

**REPORT ON FIRST ANNUAL MEETING OF TACU MEMBERS, 6<sup>TH</sup> – 7<sup>TH</sup> JUNE 2013, BRUSSELS.**

In this document I do not report who said what, unless this is necessary for understanding the significance of a point. All participants actively and constructively participated in discussions.

At the end of this report are attached:

- An important presentation by our Legal Adviser, Joseph Dalby; [Currently in separate pdf file as I cannot convert to Word]
- A list of the people who participated together with their email addresses.

**Structure of discussions/agenda**

It was agreed that TACU is at a critical stage in its development. There are not enough members to ensure its sustainability. Accordingly, it was agreed that rather than strictly following the original agenda, we would consider all the items under three main headings:

- How can we attract more members?
- What new services can we introduce and develop and what should we do with existing services?
- In particular, what services can we develop for the exclusive benefit of members?

These issues were the main focus of our discussions. However, we went ahead with the planned meeting with EC officials before getting to the core issues listed above.

**Meeting with EC officials**

Two members of EuropeAid's Legal Unit attended the meeting. We are grateful to Agneta Lindquist and Luis Araque de Juan for their participation.

- **Arbitration:** We asked about the status of our paper on arbitration submitted in August 2012. Due to changing staff responsibilities within the Legal Unit, it has been overlooked. TACU promised to send their proposal again. The EU representatives promised to respond. Joe Dalby suggested that the EU should make it mandatory for contractors to include a clause on arbitration in the contract with the expert. TACU would like to see that arbitration under EU contracts should by default be located in Brussels, unless the contractor and expert are in the same country and agree on arbitration in that country. TACU has forwarded names of potential (private) arbitrators in Brussels.
- **PRAG:** Article 13 of the General Conditions in PRAG deals with insurance and security. EuropeAid circulated a draft new version to stakeholders, including TACU, earlier this year. We responded at that time with a number of proposed amendments. EuropeAid is now obtaining external legal advice on a final version which will, if changed from the current version, take effect during 2014.
- **Security:** In the meantime, the security provisions are operative. Each Delegation assesses the (additional) security risk in country, but the EU does not have a system of gradual risk categories. If the Delegation decides there is an additional security risk (over and above what is considered 'regular', provisions for which should be covered from the regular fees/budget), it is the responsibility of the Contracting Authority to decide whether the location where the project will take place is a security risk. If so, this will be stated in the TOR and extra funds will be made available so that the Consultant can take the appropriate measures, utilizing Incidental Expenditure, on which no profit can be made. This rule came into effect on 1 January 2012, but participants wondered whether Brussels has followed up, as the ToR for a recent contract in the West Bank for example did not include anything about security. If an originally stable location suddenly turns dangerous, a provision known as Complementary Services can come into effect, which

allows additional funds up to 50 percent of the total project budget to be made available for unforeseen circumstances. Lindquist will look into the possibility to publish a list of additional risk areas online (to be regularly updated), so that experts can inform themselves. TACU will monitor ToRs on this issue.

- **Complaints:** If experts want to make a complaint about any aspect of their assignment and cannot get a suitable response from the CA/EUD they should contact the relevant geographic unit in Contracts and Finance within EuropeAid in Brussels.
- **Insurance:** Lindquist mentioned that “it is crystal clear that individual experts working for a contractor are not subcontractors and cannot be expected to take out their own insurance”. However, as this is an issue that is difficult for experts to enforce, the TACU legal adviser suggested making it mandatory for the contractor to mention this in the contract with the expert, or provide documentary evidence of insurance as part of the tender dossier (without which a contract cannot be signed).
- **Global pricing contracts:** In the past global pricing (lump sum) contracts were used for studies only, but are now also used for service contracts if clear outputs can be defined. The ToR for these contracts still contain a requirement for a Statement of Exclusivity (SoE), while it had been agreed that this would not be the case. TACU will provide examples of ToRs for global pricing contracts that include an SoE.
- **Removal and replacement of experts:** the EU representatives agreed with the TACU members that requests for replacement of key experts by the beneficiary are a thorny issue, often based on personality clashes, and therefore difficult to deal with. TACU members noted that often interviews are done with replacement candidates, but not with original experts. Lindquist mentioned that the latter can and should be done. A request by an EUD for more CVs for a TA replacement when an equivalent CV is presented by the contractor, is not necessary, but also not illegal. They are free to do so.
- **Repeated questions to the EC representatives about experts’ rights when in dispute with contractors** were given the same answer: such matters are solely between the experts and their contractors; the Commission will not get involved. Please see Joe Dalby’s presentation at the end of this report for more on this critically important matter.

