



MA Circular 06/2020

28th September 2020

To: Voluntary Organisations and Non- Governmental Organisations

Cc: Line Ministries

Certifying Authority

Audit Authority

Payment Unit

Re: Guidance Document on procurement procedures to be applied by VOs and NGOs

Preamble

This document sets out guidance on procedures to be applied by Voluntary Organisations (VOs), Non-Governmental Organisations (NGOs) (including Church Institutions and Social Partners) when procuring works, services and supplies co-financed by the Structural Funds or the Cohesion Fund during the programming period 2014- 2020.

Despite the fact that NGO's and VO's are not governed by National and EU Public Procurement Regulations (PPR)¹, EU Treaty principles and the General Financial Regulation still oblige EU Member States like Malta 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 that all fundamental notions are adhered to.

¹ Malta is bound to ensure compliance with the provisions of the Treaty on the Functioning of the European Union and secondary legislation promulgated by the European institutions including the legislative package in the field of public procurement – directive 2004/17/EC and Directive 2004/18/EC together with the new directive on procurement 2014/24/EU and 2014/25/EU Utilities and 2014/23/EU on Concessions contracts.

Aim

The aim of this circular is to provide beneficiaries with further insight about project implementation and best practices to be taken into consideration whilst ensuring that a consistent approach is applied across all Beneficiaries.

Guiding Principles

All public procurement is to be guided by the following public procurement principles, to ensure that the procurement exercises undertaken by the VOs / NGOs have:

- best value for money;
- transparency;
- sound financial management;
- non-discrimination;
- equality of treatment;
- mutual recognition;
- proportionality;
- good governance; and
- respect of thresholds.

VOs / NGOs are to be aware that such principles are thoroughly examined during audits and management verifications, and the lack of conformity with these rules and principles represent risks for the Public funds and in line with the applicable rules² action would need to be taken by the MA or the respective audit bodies.

Procurement Thresholds that NGOs should consider adopting when undertaking procurement in relation to EU funded projects:

- Estimate value €5,000 or less (excluding VAT) - contract awarded through a Request for Quotations (RFQ) with a minimum of 3 quotations or issuing a competitive call for quotations;
- Estimate value €5,000 or more, but does not exceed €10,000 (excluding VAT) – contracts awarded through a competitive call for quotations;
- Estimated value €10,000 or more (excluding VAT) – contracts awarded through a call for tenders.

The different stages of the Procurement Process:

A. Pre- Public Procurement Stage – Decision on the type of procurement process to utilise

Competitive tendering enables the VO/NGO to source products and services from the best suppliers at prices that reflect true market conditions. The process is based on bidders quoting against specifications that satisfy the buyer's requirements. By definition, a tender is "an offer in writing to

²https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/GL_corrections_pp_irregularities_annex_EN.pdf

carry out works, supply goods or services at a fixed price". Whether to ask for quotations or issue a call for tenders is merely dependant on the:

- Nature of goods / services;
- Related expenditure.

If a Request for Quotations (RfQ) is issued the call needs to be:

- clear;
- objective;
- standardised;
- sufficiently detailed;
- leave minimal room for interpretation, particularly as regards to size, quantity, material, colour, dimensions, speed, etc;
- deadline by when the quotations are to be received.

These specifications should be known beforehand by the VO/NGO according to the assessed needs. The organisation should decide also on the award criteria which generally is the cheapest technically compliant offer. However, should the VO/NGO opt to issue a Best Price-Quality Ratio (BPQR) as the Award Criteria, the MA strongly advises that the criteria for the BPQR are channelled through the Department of Contracts in order to have guidance by the body regulating Public Procurement in Malta.

A tender is the format that is ideally used when procuring supplies or services that are expected to exceed a cost of €10,000:

- Bidders shall be independent from any individuals involved in the preparation / implementation of the project and / or those drafting the tender document/ or those involved in the evaluation process.
- Ensure to have in place a process of appeal and that the appeals committee (albeit small) shall 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).
- Any clarifications made to or received from the suppliers, should be also documented to ensure an adequate audit trail.

