

28<sup>TH</sup> April, 2023

## **Circular 001/2023**

To: Voluntary Organisations, Non-Governmental Organisations, International Organisations (including Church institutions and Social Partners) and Private Bodies.

CC: Certifying Authority/Accounting Body; IAID as Audit Authority; Director Generals & Chief Coordinators EU Funded Operational Programmes

## **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 EU funds.

Despite the fact that NGO's and VO's are not governed by National and EU Public Procurement Regulations (PPR), 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.

Even though VOs /NGOs /IOs/PBs 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 VOs /NGOs /IOs /PBs to carry out procurement procedures in full respect of the principles mentioned in this circular and for the respective Managing Authority to obtain reasonable assurance about the eligibility of the expenditure being claimed.

This circular is repealing FCU circular 01/2019 and MA Circular 06/2022.

### **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**

The Oaks Business Centre, Block B, Farsons Street, Hamrun HMR 1321

Telephone Number: +356 2555 2555;  
E-mail: [fondi.eu@gov.mt](mailto:fondi.eu@gov.mt); Web: [FONDI.eu](http://FONDI.eu)

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 rules<sup>2</sup> 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.

### **Internal Controls**

As recipients of grants from various channels and project holders, VOs /NGOs /IOs /PBs are expected to uphold the mentioned principles and hence the need to have strong internal controls. Voluntary Organizations are reminded to adhere to the code of Good Governance, Practice and Ethics for Administrators of Voluntary Organisations. This code aims to establish standards, principles and rules regarding good governance and good practice which administrators of VOs should follow when performing their work and providing their services.

## 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 carry out works, supply goods or services at a fixed price".

Whether to ask for quotations or issue a call for tenders is merely dependent 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 channeled through the Department of Contracts 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 supplies are published by VOs / NGOs on the EU Journal<sup>4</sup> or other means that allow a wider public dissemination of such procurement.

#### *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 to adhere to the regulations and guidelines issued by the Department of Contracts in relation to the duration of the tender in the open market.

#### *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 rules 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 EU funds as well as the respective Operational Programme. Information on publicity can be obtained from the Manual of Procedures downloadable from [fondi.eu](http://fondi.eu) or by contacting the respective unit within the Managing Authority.

#### *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 deposit 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. 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.

The Oaks Business Centre, Block B, Farsons Street, Hamrun HMR 1321

Telephone Number: +356 2555 2555;  
E-mail: [fondi.eu@gov.mt](mailto:fondi.eu@gov.mt); Web: [FONDI.eu](http://FONDI.eu)

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. Each Evaluation Committee member must agree to the Declaration of Impartiality and Confidentiality. Through this form the committee member will be declaring that s/he has no personal interest or connections with any of the participating economic operators and that s/he understands and can perform within the ground rules and procedures. This Declaration of Impartiality is to be signed by each Evaluation Committee Member **BEFORE** commencement of evaluation. It is to be noted that Declarations of Impartiality and Confidentiality signed by the members of the Review Board, are subject to verifications by the authorities managing the respective funds.

Contracted goods, works and services should be the same as included in the tender submissions.

The following standards are recommended:

- 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 procedures);
- All evaluation board members and any appointed technical experts have to sign a Declaration of Impartiality and Confidentiality;
- 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

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- 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 as well as the respective OP. Information on publicity can be obtained from the Manual of Procedures, the [fondi.eu](http://fondi.eu) 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 National and EU requirements. VOs / NGOs should make reference to the Visual Identity Guidelines.

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*

For contracts over €10,000 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 initialed 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 include 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 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.

#### *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 contract 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 advance<sup>8</sup>;

- 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.

