

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 02/2012

16th July 2012

To: Voluntary Organisations (including Church Institutions and Social Partners)
Cc: Line Ministries
Certifying Authority
Audit Authority
Treasury

Internal Note to Voluntary Organisations ¹

Procurement ² of Works, Services and Supplies by Voluntary Organisations

This document sets out guidance on procedures to be applied by Voluntary Organisations, including Church Institutions and Social Partners, for the procurement of works, services and supplies co-financed by the Structural Funds or the Cohesion Fund during the programming period 2007-2013. This guidance is intended to avoid circumstances which may result in part or full recovery of funds, as per COCOF Guidance Note 07/0037/03-EN which sets out guidelines for the financial corrections to be applied for irregularities in the application of the Community regulations on contracts co-financed by the Structural Funds or the Cohesion Fund, and as per the Commission Guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under Article 99 and 100 of Council Regulation 1083/2006.

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:

¹ Including Church Institutions and Social Partners.

² We are also taking the liberty to issue some guidelines on full and part-time employment.

**Best value for money,
Transparency
Sound Financial Management
Non-Discrimination
Equality of Treatment
Mutual Recognition
Proportionality
Good Governance
Respect of Thresholds**

The lack of conformity with these rules and principles represents risks for the Community funds. Consequently, financial corrections should be applied to the irregularities detected in the 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 thresholds³, 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 VOs 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 Rules (PPR), there is still an obligation on the VO to carry out procurement procedures in full respect of the principles mentioned above and for the MA to obtain *reasonable assurance* about the eligibility of the expenditure being claimed.

Internal Controls

As recipients of grants from various channels and project holders of a certain magnitude, VOs are expected to uphold the above-mentioned principles. Experience for the MA (mainly as a result of management verifications carried out on EU co-funded projects implemented by VOs) has shown that

³ Directive 2004/18/EC of the European Parliament and the Council.

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

One indicator that shows that these principles are upheld within an organisation is having standard operating procedures in place, on which the day-to-day operations of the organization, especially procurement, are to be carried out. When available, many VOs fail to keep up-to-date operational procedures. The procurement of works, services and supplies is necessary for the smooth operation of the VO and for the implementation of projects. Having a clear management and control system of such procurement process, however, is imperative to ensure that everyone in the procurement system is guided by a coherent approach. This includes identifying the right specifications with the budgets at hand, establishing adequate selection and award criteria, managing the tendering process, evaluating offers and awarding contracts to the right bidder and through the appropriate procedures.

VOs are expected to follow reliable methods in purchasing goods and services required for the needs of the organization or its projects. Use of competitive bidding shall be a priority practice while as a general rule, the primary award criterion in choosing a supplier shall be the cheapest technically compliant.⁴

To improve on the current practices, the MA is hereby listing important procurement-related aspects, based on public procurement principles, to ensure that while VOs 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 DoC such as VOs, Local Councils and other Schedule 3⁵ entities) to seek the advice of the DoC on procurement issues;
2. Since projects co-financed through Cohesion Policy are considered to be public funds, they are subject to local and external audits just like any other projects;

⁴ During a recent audit by the IAID (the Audit Authority on Malta's Cohesion Policy 2007-13), it was noted that the marks awarded for technical aspects in tendering procedures with 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.

It should also be noted that the cheapest technically compliant criterion is the preferred option as it allows a stronger and more objective basis for evaluation. The MEAT criterion may only be ideal in cases of complex procurement requiring special technical specifications.

⁵ of L.N. 296 of 2010

3. In this regard, VOs must follow the spirit of the Public Procurement Regulations and the same instructions for the different thresholds (as established in L.N. 296 of 2010 and any subsequent updates), even though they are not legally bound by the Regulations. VOs are thus 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 does not exceed €6,000 Ex Vat, VOs can request three (comparable) quotations from unrelated suppliers, direct from the open market. 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 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. The organization 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 exceeds €6,000 Ex Vat, VOs 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.⁶ VOs 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).

⁶ Preferably persons involved in drawing up the tender shall not be on the team of Evaluators.

