

Department of Contracts  
Notre Dame Ravelin  
FLORIANA

To Permanent Secretaries  
Directors General  
Directors  
Heads of Public Sector Organisations

10 June 2021

## **CIRCUMVENTION OF THRESHOLDS**

A Procurement / Concession Procedure should have at its inception comprehensive and methodical planning including a needs analysis, stakeholder consultations, market research, technical and financial analysis as well as contract timeframes and sustainability. In addition, planning allows Contracting Authorities to decide which is the most relevant approach, whilst momentarily assessing the feasibility of combining and aggregating procurement requirements to attain economies of scale. Accordingly, it would be possible to enhance efficiency, maximise outcomes and optimise the contribution of the procurement function towards achieving the overall objectives of a project.

The crucial part of conducting Financial Analysis shall incorporate a detailed commercial and economic exercise (including a breakdown of all relevant costings), the results of which shall determine a realistic Estimated Procurement / Concession Value construed on current market prices.

The Estimated Value of a Procurement / Concession Procedure shall determine which regulations must invariably be adhered to. In fact, if such a value meets or exceeds the EU Financial Thresholds as set out in the relevant EU Directives<sup>1</sup>, the process to be adopted is more definite and rigorous since it is open to a wider stream of

---

<sup>1</sup> Malta has transposed the Procurement Package into national law as per legal notices hereunder:

- Directive 2014/24/EU – S.L. 601.03: Public Procurement Regulations – L.N. 352 of 2016
- Directive 2014/25/EU – S.L. 601.05: Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations – L.N. 351 of 2016
- Directive 2014/23/EU – S.L. 601.09: Concession Contracts Regulations – L.N. 353 of 2016

Economic Operators through the publication of the Procurement / Concession Call on the Official Journal of the European Union (OJEU). Ultimately, these thresholds reflect the level at which the EU Legislator deemed that cross-border trade would be more prominent. Nonetheless, non-domestic Economic Operators are at liberty to submit bids for any calls below the EU Thresholds.

However, in the transposition of the EU Directives into national law, due regard was also given to the development of structured and stringent regulations below the EU Financial Thresholds. In fact, the Procurement / Concession Regulations are composed of diverse strata of local thresholds; each such level has specific methods (and respective provisions) in order to acquire the necessary works / services / supplies.

### **Circumvention**

Accordingly, when calculating the Estimated Contract Value, Contracting Authorities are to keep in view the contents of Regulation 28<sup>2</sup> of the Public Procurement Regulations S.L. 601.03<sup>3</sup>.

It is particularly important to refer to the following sub-regulations:

Regulation 28(1): *'the calculation of the estimated value of a procurement procedure shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.'*

Regulation 28(5): *'the choice of the method used to calculate the estimated value of a procurement procedure shall not be made with the intention of excluding it from the scope of these regulations. A procurement procedure shall not be subdivided with the effect of preventing it from falling within the scope of these regulations, unless justified by objective reasons.'*

---

<sup>2</sup> Regulation for the Calculation of the Estimated Value of Procurement.

<sup>3</sup> For Utilities Procurement S.L. 601.05 (Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations), the corresponding regulation is 47. The Concession Contracts Regulations S.L. 601.09, specifically regulation 55 relates to the 'Use of an objective method in calculating the Estimated Value'.

Therefore, in line with sub-regulation 28(5), when calculating the Estimated Procurement / Concession Value, Contracting Authorities shall refrain from adopting any mechanism (including sub-division of Public Contracts) with the purpose of circumventing the provisions, in part or in whole, of the applicable Procurement / Concession Regulations. For avoidance of doubt, it is being reiterated that deliberate Circumvention of Thresholds is deemed as breaching the legislation.

The concept of intentionally splitting Procurement is not acceptable for any of the Local and EU Threshold Levels. Therefore, Contracting Authorities shall, as much as possible, if and as applicable, aggregate procurement to utilise the appropriate approach:

- Open Call for Quotations (rather than Direct Contracts or Petty Cash)
- Call for Tenders (rather than several Calls for Quotations)
- Call for Tenders channeled through the Department of Contracts or the Sectoral Procurement Directorate (rather than numerous Calls for Departmental Tenders)

With regard to Concession Calls, Contracting Authorities shall utilise an objective method in order to calculate the Estimated Value of a Concession Procedure. Accordingly, unless justified by objective reasons, a Concession Call shall not be subdivided with the intention of excluding it from the scope of the Concession Contracts Regulations.

### **Contact**

Contracting Authorities are encouraged to submit any queries to the Department of Contracts' Customer Care service on [info.contracts@gov.mt](mailto:info.contracts@gov.mt) or +356 21220212. Alternatively, guidance may be sought from the Office of the Director Sectoral Procurement on +356 22001905/8 or from the Sectoral Procurement Directorate. Contracting Authorities may also submit any queries to the Ministry's Procurement Section.

Anthony Cachia

Director General (Contracts)