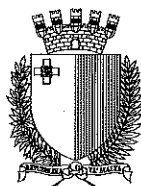


L-UFFICCJU TAL-PRIM MINISTRU



MALTA

OFFICE OF THE PRIME MINISTER

Id-Divizzjoni għall-Ippjanar u l-Koordinazzjoni tal-Prijoritajiet

Planning and Priorities Coordination Division

Internal Note 01/2012

23rd January 2012

To: ERDF Intermediate Bodies
Cc: Line Ministries
Certifying Authority
Audit Authority
Treasury

Internal Note to ERDF Intermediate Bodies: Procurement of Works, Services and Supplies by Private Bodies

This internal note is being issued in view of the difficulties identified by the Managing Authority (MA) and Intermediate Bodies (IBs) in the procurement of works, services and supplies under aid schemes co-financed by Structural Funds and private funds.

Rationale

Despite the fact that private bodies are 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 or private bodies) are used in a manner that ensures best value for money, good governance, and compliance with the main principles of non-discrimination, equal treatment, transparency and proportionality. In this regard, public procurement provisions are thoroughly examined during audits and management verifications, and any non-compliance may lead to financial corrections.

It is important to note that even for public procurement below the EU thresholds, contracting authorities still need to ensure that these principles are fully observed. Moreover, the European Court of Justice (ECJ) has confirmed in its case-law that the Internal Market rules of the EC Treaty apply also to (publicly

financed) contracts agreed to by Beneficiaries outside the scope of the 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 private and public sectors are reputed to be radically different in the dynamics of their operations, in those cases such as in aid-schemes, wherein the acquisition of works, services and supplies through public funds, is not being subjected to the full PPR, there is still an obligation on both the IB and the MA to obtain *relative assurance* that the principles and obligations mentioned above are, in some way, being respected.

So far, the general understanding has been that Beneficiaries of aid schemes co-financed by Cohesion Policy resources are requested by the IB to submit (at application stage) three comparable quotations for each activity so as to obtain a snapshot of the market. This enables the IB to obtain a snapshot of the market price and a degree of assurance that the quoted prices reflect the going market rates. However, some lessons have been learned from this practice. These include:

- Prices change from the time quotations are submitted to when grants are awarded and projects implemented and therefore the information provided, particularly in the case of certain projects and technologies, become outdated by the time the grant agreement is signed;
- Quotations on their own, without producing the original Requests for Quotations (RfQs) do not provide the full value added of the exercise when it comes to ensure an objective snapshot of the market. Experience has shown that even though most Beneficiaries do submit at least three quotations for every activity listed in their claim, these are not always comparable especially where there are non-standard and complex activities and/or where the applicants invite the market to provide a business solution (without knowing precisely what the best option is);
- After several years of implementation, IBs now have an idea of standard unit costs for some items, and therefore have an idea of market prices.

In the light of the above as well as the results of the simplifications undertaken by one of the schemes co-funded under the ESF whilst at the same time also taking into consideration that grants awarded to private beneficiaries are ultimately being charged to the EU budget, and that there may be instances where the grants awarded to private parties are substantial, the MA recommends the following:

Recommendations:

1. For schemes where the number of eligible items is limited and relatively standard, and the cost of the individual activity is equal to or below €6,000 excl. Vat, the IB uses its own market knowledge (or undertakes basic research before the call) and establishes an average value for each of the eligible activities (price list) and caps the grant value to that amount. The market research should be carried out professionally (internally within the IB or externally) and periodically updated to reflect the market¹. For procurement within this threshold, the IB shall reimburse on the basis of either the invoice supplied by the Beneficiary (at request for reimbursement stage) or the capping established through the market research by the IB, whichever is the cheapest;

2. Wherever the system described under point 1 is not practical, requests for quotations/proposals are applied:

- a. Where the share of the individual activity is less than €130,000 excl. Vat, Beneficiaries shall need to present at least three comparable quotations / proposals together with the original request for quotation (RfQs). Quotations should be obtained from suppliers who are totally independent from the Beneficiary i.e. not linked or related companies.