2. Where should a tender be advertised?

VOs should always ensure adequate publicity of tender's on local newspapers, news portals and popular websites. 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.

Tenders should be advertised on at least one local newspaper. The VO should ensure that the selected newspaper on which the tender is advertised gives the best possible level of competition. VOs are also encouraged to make use of their own media such as their own website.

Tenders exceeding the EU Thresholds for works, service and supplies⁷ should be also published by VOs on the EU Journal.⁸

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. It is recommended that tenders below €47,000 Ex Vat stay on the market for at least 21 calendar days while those over this threshold, should stay on the market for a minimum of 52 calendar days.

4. How much can we charge for participation in a tender?

In line with DoC policy the MA 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 offices in order to purchase the tender document.

So the MA recommends that there should not be any fee for accessing a tender document (either through online means or by physically collecting it) but there can be a *participation fee* (paid on submission of the offer) which should be relative to the size of the tender and which cannot, under any circumstance, act as a barrier to competition.

⁷ COMMISSION REGULATION (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract. At the time of writing, these are €130,000 for services and supplies, and €5,000,000 for works. It is suggested that these are checked by the Beneficiary before publishing a tender.

⁸ For first time users, the initial step is to register as first time users using this link:

<http://simap.europa.eu/enotices/prepareRegisterUser.do?prepopulate=false>. Once you register, the VO can either pre-announce the tender and publish it at a later stage, or publish the contract notice right away if the timeframes are limited. It takes a maximum of two weeks for a tender to be published. It is of crucial importance to first publish your tender on the Official European Journal and then publish the tender locally.

Participation fees shall be as follows:

- 1) Where the estimated value of the procurement is less than €50,000, participation in the call for tenders is free of charge;
- 2) Where the estimated value of the procurement is between €50,000 and €100,000 the participation fee will be €20;
- 3) Where the estimated value of the procurement is between €100,001 and €120,000 the participation fee will be €50.

VOs should take care to create an item of Revenue entitled 'Participation fees in tenders'. Revenue from this activity should be accounted for in this item. The participation fees should apply to both conventional tender documents and also to electronic tenders.

5. What should a tender document include?

This depends on the nature and magnitude of the activity. VOs are encouraged to make use of the content of the DoC 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....

Dissecting a Tender

1. Instructions to Tenderers
2. Selection Criteria
3. Award Criteria⁹
4. General Conditions
5. Special Conditions
6. Specifications/Terms of Reference
7. Bills of Quantities

Important

- VOs are to ensure that contracting is in line with the approved project proposal and must be in line with the Grant Agreement;

⁹ Failure to state all the selection and contract award criteria in the tender documents or tender notice, or application of unlawful contract award and 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.

- In line with DoC policy, the award criteria should preferably be the cheapest technically compliant bidder;¹⁰
- 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 are also to take the necessary steps to ensure that environment sustainability is also incorporated into the procurement. Tender drafting teams shall contact the contact person at MRRA for further advice prior to finalising the tender document¹¹;
- Tenders are opened in a transparent manner with at least three members of the VO 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. This 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 shall 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 Chairperson) in order to guide the evaluators on the procurement procedures;¹²
- The list of tenders received, together with the respective prices, is made public (VO notice board and/or website) immediately after opening and scheduling;
- All evaluation board members and any appointed technical experts should sign a declaration of 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 stage, he/she is deemed non-compliant and not considered for further evaluation in the successive stages;

¹⁰ During a recent audit by the IAID (the Audit Authority on Malta's Cohesion Policy 2007-13), it was noted that the marks awarded for technical aspects in tendering procedures with 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.

It should also be noted that the cheapest technically compliant criterion is the preferred option as it allows a stronger and more objective basis for evaluation. The MEAT criterion may only be ideal in cases of complex procurement requiring special technical specifications.

¹¹ At the time of writing, the contact person is Mr Joseph Camilleri, EU Funds Manager, MRRA. Email joseph.k.camilleri@gov.mt; Tel: 22927840.

¹² VOs are encouraged to make reference to DoC's Manual for Evaluation Committees. This can be found on DoC's website www.contracts.gov.mt under Resources; Templates.

