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EU's revision of the public procurement directives

Analysis of public procurement legislation in Malta submitted by The Daphne Caruana Galizia Foundation to Transparency International's feedback to the EU revision process.

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1. Current public procurement rules in Malta

For amounts of **no more than €5,000**, 3 quotations are needed, or publication on e-procurement platform, or direct contract at discretion of the Head of Authority.

For amounts that **exceed €5,000, but do not exceed €10,000**, quotations through the government's e-procurement platform or direct contract at the discretion of the Head of the Contracting Authority.

[LN 601.3](#) - 100. (1) Where the estimated value **does not exceed five thousand euro (€5,000)**, the supplies, works or services may be procured **departmentally** either after obtaining **a minimum of three (3) quotations or after the publication in the government's e-procurement platform or through a direct contract at the discretion of the Head of the Contracting Authority**, taking into consideration the amount involved, the urgency attached to the procurement or restrictions of choice and availability:

Provided that the Head of a Contracting Authority, listed in Schedule 1, **may delegate his authority in writing**, providing the reasons for such delegation, to a senior official of an entity forming part of the Contracting Authority, for the procurement by direct order of supplies, works or services, **where the value does not exceed five hundred euro (€500)**. However **the procurement under the above shall not exceed a total value of five thousand euro (€5,000)** during a period of one calendar year:

Provided further that **every six months**, the senior official, who receives such a delegation from the Head of the Contracting Authority, shall provide the Head with a full list of all procurement effected under this sub-regulation. The list must include the date of the purchase, the name of the economic operator, the nature of the purchase, the invoice number, the payment reference, and the value of the supplies, works or services:

(2) Where the estimated value **exceeds five thousand euro (€5,000), but does not exceed ten thousand euro (€10,000)**, the supplies, works or services may be procured departmentally either after obtaining quotations through government's e-procurement platform or through a direct contract at the discretion of the Head of the Contracting Authority or any person delegated by him in writing, taking into consideration the amount involved, the urgency attached to the procurement or restrictions of choice and availability.

Where it exceeds **€10,000, but less than the threshold of €143,000**, they must go through a tendering process.

In exceptional cases, where the estimated value exceeds **€10,000**, this may be done through direct contract, upon obtaining the prior written approval of the Minister who may delegate his authority in writing to the Permanent Secretary or any other senior official in his Ministry.

[LN 601.3](#) - **101.** Where the estimated value **exceeds ten thousand euro (€10,000)**, but does not exceed the threshold established under regulation 9(1)(a) [€143,000], the supplies, works or services may be procured after a departmental call for tenders.

[LN 601.3](#) - **103.** Supplies, works or services valued in excess of ten thousand euro (€10,000) may, in exceptional cases, be procured through a **direct contract** by any contracting authority upon obtaining the **prior written approval of the Minister** who may delegate his authority in writing to the Permanent Secretary or any other senior official in his Ministry;

Provided that contracting authorities listed under Schedule 3 shall obtain the prior approval of the Minister responsible for that contracting authority who may delegate his authority in writing to the Permanent Secretary, any senior official in his Ministry or to the Head of the contracting authority instead of the Minister.

The Director of the Department of Contracts' does not need to be involved if the estimated value of a public contract is less than €143,000:

[LN 601.3](#) - **9.** (1) Without prejudice to the applicability of the other provisions of these regulations, the procurement process of public contracts:

(a) the estimated value of which is **less than one hundred forty three thousand euro (€143,000)**, shall be issued, administered and determined by the contracting authorities on their own **without the need to involve the Director**;

(b) the estimated value of which equals or exceeds the threshold of one hundred forty three thousand euro (€143,000) shall be issued, administered and determined by the Director on behalf of the contracting authority;

When it comes to estimated values **exceeding €143,000**, these shall be issued, administered and determined by the **Director on behalf of the contracting authority**.

2. Abuse and issues with public procurement in Malta

Any public contracts exceeding €5,000 are to be listed on the Government Gazette every six months. This means that contracts of a lesser value go under the radar. Furthermore, the [Government Gazette](#) is very difficult to navigate, as it is published as a series of PDF documents, and the search engine does not work properly, thus barring one from accessing the necessary information.