Several other issues that we raised were considered outside the competence of the Legal Unit and we were referred to other parts of EuropeAid. See later for a discussion of this matter.

### **TACU discussions**

How can we attract and retain more members?

A core problem of TACU’s activities (or any union’s) is that many achievements fall in the category of public goods, meaning that also non-TACU members can/will benefit from them (even without ever knowing that TACU exists or was responsible for the improvement of labour conditions). Examples are changes in the PRAG or the SoAE. However, in some cases one has to be informed to be able to benefit. And that is where TACU comes in. Another economic law was also cited: if you want to create a market for your product, you have to create demand. This means giving potential members something for free (a teaser), but make them pay if they want more. The price mechanism (lower price will create more demand) was only briefly discussed, as all members present thought the present membership fee was reasonable.

We concluded that there should be two complementary strands to our strategy: EXCLUSIVITY and ACTION DRIVEN.

Exclusivity means that we will concentrate on developing services that are exclusive to members. We start from the observation that independent experts are experts without rights. They are dissatisfied, frustrated and angry. We will find ways to help them overcome these feelings by providing them with the protection and support they need. To be an expert is to be independent and unique. One is a member of an elite, let us call it, a Corps d'Experts. TACU will help experts to turn their feelings of isolation, frustration and dissatisfaction into a feeling of strength and pride. They will also know that wherever they are TACU will always be there to support them. We will promote TACU as a 'community of experts', where experts can exchange knowledge and get relevant, commercial information.

As TACU grows, so more and more exclusive services can be developed and delivered. Over the next two years, our priorities will be:

- A knowledge base, e.g. a comprehensive account of how EU projects are identified, developed and launched – who does what behind the scenes;
- A glossary of terms for our industry;
- A members handbook (names and details of members);
- Expert contract checklists and advice – the “dos” and “don'ts” of agreeing a contract with a contractor;
- Direct support in negotiating individual contracts;
- Information on current fees and fee rates;
- A rating system of contractors;
- Legal services;
- Members-only section of TACU website and decreasing reliance on LinkedIn for discussion groups;
- Coaching of young/new experts;
- Other personal services as needs emerge.

Promotion of these services will attract new members.

Action means that TACU could initiate another campaign (like the SoE&A campaign) around an issue that is very much alive among potential members. In order to identify the topic that generates most interest, we will closely monitor discussions in relevant discussion groups on LinkedIn and start a number of open discussion groups among the international community of experts on LinkedIn aimed at collecting a large range of “horror stories” covering, inter alia:

- Low fees, late payment of fees, non-payment of fees;
- The difficulty of getting assignments versus the ease with which one can be fired from them;
- Our weak legal position;
- Body shops and rogue contractors;
- The increasing emphasis by contractors on low prices rather than high quality.

According to Joseph Dalby late or non-payment tops the list of legal issues that he is requested to advise on. Henry suggested a 2-year campaign on this issue, including description of cases, blacklisting of companies, arbitration possibilities, check-lists for prevention of payment problems and guidance on how to negotiate contracts.

### **Roles and responsibilities**

We have discussed nearly all the above issues at some time or other over the last two years or so. What has changed now is that we have a committed Advisory Board that is ready to take on the responsibility of dealing with them in cooperation with Henry and Stephen. With five AB members (plus a number of other volunteers) we have effectively trebled or more TACU's “human resources”.