- 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 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 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 be also signed (by all Evaluation Committee members) and dated. 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 (in a notice board at the VO'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;
- For tenders above €12,000 Ex Vat, 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.

The VO may decide to impose a deposit¹³ to be paid by the appellant when filing an objection (which should be refunded if the Board finds in favour of the appellant). The imposed deposit shall in no way act as a barrier and in line with the Public Contracts Regulations, it should be:

- For tenders below €47,000: €400;
- For tenders between €47,000 and €120,000: 0.5% of the estimated value of the tender;

¹³ This should be also stated in the tender document.

- For tenders over €120,000: 1% of the estimated tender value (minimum €1,200) up to €58,000.

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.

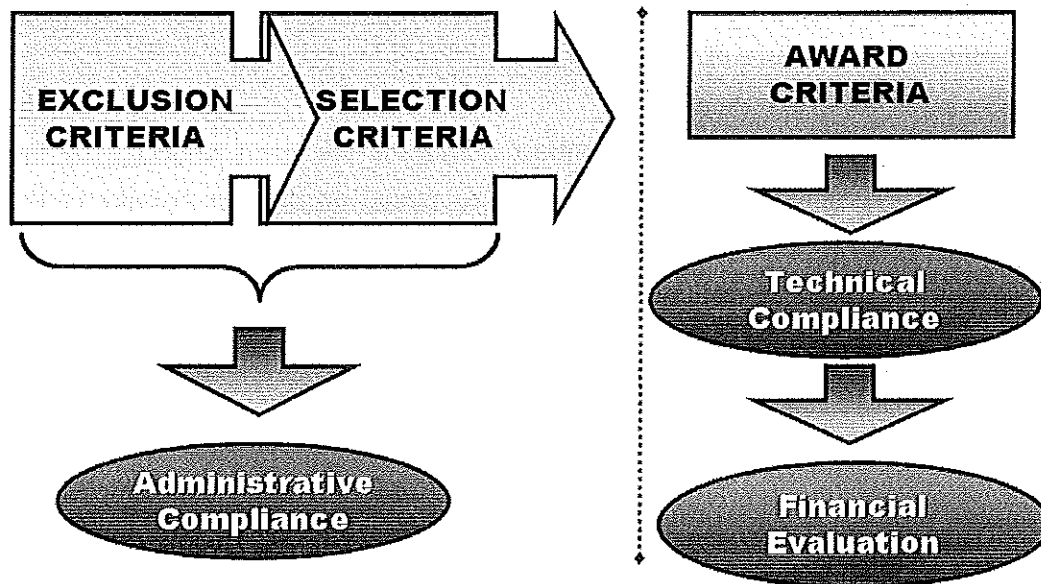
- A contract must be signed between the Beneficiary and the contractor outlining the deliverables, contract duration and payment schedule, amongst others. Any items or components of the contract that are not approved in the Grant Agreement will not be paid for by the project.

Basic Contract Form

1. Contract
 2. Special Conditions pertinent to this contract
 3. Any general conditions as applicable
 4. Copy of tender specifications and conditions
 5. Contractor's technical offer
 6. Contractor's financial offer/Bills of Quantities
 7. Addenda and any clarification correspondence
- The contract shall clearly indicate that the contract is co-financed through 2007-2013 Cohesion Policy as well as the respective OP. Information on publicity can be obtained from the Manual of Procedures, the PPCD website or by contacting the respective unit within the Managing 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 Cohesion Policy requirements;
 - Contracts must be awarded according to the specifications as published in the tender document – modifications would imply direct award of a contract. Possible prolongation of the duration of a contract of services or supplies must be envisaged already in the tender document;
 - 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 (set at 10% of the contract value) and the relevant Pre-Financing Guarantee (where applicable);
 - The VO'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: if two offers respect the specifications, there can be a tendency to prefer a brand over another;
- 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, 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!