[LN 601.3](#) - **111.** (2) Every six months the Head of the contracting authority **shall publish in the Gazette a full list of all departmental contracts** awarded by him with a value exceeding five thousand

euro (€5,000) and a list of all cases involving variations which exceed the original contract values by more than five per cent.

Apart from that, tenders whose estimated value equals or exceeds the threshold of €143,000 may be advertised on the Government Gazette, making it next to impossible for competitors to know about it and compete appropriately.

[LN 601.3](#) - 45. (1) Unless otherwise authorised by the Director, tenders issued with an estimated value which falls under regulation 9(1)(b) shall be **published through government's e-procurement platform**:

Provided that if the authority responsible for the tendering process does not make use of the government's e-procurement platform it shall advertise the tender on the Gazette.

9. (1)... (b) the estimated value of which equals or exceeds the threshold of one hundred forty three thousand euro (€143,000) shall be issued, administered and determined by the Director on behalf of the contracting authority;

Furthermore, direct contracts are often abused by authorities to split up big contracts into smaller ones not exceeding €10,000 - the threshold in law - and evade the tendering process. Direct contracts are possible for amounts **not exceeding €10,000**, under certain conditions.

[LN 601.3](#) - 103. Supplies, works or services valued in excess of ten thousand euro (€10,000) may, in exceptional cases, be procured through a **direct contract** by any contracting authority upon obtaining the **prior written approval of the Minister** who may delegate his authority in writing to the Permanent Secretary or any other senior official in his Ministry;

Provided that contracting authorities listed under Schedule 3 shall obtain the prior approval of the Minister responsible for that contracting authority who may delegate his authority in writing to the Permanent Secretary, any senior official in his Ministry or to the Head of the contracting authority instead of the Minister.

There have been many instances of these big contracts being split up, with even the National Audit Office pointing this out.

- [No contracts, standardisation in BCA's direct orders - NAO - The Shift News](#)
Building and Construction Authority (BCA) - The authority's procurement of at least €600,000 was "generally made by direct orders," which were "split into various amounts not exceeding €10,000 evidently to bypass procurement regulations," and ministry approval.
- [Gozo ministry's permanent secretary 'habitually' abusing procurement rules - The Shift News](#)

Gozo Ministry - “Between 9 December 2021 and 28 November 2022, the Gozo Ministry issued 37 direct orders towards a security services company, for a total value of €209,082 (VAT excluded),” the National Audit Office found.

- [Court agency 'consistently bypassed' procurement regulations - NAO - The Shift News](#)
Court Services Agency - The National Audit Office noted in a report how “public procurement regulations were consistently bypassed” by the agency. It found contracts which had expired or had been irregularly extended, payments for services not covered by a contract at all, and direct orders given to the same service providers.

3. Recommendations

- We recommend an appropriate e-procurement platform for all public contracts, whether they are direct orders, by public tender, negotiated procedure or any other mechanism, and that the Government Gazette isn't seen as an alternative to this desired system.
- We recommend a legal remedy whereby competitors can challenge public contracts awarded by direct order if there are grounds to show they were awarded in an uncompetitive manner, since this remedy is only possible during a tendering process. This remedy would be widely available to competitors within the field of said direct contract. Ideally, this would also be available to CSOs and affected communities, not just regarding “high-impact” projects.
- Furthermore, the issue of splitting up contracts must be dealt with, as it has been greatly abused. We foresee a legislative clause which creates a capping on the number of contracts that can be given to a particular supplier/company during the period of one calendar year.
- Public procurement legislation does not exist in a vacuum and must be combined with effective rules on lobbying and, especially, political financing. The few regulations with respect to the financing of political parties in Malta are unenforced, therefore it is no surprise that a pay-to-play market exists.
- In line with Transparency International's recommendation to allow for CSOs to submit complaints to challenge public contracts, we also recommend the creation of the role of Commissioner for Public Procurement, who would receive complaints from both competitors as well as CSOs and affected communities, and adjudicate accordingly. This would streamline the complaints process. Such an office should

also be able to accept complaints from competitors in relation to direct orders that do not go through a tender process, where abuse is evident.