We have allocated roles as follows:

1. Overall roadmap for next two years: Henry and Stephen;
2. Communications strategy and implementation: Maria Paalman and Stephen:  
Develop a communications strategy and plan, including:
  - attracting new members, including
  - Description of different subgroups of potential members
  - Assess effective communication channels to attract different subgroups
  - Formulate key messages
  - Promotional activities via social and conventional media;
  - Campaign on specific issues, such as late-or non-payment
  - Retaining current members
  - On-time and effective communications with current and potential members;
  - Monthly (or more frequent) newsletters;
  - Compile members' handbook (list of all members, contact details, specialist areas, etc).
  - Internal and external communications with contractors, contracting authorities (in particular EU), national networks of consultants, media etc.;
  - Media relations;
  - Compile members' handbook (list of all members, contact details, specialist areas, etc).
3. All IT-related issues: Coert van der Burg and Tony Barry:  
TACU Wiki;
  - Knowledge base development;
  - Ranking of contractors;
  - Secure members-only section of website;
  - Website redesign (partial);
  - Video services (preparation of instructional videos for members);
  - Ensuring TACU comes near the top in all Google searches (and other search engines) when experts search for any key words relevant to our activities.
4. Robert Peacock and Michael Gericke:
  - Code of conduct;
  - Contract issues;
  - Fees and rates
5. Lobbying European Parliament: Henry and Stephen;
6. Revised lobbying strategy towards EuropeAid/EC: Henry and Stephen;
7. Internal organisational/admin strengthening: Henry and Stephen;
8. Legal initiatives: Joseph Dalby, supported by Jan de Voogd and Catherine Hall.

Other participants of the meeting have volunteered their services in a number of areas. For instance, Dirk Blink has volunteered to help with the code of conduct, as has Peter Ton, who has forwarded NEDWORC's own code of conduct as an example. Ad van Herk is helping over the European Parliament; etc.

These activities will be implemented over the two-year period from June 2013 (now) to June 2015.

Milestones include:

- Start promotional campaigns in September 2013
- Procedures for rating contractors to be operational in September 2013;

- Horror stories collected and presented in a “Black Book” in October 2013;
- Present findings and new recommendations to EC and EP in November 2013;
- All other services in place in January 2014.

### **European Parliament**

We were able to arrange a meeting with a senior official (not MEP) within the EP. This was very useful. Previously we had believed that the EP’s Development Committee was the most appropriate body to target, though efforts to establish contact were fruitless. We now understand that the more relevant body for addressing our primary concerns with EuropeAid is the Budgetary Control Committee (BCC). Apparently, this committee has far stronger teeth and is a great deal more respected by the Commission than the Development Committee.

The official who briefed us texted the Vice-Chairman of the BCC (a Belgian MEP), who responded that he would be interested in meeting us to discuss our concerns. Henry and Stephen will follow up on this.

### **EuropeAid**

Until now our contacts with EuropeAid have been almost entirely with the Legal Unit. This reflects the essentially legal nature of all our proposals, starting with our campaign to ban the SoE&A. However, we now intend to broaden our dealings to include the Evaluation Unit and to get more involved in discussing policy and operational issues at Deputy Director-General level. We have good contacts for these.

### **Attendance**

All the TACU members were happy to include their email addresses. We have deliberately kept Joseph Dalby’s address off the list, however, as he already gets a huge amount of mail redirected to him by Henry and Stephen and we need to provide some protection from time-wasting queries which others can deal with.

