

COMPENSATION SCHEME POLICY

Regulatory Mechanism vis-à-vis Claims related to Market Price Increases of Commodity Items utilised in Public Contracts involving Supplies.

Regulation 3 of Subsidiary Legislation 601.13¹ (published on the Government Gazette on 15 July 2022, through Legal Notice 203 of 2022) states that:

- (1) Requests for compensation shall be made to the relative contracting authority, and may be entertained by the Director of Contracts on condition that the public contract which refers to the request:*
- (a) shall have been signed on or before the 24 February, 2022;*
 - (b) was still in force on the date referred to in paragraph (a); and*
 - (c) refers to specific items listed in any policy document referred to in sub-regulation (2).*
- (2) The Director of Contracts may issue such policy documents as may be required from time to time, in order to facilitate and better regulate the compensation scheme referred to in these regulations.*

Accordingly, in line with the above, the Compensation Scheme Policy applies to Public Contracts originally signed (signature by the last party²) on or before 24 February 2022 and that were still in force on such dates. In addition, this policy mechanism shall be valid and applicable for Supplies including any relevant repetition³ (modifications) that were delivered as of 15 March 2022 and no later than 15 January 2023. Therefore, for avoidance of doubt, it is reiterated that any Supplies delivered prior to 15 March 2022 shall not be eligible for redress allowance under this Compensation Scheme Policy, and accordingly shall not be entertained.

Furthermore, Contracting Authorities / Entities shall submit the relevant Compensation Requests to the Department of Contracts by no later than 30 March 2023, thus, allowing an adequate period for claims received (in relation to deliveries made up to 15 January 2023) to be validated and approved by the relevant Contracting Authorities / Entities.

¹ S.L. 601.13 is titled 'Temporary Suspension of Certain Provisions relating to Public Procurement Regulations'.

² A contract shall take effect on the date on which it is signed by the last party.

³ Compensation Requests for Additional items [new rates] are not eligible under the Compensation Scheme Policy.

Accordingly, the Contracting Authorities / Entities shall stipulate a realistic time frame by which Contractors shall submit their claims to them allowing them enough time to carry out the necessary verifications. In the eventuality that a Contractor fails to submit a claim within the stipulated time frame, it shall be understood that the said Contractor has no claims to present and is automatically forfeiting one's right to claim for any applicable / potentially applicable compensation under this Compensation Scheme Policy.

Contracting Authorities / Entities are hereby being notified that pursuant to Regulation 5(b) of S.L. 601.13, the *'payment of such compensation shall be effected, and shall be borne solely, by the contracting authority'*.

Review of Public Contracts involving Supplies

The Department of Contracts has conducted a review of such Public Contracts vis-à-vis the abnormal Market Price Increases being experienced since the onset of the Conflict between Russia and Ukraine in February 2022, in comparison to the Pre-Conflict scenario. It was concluded that such contracts cover a vast list of Commodity Items that differ from one another both in substance and in magnitude. Accordingly, it is not possible to identify specific Categories / Sub-Categories and corresponding Percentage Cost Increases.

Therefore, the Monetary Compensations to be granted to Contractors to mitigate the financial losses being incurred in such Public Contracts shall be on a Contract-per-Contract basis, depending on the justification/s provided by the Contractors and validated by the respective Contracting Authority / Entity. Such percentages shall be applied on the Total Relevant Value (i.e. Original Value + Modifications Value [if applicable]) as per Contract Agreement.

Compensation Request Template

To assist Contractors and Contracting Authorities / Entities as well as to standardise procurement documentation, the Department of Contracts has formulated a generic top-level Compensation Request Template to be utilised for Claims in relation to Market Price Increases of Commodity Items utilised in Public Contracts involving Supplies. It is expected that any Compensation Request shall be presented in line with the official requirements of the said template.

Contractors shall substantiate their claims with all applicable Supporting Documentation, such as, but not limited to:

- Detailed, Valid and Cogent Justification for a Compensation Request
- Financial Analysis of the Public Contract involving Supplies

- Cost Implication of the Quantified Compensation (including all applicable Calculations and Arithmetic Breakdown) of each relevant Commodity Item
- Justification that attributes the Price Increase of each Commodity Item to External Market Forces that a diligent Economic Operator would not have been able to foresee or control
- Original Invoice (and any subsequent Invoices) of the Commodity Item as submitted by the Contractor's Supplier / Manufacturer
- Relevant Price Index⁴ (or another Economic Indicator) of each Commodity Item, based on an Independent Source (preferably National Statistics Office or equivalent) against which the claimed Percentage Increase is being compared

Further to the above, the Contracting Authority / Entity shall also submit to the Department of Contracts a 'Signed and Endorsed Declaration' by the Head of the Contracting Authority / Entity attesting the validity, accuracy and justification of the claims presented by the Contractors.

