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*Id-Divizjoni għall-Fondi u Programmi*

*Funds and Programmes Division*

### **Financial Control Unit Circular 01/2016**

To: Project Leaders  
From: Financial Control Unit, Funds & Programmes Division  
Date: 15<sup>th</sup> January 2016  
Subject: **Public Procurement Guidance for Practitioners on the avoidance of the most common errors**

Public procurement is a key aspect of public investment: it stimulates economic development in Europe and represents an important element for boosting the Single Market. Given that public procurement accounts for 19% of the EU's GDP and 48% of European Structural and Investment Funds, the correct and coherent implementation of the rules translates into benefits in terms of efficiency and effectiveness so as to make the most of public investment.

The aim of this circular is to provide guidance, based on a recently published Guide by the European Commission, to avoid frequent errors and adopt best practices when it comes to carrying out public procurement procedures.

The guidance is structured around the six stages of a public procurement process highlighting the issues to look out for and potential mistakes to avoid as presented in Annex 1. The top ten tips to avoid such errors are then presented in Annex 2. The six stages provide useful support and should steer practitioners through the areas where mistakes happen most commonly:

#### **1. Preparation and Planning**

In line with EU Treaty principles and Directive 2004/18/EC a competitive tender process carried out in an open, objective and transparent manner should achieve the best value for money in public procurement. Essential principles to be observed in conducting procurement for a public contract include non discrimination, equal treatment, transparency, mutual recognition, proportionality, freedom to provide service and freedom of establishment for potential tenderers.

This first stage of the process is critical and will influence all future activity on the contract. In fact, many errors can be traced back to inadequate planning. From the outset, beneficiaries are to consider important elements as engagement with key stakeholders, identification and assessment of the needs, appraisal of options, budget and funding, affordability, value for money, establishment of benchmarks, achievability, market research, a realistic timetable, the suitability of the use of a framework agreement and the establishment of the subject matter of the

As well as containing the usual information as price, delivery and tender submission date, the tender documents should also specify a reference to the published contract notice, further elaboration of the criteria for selection and award of the contract and the language in which the tender is to be drawn up. It is pertinent to note that contract modifications require a new procurement procedure.

### **3. Submission of tenders and selection of tenderers**

The purpose of this stage is to ensure that compliant tenders are received and selected according to the rules and criteria established in the tender dossier. Communication with a tenderer before submission of the tender is recommended to be only in writing with the same information sent to all tenderers. After the deadline for submission, communication is only to be limited to clarification only in open and restricted procedures. Any dialogue relating to the substance of an offer is not acceptable and would in fact be interpreted as negotiation.

The time and place for delivery of tenders are fixed in the tender notice and if a time extension is given then all tenderers should be informed in writing and a notice sent to the OJEU/the website used so that all potential tenderers are made aware of the new deadline. Once all tenders have been submitted, the Evaluation Committee checks they are compliant and for tenders which are rejected, an explanation is given stating why they are non-compliant. Tender submissions have to be confidential and in safe custody. There are contracting authorities which have a formal opening ceremony for tenders wherein at least two persons from the Evaluation Committee should be present to record the tender details. Members of the public can be invited and all non-compliant tenders must be rejected.

### **4. Evaluation of tenders**

The purpose of this stage is to determine the winning tenderer by strictly applying the published award criteria. The award criteria or the evaluation methodology should never be amended midway through the procurement process. At the planning stage, a decision would have been taken as to which evaluation method to follow. The lowest price is the most transparent and is advisable on the condition that the technical specifications can be fixed upfront by the CA yet the MEAT (most economically advantageous tender) is becoming increasingly the most popular evaluation method. This is an evaluation based on price and quality, technical merits and functional characteristics and hence, if this method is to be used details of all criteria must be included. The CA needs to define what it considers to be an 'abnormally low tender' as it could highlight a fault in the specification or may implicate a possibly incorrect determination of the estimated total value of the contract. It may also be the case that the tenderer misunderstood the specifications of that the specifications have been badly drafted. If clarifications are sought, these should not have the effect of changing the already submitted tender in relation to substantial information such as pricing, quality and service elements.

Post tender negotiations are not allowed in restricted or open procedures and a full comprehensive report on the process and outcome of the Evaluation Committee deliberations must be recorded and kept on contract file. It is pertinent that evaluation reports have to be clear and sufficiently detailed to demonstrate how the decision to award the contract was taken.

## Annex 1

### Common mistakes leading to financial corrections

At the planning stage:	
Direct award of a contract with inadequate justification for non-publication of a contract notice (CN)	<i>How to avoid:</i> Publish a CN for all contracts above the relevant EU/national thresholds for the type of contract concerned
Artificial splitting of works/services/supplies contracts	<i>How to avoid:</i> The true scope and value of the project is to be considered and the calculation should be done correctly in accordance with Article 9 of Directive 2004/18/EC. The value of individual lots should be aggregated to determine if the overall value is above the Directive's thresholds.
Cases not justifying use of the exceptional negotiated procedure with prior publication of a CN or without prior publication of a CN	<i>How to avoid:</i> The negotiated procedure can only be used exceptionally in very specific circumstances as per Articles 30 and 31 of the Directive. The use thereof is a derogation from the general rules and hence CAs should ensure that precise circumstances justifying such negotiation exist.
Disproportionate and discriminatory selection criteria and award criteria not related to the subject matter of the contract	<i>How to avoid:</i> Prior to publication of the tender notice, the CA should check that the selection and award criteria and the related methodology are proportionate and non-discriminatory.
Errors/mistakes in ordering on a framework agreement	<i>How to avoid:</i> The CA must rank the suppliers based on the award criteria set out in the tender documents.