## **Whistle Blower and reporting of suspected irregularities/fraud**

By means of the protection of the Whistleblower Act (CAP 527), Act VII of 2013 as amended by Act LXVII of 2021, NGOs/Vos are to be reminded that there is the possibility to file a report on any suspected irregularities/fraud or regarding alleged improper practices that one may face in the implementation of EU Funded projects. Suspected frauds or irregularities can be reported through the following link:

<https://eufunds.gov.mt/en/report%20suspect%20fraud/pages/report-fraud.aspx>

## **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;
- In line with the guiding principles each Beneficiary, and its team members whether internally or outsourced, is to aim at avoiding the risks of conflict of interest within a framework of a strong, ethical and integral management culture, where everyone is responsible for their actions and where conflicts of interest are not tolerated;
- Follow the Manual of Procedures for Projects Implementation and familiarise themselves with the relevant Eligibility Rules; (both downloadable from [fondi.eu](http://fondi.eu) 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 Impartiality and Confidentiality prior to the evaluation of bids submitted. Indeed, the Evaluation Committee members are to sign the Declaration of Impartiality and Confidentiality during the first meeting of the Evaluation and as soon as the members have enough information on the competing bids to allow a complete and full

The Oaks Business Centre, Block B, Farsons Street, Hamrun HMR 1321

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assessment on the existence or otherwise of a situation of conflict of interest. It is recommended that the Head of the respective organisation endorses these Declarations and ensure that these declarations were properly assessed. The respective Managing Authorities and other relevant stakeholders reserve the right to carry out checks on the compliance of these requirements.

- It is of utmost importance that a quality check is performed on these declarations including the assessment of the Curriculum Vitae vis-à-vis the signed declarations. Upon suspicion of a conflict of interest, or where a third party reports a possible conflict of interest, the officer concerned should be obliged to refrain from dealing with the relevant assignment.
- 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.
- 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 of the bids;
- 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;

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- Since projects co-financed through EU funds, 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.

It is important that the VOs/NGOs ensure that there is increased transparency and competition in use of EU funds. They should also ensure a zero-tolerance policy towards conflict of interest, double-financing, fraud or corruption. Failure to abide by these principles/guidelines may lead to recovery of funds. Arguments that the VOs/NGOs 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.

## 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.

Emphasizing the point that the VOs /NGOs /IOs /PBs have to follow the spirit of the Public Procurement Regulations, they should bear in mind that these Regulations stipulate that where the estimated value of the supplies or works or services does not exceed €5,000 (excluding VAT), quotations are to be sought. Where the estimated value exceeds €5,000, one shall act very much in line with the procedure outlined previously. For procurement with an estimated value equal or over €100,000, organisations not subject to Public Procurement Regulations should take all the necessary measures to ensure that the process, as already highlighted, follows the spirit of the Regulations. In such cases, organisations are encouraged to consult and liaise with the Managing Authority prior to undertaking such procurement.

One would be committing an irregularity if one splits items - which could have been easily acquired through one tender - into smaller lots with the purpose of avoiding issuing a tender.

In the case of quotations, these have to be 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. VOs /NGOs /IOs /PBs should also follow the spirit of Department of Contracts Circular . Specifications should be established beforehand by the VOs /NGOs /IOs PBs according to the 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 where procurement does not warrant the BPQR criterion. Any clarifications made to or received from the suppliers, should be also documented to ensure an adequate audit trail.

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

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

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

When establishing the time limits for the receipts of tenders and requests to participate, VOs /NGOs /IOs /PBs responsible for the tendering process shall take into account the nature of the goods/services being procured, the complexity of the tender specifications and eventual contract *and* the level and intensity of the preparations needed by potential bidders to finalise their tender document to be submitted. The organisations should consider also the minimum time limits set out in the NPPR. The ultimate aim should always be to maximize competition as much as possible.

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

In line with the Department of Contracts (DoC) policy the Managing Authority 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 offices of the VOs /NGOs /IOs to obtain a copy of the tender document.

Thus it is recommended that there should not be any fee for accessing a tender document (either through online means or by physically collecting it).