The Department of Contracts and / or the Contracting Authorities / Entities reserve the right to request that *inter alia* the Contractors submit additional Supporting Documentation for the correct implementation of the Regulatory Mechanism of the Compensation Scheme.

Applicability of the Compensation Scheme Policy

The Compensation Scheme shall be applicable to all Procurement Procedures pursued by all the Contracting Authorities / Entities⁵ within the Public Administration in relation to Public Contracts involving Supplies within the scope of the Public Procurement Regulations S.L. 601.03 and the Utilities Procurement Regulations S.L. 601.05⁶, specifically wherein the Contract Value exceeds Euro 10,000 excluding VAT.

⁴ The Price Index serves as an economic indicator that measures the inflation or deflation in the relative price changes of goods and services over a period of time. It allows for a comparison between the values for any two periods.

⁵ The Compensation Scheme Policy applies to all Contracting Authorities listed in Schedule 1,2,3 and 16 of S.L. 601.03. In addition, the said policy applies also to all Contracting Entities pursuing activities in line with S.L. 601.05.

⁶ Utilities Procurement refers to Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulation: S.L. 601.05.

Contracting entities in S.L. 60.05 are entities which: (a) are contracting authorities or public undertakings and which pursue one of the activities referred to in regulations 8 to 14; (b) when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in regulations 7 to 13, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority.

Regulations 7 to 14 relate to various activities as follows: Reg 7 – Gas and Heat. Reg 8 – Electricity. Reg 9 – Water. Reg 10 – Transport Services. Reg 11 – Ports and Airports. Reg 12 – Postal Services. Reg 13 – Extraction of Oil and Gas Exploration or Extraction of Coal or other Solid Fuels. Reg 14 – Tenders Comprising Products Originating in Third Countries

Modus Operandi: Submission of a Compensation Request

Contractors shall present their claims in relation to the aforementioned Market Price Increases of materials / commodity items utilised in Public Contracts involving Supplies to the concerned Contracting Authority / Entity, being the final beneficiary of the Procurement Contract. Thereafter, in line with Regulation 4 of S.L. 601.13, the *‘relative contracting authority shall transmit the request to the Director of Contracts only if it deems the request to be applicable, fair and reasonable in accordance with the provisions of these regulations, and the decision of the Director of Contracts shall be final’*.

To this end, the Department of Contracts is providing an overview of the Modus Operandi (including any applicable Terms and Conditions) to be adhered to when submitting the Compensation Request for the Director of Contracts’ consideration. Specifically, a dedicated email address to centralise the submission of such documentation for review has been set up. Thus, Contracting Authorities / Entities shall direct any communication in relation to this matter on compensations.contracts@gov.mt.

Step 1: Contracting Authorities / Entities shall vet, review and assess the Compensation Request (including all the submitted Supporting Documentation) and ascertain that it is fair and reasonable in accordance with the provisions of S.L. 601.13. The endorsement and validation by Contracting Authorities / Entities shall be substantiated by the Competent Body / Authority, namely the Head of the Contracting Authority / Entity.

‘Fair and reasonable’ would *inter alia* mean that value for money is still being achieved⁷ and that the compensation being requested is related solely to the actual Commodity Price. Accordingly, the Commodity Price shall exclude any related components such as profit, logistics, freight and other similar elements.

The Head of the Contracting Authority / Entity shall:

- Duly certify that the relevant Supply / Supplies have been delivered within the applicable timeframe; and
- Ascertain that the Request for Compensation in relation to the Commodity Item/s is valid, accurate and justified as well as correctly and adequately substantiated through the submitted documentation by the Contractor.

⁷ ‘Fair and reasonable’ would *inter alia* mean that value for money is still being achieved; for example, a better value for money cannot be achieved through the re-issue of a competitive call.

Step 2: Contracting Authorities / Entities shall submit the Compensation Request (including all the Supporting Documentation) via email to the Department of Contracts through compensations.contracts@gov.mt.

The subject of the email shall read: Compensation Request – Public Contracts involving Supplies. In addition, the salient parts of the Contract Title as well as the name of the Contracting Authority / Entity shall also be included.

The said Compensation Request must be channelled through any customary Quality Assurance processes including the respective Permanent Secretary prior to its submission to the Department of Contracts.

Step 3: Any approved Compensation Request shall be formalised through an Addendum to the Contract Agreement.