue to be provided to ensure that these principles are observed.

Apart from following this note, VOs/NGOs/IOs are highly encouraged to go through and follow the Manual of Procedures and to familiarise themselves with the Eligibility Rules for SOLID Funds.

*For ease of reference, together with this guidance note, we are also enclosing a copy of the DoC Evaluation Manual which the VOs/NGOs/IOs are encouraged to follow during the evaluation of tenders (Annex 1), and a copy of the EC Guidelines for financial corrections to be applied for irregularities in the application of the Community regulations on contracts co-financed by the SOLID Funds (SOLID/2011/31/Rev) (Annex 2), so that VOs/NGOs/IOs are more aware of the risk involved in case any of the above-mentioned principles and procedures are not adequately followed.*

In case of difficulties, kindly contact your respective contact person at the Responsible Authority.

As a final note, I would like to express my gratitude to all VOs/NGOs/IOs for their cooperation with the FPD as the RA for the SOLID Funds, since the inception of the FPD as the new RA as from 31<sup>st</sup> October 2011.



Mr Raphael Scerri  
Director General Funds and Programmes.