B. Publication Stage - Tender advertising

Adequate publicity of tenders such as on local newspapers, news portals and / or on popular websites (where necessary) needs to be ensured. VOs / NGOs are also encouraged to make use of their own media such as their own website.

It is also recommended that tenders exceeding the EU Thresholds for works, services and supplies³ are published by VOs / NGOs on the EU Journal⁴ or other means that allow a wider public dissemination of such procurement.

³ COMMISSION DELEGATED REGULATION (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application **thresholds for the procedures for the awards of contract**. At the time of writing, these are €144,000 for services and supplies, and €5,548,000 for works. It is suggested that these are checked by the Beneficiary before publishing a tender.

⁴ For first time users, the initial step is to register as first time users using this link: <https://webgate.ec.europa.eu/cas/eim/external/register.cgi>. Once you register, the VOs / NGOs / IOs 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 is of crucial importance to first publish your tender on the Official European Journal and then publish the tender locally.

C. Participation fee

The Managing Authority (MA) recommends that tender documents are put online to ensure greater opportunities for economic operators to participate in tenders and there should not be any fee for accessing a tender document.

Nevertheless, the organisation may opt to set a bid bond / tender guarantee (paid on submission of the offer) in which case it is important to consult DoC accordingly.

D. Duration of tender on the market

One of the aims for undertaking a procurement process is to maximise competition as much as possible. Thus, the duration of the tender in the open market is an important part of this process. The duration set 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.

It is recommended that tenders below €135,000 (exc. VAT) stay on the market for at least 20 calendar days while those over the threshold, should stay on the market for a minimum of 30 calendar days.

E. Tender document content

The content of the tender document mainly depends on the nature and magnitude of the activity. VOs / NGOs are encouraged to make use of the Department of Contract's Public Procurement Templates and adapt them to their needs.

NOTE: *Tender Templates for Non-Governmental Organisations (NGOs) are available at the Department of Contracts.*

Basic elements of the tender document include (not exhaustive):

- Instructions to tenderers
- the objective of the tender (i.e. why it is being issued);
- who can apply;
- general conditions
- eligibility and selection criteria;
- award criteria
- duration of the contract;
- expected output and results;
- specifications / Terms of Reference
- bills of Quantities (if applicable); and
- other contractual obligations such as payment schedule, guarantees, variations etc...

The selection and award criteria must be clearly stipulated in advance within the tender document. Moreover, 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 lack of

conformity with these criteria represent risks for the Public funds and in line with the applicable rules⁵ action would need to be taken by the MA or the respective audit bodies.

The tender needs to clearly indicate that it is co-financed through Cohesion Policy as well as the respective Operational Programme. Information on publicity can be obtained from the Manual of Procedures downloadable from eufunds.gov.mt or by contacting the respective unit within the Managing Authority. VOs / NGOs should make reference to the Visual Identity Guidelines available at the following [link](#).

F. Objections and Appeals

For all procurement procedures above €5,000 exc. VAT, bidders are to be given the opportunity to file a notice of objection with the Review Board/Appeals Board. Adequate time (recommended ten (10) 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 needs to 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 VOs / NGOs may decide to impose a deposit⁶ to be paid by the appellant when filing an objection (which needs to be refunded if the Board finds in favour of the appellant). The imposed deposit should in no way act as a barrier and the MA recommends that the amount is in line with the Public Contracts Regulations. Thus, equivalent to 0.50% of the estimated value of the whole tender set by the VOs / NGOs. If the tender is divided into lots, then it is recommended that the deposit is set according to the estimated value of the tender for each lot submitted by the tenderer and as set by the VOs / NGOs. Moreover, it is also recommended that the deposits are not less than €400 or more than €50,000 which may be refunded as the Review Board may decide in its decision.

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

It is the VOs / NGOs who are responsible to set up the Review Board. It should be ensured that persons forming part of the original evaluation committee *and* preferably officers who were involved in the drafting of the tender document do not form part of the Review Board. It should be ensured that no undue influence is exerted by parties having an interest in the evaluation.