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Prepared by Stephen Dewar and Maria Paalman, June 2013

**CONFIDENTIAL TO TACU MEMBERS ONLY  
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TACU First Annual Members' Meeting  
6 June 2013  
Legal Assistance Provided By TACU and General Legal Issues  
Joseph Dalby**

1. Experts routinely have exposure to the procurement procedure and EU TA contracts, being:
  - the Financial Regulation and PRAG and the SoEA
  - the main contract including ToR, General Conditions,
  - the personal contract with the contractor
2. And issues arising therefrom:
  - Compliance with the terms of references
  - Removal and replacement of experts
  - Amendment of the main contract
  - Non-payment
3. What remains is:
  - little sight or knowledge of the consortium contract
  - the full ToR documentation (at least prior to SoEA/commencement of project)
4. Meeting with EuropeAid officials was instructive for the statement: “The Commission will never have a contractual relationship with experts” – a statement not just of interpretation or principle but, it would appear, of policy.
5. An example of that approach was apparent in this morning's debate with DG EuropeAid. e.g. ensuring the contractor's obligation to provide proof of insurance is complied with; who would provide the arbitration service to resolve disputes between expert and contractor - although EU officials appears intellectually open to considering the introduction of arbitration clause.
6. EU appears unwilling to crossing the rubicon of dictating the terms of contract between expert and contractor, even in a small way. That might be a bridge too far, but if it is (or is already) crossed in any shape or form then that is/will be establish a precedent to make further inroads into this area.
7. Therefore, for the time being, experts forced to find lacunae and principles in the General Conditions that favour their position in relation to both contractor and contracting authority and to follow best practice in their contractual negotiations with the contractor.
8. Experience from cases to date is that holding the CA to account at the behest of experts is a tough nut to crack.

**Focus on issues that have arise to date.**

***Removal of experts***

9. Much time consumed on this issue, as the though process has been invested in a complaint to the European Ombudsman (Complaint 552/2013/DK) about the power to replace under Article 17. The language is wooly, and probably turns on whether experts are personnel or a staff member. Article 17 refers to member of staff, and paying the replacement member not less then the replaced member, and only refers to expert once in Article 17.4 and is only predicated on absence. Whereas the mechanism to replace an expert in Article 20 refers always to an “expert” and not a member of staff. Indeed in one case before the EO the Commission submitted that an expert can only be replaced, following the contract's signature, in case of death, illness, accident or for other reasons beyond the consultant's control. I do not know how they can get round that.

10. I consider that the Commission has simply failed to adequately provide for the replacement of experts in the General Conditions.

**Non-payment**

11. That is the catalyst for many thoughts but the main problem is non-payment of experts by contractors.
12. As we know, the Commission does not want to know about disputes. But it is myopic in my opinion for them to defer to the contractor when the EU has paid the contractor for the services performed by the expert. There is I think a political / moral if not strictly legal basis to press for payment through the Commission.
13. I have been hunting around for an obligation on contractors to pay experts. I have been directed to the standard ToR. Indeed there is such an obligation: *"It must also transfer funds as necessary to support their work under the contract and to ensure that its employees are paid regularly and in a timely fashion"*
14. The ToR usually form part of the contract with the expert and therefore something can be relied upon directly. If an expert can hold the Commission to its ToR then that obligation must be enforceable. One could couple the obligation to pay and the power of the CA to make administrative orders to direct the contractor to act in a certain way. Article 7.3 provides that *"The Consultant shall comply with administrative orders given by the Project Manager."*
15. The question then becomes is the Commission obliged to issue an administrative order in the event that it becomes aware and accepts that the contractor is not acting in compliance with the Terms of Reference. If so then in breach of the obligation the Commission is accountable for any loss arising from its maladministration. That would present a very satisfactory basis to enforce payment.

**Standard Contracts**

16. Of course some self-help would go a long way. The rush to contract on the contractors standard terms invariably leads to regret when the relationship goes south.
17. It would be useful to have a standard contract, but better to have a number of standard clauses to include and or a list of types of clauses to avoid.
18. Of course arbitration clauses, non-exclusive jurisdiction clauses, avoidance of the general conditions and Tor not expressly written (not just referred) into the contract. I would be happy to collate a compendium of useful clauses if sent to me.

END

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