## **5. What should a tender document include?**

This depends on the nature and magnitude of the activity. VOs /NGOs /IOs /PBs 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 document or tender notice, *or* applying unlawful contract selection and award criteria, may lead to a recovery of a percentage of the value of the contract (in some cases 25%). 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 reflects the project proposal and must

be in line also with the Grant Agreement;

- Clauses making reference to the National and EU laws, including but not limited to Employment and Industrial Relations Act, Data Protection Act and Freedom of Information Act, and Gender Equality should be inserted in the tender document;
- VOs /NGOs /IOs /PBs are recommended to take the necessary steps to ensure that environmental sustainability is also incorporated into the procurement. Tender drafting teams are to contact the respective authority to ensure full compliance in relation to green public procurement;
- VOs /NGOs /IOs /PBs are to take into consideration the Government-wide Procurement Policy Notes. For example Procurement Policy Note #34 states that EU-Funded Procurement Calls wherein the Contract Value Equals or Exceeds €100,000 (excluding VAT) shall necessitate that a Contracting Authority provides Pre-Financing Payment to the Contractor.. It is pertinent to add also that pre-financing should not be provided on components which are of a recurrent nature such as maintenance;
- Tenders are opened in a transparent manner with at least three members of the VOs /NGOs /IOs /PBs being 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 related to the field of expertise associated with the technical specifications included in the tender (these experts can also be financed by the project if approved in the Grant Agreement and are to be contracted in a fair and transparent manner). 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.  
VOs /NGOs /IOs /PBs are encouraged to refer to DoCs Manual titled 'Standard Operating Procedures: Guidelines for Tender Evaluation Committees';
- The list of tenders received, together with the respective prices, is made public (VOs /NGOs /IOs /PBs notice board and/or website) immediately after opening and scheduling;
- All evaluation board members and any appointed technical experts are to sign a declaration of confidentiality and impartiality;
- Deadlines must be 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

The Oaks Business Centre, Block B, Farsons Street, Hamrun HMR 1321

Telephone Number: +356 2555 2555;  
E-mail: [fondi.eu@gov.mt](mailto:fondi.eu@gov.mt); Web: [FONDI.eu](http://FONDI.eu)

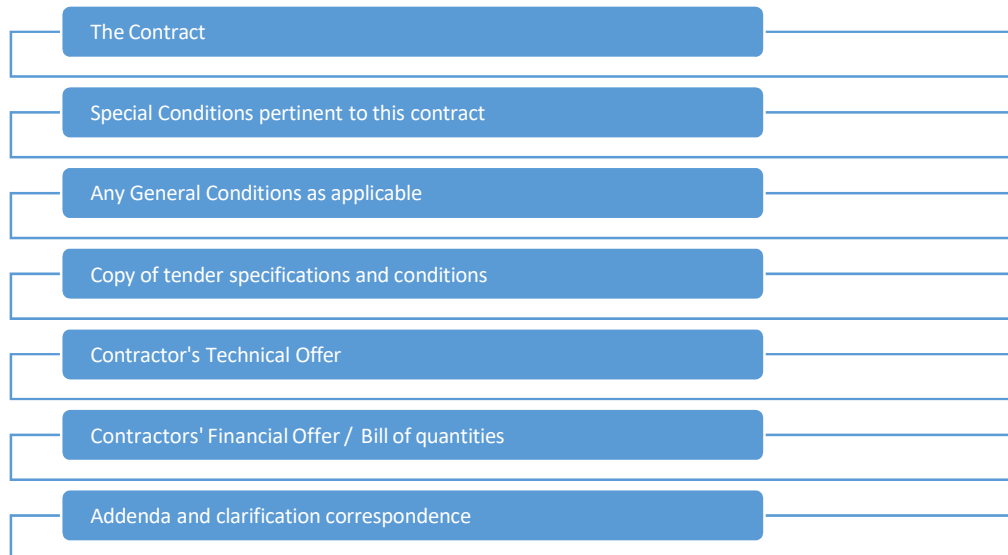
compliance); Award Criteria (technical compliance). These stages are sequential: if a tenderer does not satisfy all the requirements of a particular stage, the bid is deemed non-compliant and not considered for further evaluation in the successive stages;