G. Evaluation Process

The evaluation process needs to be carried out by a suitably competent evaluation panel and in accordance with the principles of equal treatment, non-discrimination, and transparency. Contracted goods, works and services should be the same as included in the tender submissions. The following standards are recommended:

⁵https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/GL_corrections_pp_irregularities_annex_EN.pdf

⁶ This should be also stated in the tender document.

- Tenders are opened in a transparent manner with at least three members of the VOs / NGOs 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 evaluation committee 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 can include technical experts 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 / Advisor) in order to guide the evaluators on the procurement procedures⁷;
- **During the first meeting of the Evaluation Committee**, all evaluation board members and any appointed technical experts should sign a Declaration of Impartiality to confirm whether they have any potential conflict of interest through direct or indirect relationship with any of the tenderers;
- The evaluation report is sufficiently detailed and provides a clear picture of how the recommendation for award was reached. It needs to be also signed (by all Evaluation Committee members) and dated, and endorsing each page. 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; and
- It is essential that the tender specifies what are the gateway eligibility criteria (such as what criteria must be satisfied to even consider the bid content). These criteria are to be distinct from the criteria which will be used by the VO/NGO to evaluate the actual bids received.

Contract Management

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 Project Grant Agreement will not be paid for by the project.

A. Contract Contents

Basic elements of the contract document include (not exhaustive):

- Special Conditions pertinent to this contract
- Any general conditions as applicable
- Copy of tender specifications and conditions, and any clarifications issued
- Contractor's technical offer
- Contractor's financial offer / Bills of Quantities
- Addenda and any clarification correspondence (if applicable)

The contract shall clearly indicate that the contract is co-financed through 2014-2020 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. VOs / NGOs should make reference to the Visual Identity Guidelines available at the following [link](#).

⁷ 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 under Resources.

The contract needs to also clearly indicate the contractor's name (and no variant). The contractor needs to 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 will 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 VOs / NGOs relationship / obligations rest solely with the contractor indicated in the contract (and not with any sub-contractors {if there are any}).

B. Contract Award

Contracts are to be awarded according to the specifications as published in the tender document.

C. Performance Guarantee

The MA highly recommends that in line with the Department of Contracts policy the Contractor also provides a relevant Performance Guarantee (set at 10% of the contract value for contracts over €500,000, or at 4% of the contract value for contracts below €500,000).

D. Signatories

In order to fulfil the principle of mutual recognition, the contract needs to 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 is to be initialled by all parties;

E. Contract implementation

The VOs / NGOs should continuously monitor that the contract obligations are being respected by the contractor. The Managing Authority stresses the importance that must be placed on the responsibility of the VO/ NGO to ensure that a contractor is abiding by the obligations stipulated in the contract.

Should a contractor fail to meet the contractual obligations, the VO/NGO needs to bring this to the attention of the contractor, ideally in writing. Should the contractor continue to fail to meet the contractual obligations, the VO/ NGO may ask the Department of Contracts for advice. Should the contractor persist in failing to abide by the contract despite being cautioned, the VO/ NGO can initiate the procedure to implement the necessary penalties as stipulated in the contract.

F. Penalty payments

It is important to note that it is the VO/NGO 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.

Additionally, the VO/NGO 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.

G. Bank Guarantees

It is important that safeguards such as bank guarantees are put in place to recover funds in the case of payments not covered by a deliverable such as an Advance Payment on a contract. It is important to note that Beneficiaries are not to retain money at the end of the contract. Retention money throughout implementation of a contract is allowed, however, all money must be released upon completion of a contract.

In this regard if VOs / NGOs 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. Should retention money be deemed necessary (e.g. if the VO / NGO 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 bankguarantee 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.

H. Variations

In case of variations to contracts, the VO / NGO must inform the MA immediately.