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 should continuously monitor that the contract obligations are being respected by the contractor. The MA 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 may in the first instance, ask the the Department of Contracts for advice. Should the contractor persist in failing to abide by the contract despite being cautioned, the project leader can initiate the procedure to implement the necessary penalties as stipulated in the contract. It is important to note that it is the Beneficiary organisation and not the MA that initiates this procedure. 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 inform the MA immediately in order to limit any undesirable consequences to the project. Failure by the Beneficiary to raise such concerns could result in funds being lost.

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 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 NOT OPTIONAL, so if there is a need for retention money, it must 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 contracts¹⁴, the VO must inform the MA 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 MA and the Beneficiary VO. The VO must present a detailed report to the MA explaining the additional costs encountered together with a sound justification (including also those of any technical supervisor engaged for the project) and recommendations. The MA will not consider any requests for variations unless there is an explanation on 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 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 Head of the Operational Programme, and must be signed by the project leader. The MA reviews the documentation submitted by the VO and makes the necessary recommendations based on the justification presented. It should be made clear that even though the MA may approve funds to finance a variation, in doing so it will be relying entirely on the technical assessment and information provided by the VO and this remains the VOs responsibility.

Assuming approval to use funds has been granted by the MA, it is the responsibility of the VO to ensure that adequate organisational structures and separation of duties exist in the approval. The DoC can be contacted informally for advice. VOs are to approve such variations only in exceptional and well justified cases that could not have been foreseen in advance.¹⁵ As in the case of bodies governed by the Public Procurement Regulations, the approval of additional costs for works and services can never exceed 50% of the original contract value. This shall also apply to supplies.

In all cases, additional costs shall be considered eligible under Cohesion Policy 07-13 only if funds are available. The MA reserves the right to refuse awarding further funds, even in justifiable cases.

¹⁴ 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.

¹⁵ Supplementary contracts (whether or not formalized) 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.

Some changes in the contract may necessitate an addendum (formal change recorded in a contractual manner) to the original contract between the VO and contractor. The VO shall make 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 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 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 particular requirements.

The option of a contract of service (employment) as opposed to a contract for service (outsourcing)¹⁶ 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, any external call for recruitment through a contract of service (i.e. on the payroll of the organization) should be first approved by the relevant internal procedure (also in conjunction with PAHRO) and the ETC. The ETC permit number should be quoted on all adverts. The applicable national employment procedures shall apply. The ETC shall be consulted at all times.

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 are therefore recommended to take into consideration the publication of L.N. 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

¹⁶ In this case this should follow the above mentioned procurement principles.

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 organization's hierarchy;
- (g) the person's activity is a core element in the organization 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 they are 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 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 MA and the European Commission are not responsible for any employment related disputes that may arise during and 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 Cohesion Policy, 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

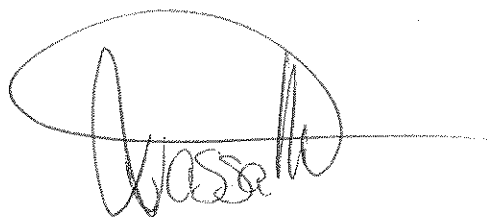
By way of conclusion, it is important that VOs ensure that there is increased transparency and competition in the use of EU funds. Failure to abide by these principles may lead to recovery of funds. Arguments that VOs can be "excused" for committing mistakes and that they are on a learning curve due to their small size and inexperience is not justifiable and are thus subject to financial corrections just like any other Beneficiaries. VOs are bound by the same obligations just like any other Beneficiary under the Operational Programmes.

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

Apart from following this note, VOs are highly encouraged to go through and follow the Manual of Procedures for Projects Implementation (Cohesion Policy 2007-2013 – Guide to Beneficiaries (Version 4 2011) and to familiarize themselves with the OP Eligibility Rules.

For ease of reference, together with this note, we are also enclosing a copy of the DoC Evaluation Manual which VO's are encouraged to follow during the evaluation of tenders, 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 Structural Funds or the Cohesion Fund (COCOF 07/0037/03-EN) so that VO's 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 Projects Manager at the Managing Authority.

A handwritten signature in black ink, appearing to read 'Jonathan Vassallo', enclosed within a large, hand-drawn oval. A horizontal line extends from the right side of the signature.

Jonathan Vassallo
Head Managing Authority