At the publication stage:	
Insufficient definition of the contract subject matter leading to subsequent irregular modifications of the contract	<i>How to avoid:</i> The specification is to be written in a neutral form and writer should be sufficiently skilled to define the contract accurately whilst involving other stakeholders to enable them to do so.
Lack of publication of a contract notice	<i>How to avoid:</i> The value of the contract is to be checked and if the value is over the thresholds then it must be advertised in the OJEU via a CN.
Non compliance with minimum time limits for receipt of tenders & requests to participate	<i>How to avoid:</i> Consider time limits before publishing the notice and set realistic timelines at the planning stage.
Lack of publication of extended time limits for either receipt of tenders or for requests to participate	<i>How to avoid:</i> All time extensions need to be published in the OJEU for contracts where publication of a CN for the contract in the OJEU was required in accordance with the Directive

<b>At the evaluation stage:</b>	
Modification of award criteria after the opening of tenders resulting in the incorrect acceptance of tenders	<i>How to avoid:</i> If the award criteria need to be modified after CN publication, the CA must either cancel the tender and retender or issue an erratum and possibly an extension of the deadline for submissions.
Lack of transparency/equal treatment during evaluation	<i>How to avoid:</i> The chair of the Evaluation Committee should ensure that there is written justification for each score given in the tender evaluation.
An undisclosed conflict of interest	<i>How to avoid:</i> A conflict of interest declaration should be signed by all Evaluation Committee members and separate red flag/data mining techniques should be used by the CA to identify and investigate any possible undisclosed links between staff in the CA and tenderers.
Modification of a tender during evaluation	<i>How to avoid:</i> The procurement officer and chair of the Evaluation Committee must ensure that only information submitted at the time of the tender is evaluated.
Negotiation during the award procedure	<i>How to avoid:</i> Given this is not allowed any clarifications or communication with tenderers after the tender submission should be in writing.
Rejection of abnormally low tenders without justification	<i>How to avoid:</i> Careful pre-procurement planning, including setting benchmark prices is key. Tenderers with low tenders must justify their low offers and cannot be automatically excluded.

<b>At the award stage:</b>	
Negotiation on the contract	<i>How to avoid:</i> This violation changes the nature of the advertised contract meaning that other tenderers have not had the opportunity to make an offer for the amended contract. If it is discovered before signing that there has to be re-scoping, then the CA must cancel the tender procedure and retender.

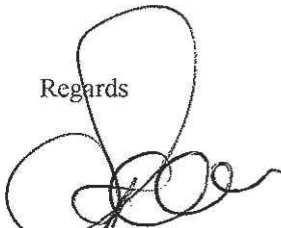
<b>At the contract implementation stage:</b>	
Reduction in the scope of the contract	<i>How to avoid:</i> All stakeholders should be involved at the planning stage to review the scope and risks. If the contract is to be re-scoped, the CA must cancel the contract and retender so that the market has another opportunity to tender for the revised contract.
Award of contracts for additional works or services without competition in the absence of justified urgency brought about by unforeseeable events	<i>How to avoid:</i> The procurement planning phase needs to be expertly executed and all risks included in the preparation of the tender documents.

Annex 2

Top ten tips to avoid public procurement errors

DO	DON'T
Plan, choose the <b>CORRECT PROCEDURE</b> , document	Launch <b>WITHOUT ADEQUATE PLANNING</b> , approval and controls
Find the appropriate <b>CONTRACT PACKAGING OPTIONS</b>	<b>SPLIT</b> or avoid grouping <b>CONTRACTS</b>
<b>PUBLISH</b> the Contract Notice in the OJEU	Start <b>WITHOUT ADVERTISING</b> nationally and/or in OJEU
Check potential <b>CROSS-BORDER INTEREST</b> and advertise	Launch <b>WITHOUT</b> stating the selection and <b>AWARD CRITERIA</b>
Follow <b>MINIMUM TIME LIMITS</b> in Directives and national rules	<b>ACCELERATE TIMETABLES</b> faster than the minimum time limits
<b>DESIGN</b> selection criteria (eligible tenderers), <b>AWARD</b> criteria (best tenders)	Apply discriminatory, unrelated or inappropriate selection criteria
Apply <b>TRANSPARENT</b> and <b>FAIR</b> procedures	Evaluate using <b>UNLAWFUL AWARD</b> criteria / modify award criteria after opening
Ensure that everyone has signed a Conflict of Interest declaration	Allow <b>CONFLICT OF INTEREST</b> in preparation or evaluation
<b>PUBLISH</b> contract award notice	Implement without <b>STANDSTILL / REMEDIES PERIOD</b>
Tender additional works if they are not justified by <b>UNFORSEEN CIRCUMSTANCES</b>	<b>MODIFY</b> the contract / <b>AWARD DIRECTLY SUPPLEMENTARY</b> contracts unless the modifications are clearly non-substantial

Regards



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