The VO / NGO 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/ NGO 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 within the VO/ NGO and endorsed by the respective head of organisation/financial controller;
- The MA reviews the documentation submitted by the VO / NGO and makes the necessary recommendations based on the justification presented;
- 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 Beneficiary and this remains the VOs / NGOs responsibility;
- Assuming approval to use funds has been granted by the MA, it is the responsibility of the VO / NGO to ensure that adequate organisational structures and separation of duties exist in the approval;

- Any possible or potential modifications to the contract need to be considered and accounted for prior to the publication of the actual Call for Tenders;
- Variations that are not included / foreseen within the tender document, and awarded, will be considered as a separate contract awarded via a direct award;
- VOs / NGOs are to approve such variations only in exceptional and well justified cases that could not have been foreseen in advance⁸;
- As in the case of bodies governed by the Public Procurement Regulations, the approval of additional costs or repetition for / of works, services and supplies can never exceed 50% of the original contract value;
- Changes in the contract necessitate an addendum (formal change recorded in a contractual manner) to the original contract between the VO / NGO and the contractor;
- The VO / NGO 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 / NGO 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 contract.

Good practice Standards

VO / NGO are encouraged to adopt the following standards:

- Develop standard operating procedures covering their internal financial policies (including procurement process) and ensure these are updated on a regular basis and implement it in a coherent manner;
- Follow the Manual of Procedures for Projects Implementation (Cohesion Policy 2014-2020 – Guide to Beneficiaries) and familiarise themselves with the relevant OP Eligibility Rules; (both downloadable from eufunds.gov.mt under Useful links and downloads and available per Operational Programme)
- A comprehensive system should be in place when selecting the evaluation committee members with their declaration of Conflict of Interest prior to the evaluation of bids submitted;
- Develop thorough and impartial technical specifications taking into consideration the budget available for any procurement process;
- Establish an adequate selection and award criteria, which is strictly adhered to during the evaluation process;
- Contracts are awarded according to the guiding principles and regulations mentioned in this document. A documented audit trail is to be kept for any eventual verifications;
- Ensure that the contracting is in line with the approved project proposal and in line with the Grant Agreement;
- Clauses referring to National and EU laws, Labour Law, Data Protection, Freedom of Information, and Gender Equality should be inserted in the tender document;
- Ensure that environment sustainability is also incorporated into the procurement. Tender drafting teams are recommended to contact the Ministry for Sustainable Development, the

⁸ Supplementary contracts (whether or not formalised) 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 funds or cancellation of support to the given activity.

Environment and Climate Change (MSDEC) for further advice prior to finalising the tender document;

- The list of tenders received, together with the respective prices, is made public (VOs / NGOs notice board and / or website) immediately after opening and scheduling;
- Deadlines must be strictly respected;
- 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 complete / non-submitted administrative information pertinent to the documentation as outlined in the same tender document. Nonetheless, the VOs / NGOs 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 already have 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 VOs / NGOs should ensure a level playing field for everyone;
- Results must be published (on a notice board/website at the VOs / NGOs 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;
- It is the responsibility of VOs / NGOs to seek advice of the DoC on any procurement issues encountered;
- Since projects co-financed through Cohesion Policy are public funds, they are subject to local and external audits just like any other projects.

What to avoid

VO / NGO are to avoid the following scenarios:

- Brand discrimination: The choice should be based solely on the award criteria irrespective of brand names;
- Prejudice: All offers must be benchmarked against the tender requirements, not one against the other (with an offer being assessed against the one preceding it);
- Assumptions: If there are unclear issues, one cannot assume that the tenderer will deliver / abide with tender requirements and obligations;
- Being circumstantial and vague in one's argumentations / recommendations: these will be subject to scrutiny by the MA, IAID, NAO, European 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 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;
- Change in award criteria: during evaluation, evaluators should ensure that the (selection and award) criteria specified in the tender document are the ones used in the adjudication process.

- Changes made at contract implementation stage: during contract implementation the specifications set in the tender document should be adhered to. In the case of need for modifications, one will need to ensure that the change is not altering the objective of the contract, the timescales defined in the original contract and the overall price.

Jonathan Vassallo

Head - Managing Authority