- 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 VOs /NGOs /IOs /PBs 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. It is to be reiterated that VOs /NGOs /IOs /PBs 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. It is advisable that the template for the Evaluation Report downloadable from the website of the DoC be used. This can be found on DoC's website [www.contracts.gov.mt](http://www.contracts.gov.mt) ;
- The minutes of the meeting/s where the decision for award is taken (apart from the evaluation report), are signed, properly filed and attached to the evaluation report;
- Results must be published (on a notice board at the VOs /NGOs /IOs /PBs premises and/or website) 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 (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, the award of contract is to be suspended until the Review Board communicates its decision. The VOs /NGOs/IOs /PBs should oversee that no undue influence is exerted by parties having an interest in the evaluation;



- 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*



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 by EU Funds<sup>1</sup>. Information on publicity can be obtained from the Manual of Procedures, the Fondi.eu website or by contacting the respective 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 the respective requirements. Here, it is pertinent that the VOs /NGOs /IOs /PBs refer to the visibility guidelines outlined;
- 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 VOs /NGOs /IOs /PBs and communicated immediately to the FPD;
- 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

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<sup>1</sup> Specifying the actual funding

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 VOs /NGOs /IOs /PBs 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.

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

The VOs /NGOs /IOs /PBs should continuously monitor that the contract obligations are being respected by the contractor. The Managing Authority 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 VOs /NGOs /IOs /PBs could at the same time consult the Department of Contracts for advice. It is important to note that it is the beneficiary and not the Managing Authority that initiates the procedure for implementing the 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 Managing Authority immediately, without prejudice to the provisions in the Manual of Procedures 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 VOs /NGOs /IOs 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 VOs /NGOs /IOs /PBs 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 that this 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 not cover the VAT element.

## **7. What happens in case of variations?**

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, or *repetition of similar works* (also called new works) where there is already a rate in the BOQ and only the quantity is increased. Variations can also take the form of reductions (e.g. a reduction in the scope of a contract).

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

Assuming approval to use funds has been granted by the MA, it is the responsibility of the VOs /NGOs /IOs /PBs 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 /PBs are to approve such variations only in exceptional and well justified cases that could not have been foreseen in advance<sup>2</sup>. The approval of additional costs (i.e. new items which are not part of the original contracts) for works, services or supplies can never exceed 50% of the original contract value.

In all cases, additional costs shall be considered eligible only if funds are available. The MA 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 VOs /NGOs /IOs /PBs and contractor.

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<sup>2</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

It is recommended that the VOs /NGOs /IOs /PBs make sure that any changes to the contract are well documented and approved by the legal representative of the organisation and the manager of the organisation, who is generally responsible for procurement. Contracts and subsequent addenda are generally signed by both the VO /NGO /IO /PBs 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 /PBs 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 VOs /NGOs /IOs /PBs particular requirements.

The option of a contract of service (employment) as opposed to a contract for service (outsourcing)<sup>3</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 /PBs, any external call for recruitment through a contract of service (i.e. on the payroll of the BENEFICIARY), 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 /PBs are therefore recommended to take into consideration the provisions of National Legislation

If a VO /NGO /IO /PB 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 lifetime of the programme or before). 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 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.

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<sup>3</sup> In this case this should follow the above-mentioned procurement principles.

**9. What are the obligations for full-time or part-time employment with tasks solely related to the operation of the beneficiary or as part of a project?**

If a beneficiary employs a person on an employment contract to work solely on a project funded through EU Funds, the Beneficiary shall ensure that the person being engaged works solely on the project and does not undertake any unrelated work within the Beneficiary operations. The time spent on the project should also be well documented and regular task-based reports may be provided.