Experience has shown that quotations are only comparable if the 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 according to assessed needs. RfQs should also include a deadline by when quotations 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, notwithstanding the specificities of the Maltese companies and the availability of goods and services on the local market. Reimbursement by the IB should then be made on the cheapest quotation. Any clarifications made to or received from the suppliers by the Beneficiaries, should be also documented. IBs are to ensure that such instructions are clear to the Beneficiaries and that the templates for On-the-Spot checks are amended to include this check;

- b. For the more complex activities and where the cost of the individual activity or solution is equal to or exceeds €130,000 excl. VAT, Beneficiaries should be required to issue a Request for Proposal (RfP) listing all the requirements for the activity and the **main** details and conditions which are normally found in a tender document, including award criteria. Notice of the RfP should also be published in the local media² and where possible on the Beneficiary's

¹ The market research may need to be updated during the call should the evaluation take longer than expected.

² IB can decide to make expenditure related to publicity as eligible, up to a threshold decided beforehand by the IB.

own website³. Evaluation of the proposal can either be sub-contracted (e.g. to architect or technical expert) or carried out by the Beneficiary's own in-house expertise. The evaluation process and the final recommendation should be properly recorded and submitted to the IB for verification. Although the Beneficiary may choose not to opt for the cheapest option, reimbursement by the IB shall be made on the basis of the cheapest proposal.

3. In both cases (a) and (b) above, in order to simplify the application process, the IB may apply a system whereby applicants are requested to submit these documents only once they have passed the eligibility and the evaluation process and ranked as potential Beneficiaries. At application stage, applicants should only be required to indicate the estimated budget for each activity, based on their market research and estimates. The Beneficiary shall submit a financial plan as part of the project application and shall indicate the basis of the budget being requested e.g market research (i.e. quotations or prices acquired through web research); or engineer's / architect's estimate. It is up to the Beneficiary to ensure that the budget requested is sufficient for the project as that will be the maximum amount allocated under the Grant Agreement. It is clear that any unutilized funds (funds remaining in the project after the Beneficiary procures the approved goods / services/ works shall be returned to the scheme and are not for the original Beneficiary's use.

Once applicants are selected as potential Beneficiaries, the IB should then ask them to submit the relevant documents while the Grant Agreement is being drawn up⁴. The Grant Agreement would be based on the cheapest quotation/proposal, even though the Beneficiary may have opted for a more expensive option, assuming this award is in line with the criteria established in the request for proposals.⁵

The IB is to ensure that the final grant amount never exceeds the original budget submitted by the Beneficiary at application stage, though some flexibility may be applied (e.g up to 10%) to shift funds between activities, providing that all activities listed in the application form are carried out.⁶ This new procedure shall also reduce the instances wherein applicants are requested to present fresh quotations to reflect changes from the original specifications which occur between the application and claim stage.

The removal of the obligation to produce quotations at application stage, only to have to confirm them again once the award is given, is considered to be a simplification to the current system.

³ And/or the IB's website.

⁴ Within a deadline established by the IB.

⁵ IBs are to highlight this issue during information sessions and also via the business organisations and representatives.

⁶ IB must ensure that any shifting between direct costs and staff costs does not significantly alter the objectives of the project..

By way of conclusion, it is important that the IB shall ensure that there is increased transparency and competition in the use of EU funds. The IB should also reserve the right to appoint experts to verify whether the costs presented are reasonable and fair, and whether any of the basic principles (when compared to public procurement procedures) necessary to ensure healthy competition and value for money, were neglected.

This note is applicable for any forthcoming calls for projects. In case of difficulties, kindly contact Mr Ronald Mizzi, Senior Manager OP I, at ronald.mizzi@gov.mt.

A handwritten signature in black ink, appearing to read 'Jonathan Vassallo', enclosed within a hand-drawn oval.

Jonathan Vassallo
Head Managing Authority