



## **Request for Proposals for legal research & advice for OCP spin-out from fiscal sponsor**

**v1.0**

**Date: 18 November 2019**

The Open Contracting Partnership (OCP) is accepting proposals from law firms who can advise on leaving fiscal sponsorship and operating as an independent tax-exempt organization.

**Proposals should be submitted to [kfrauscher@open-contracting.org](mailto:kfrauscher@open-contracting.org) no later than 15th December 2019. Thank you.**

### **Background**

The Open Contracting Partnership ([www.open-contracting.org](http://www.open-contracting.org)) is a silo-busting collaboration across governments, businesses, civil society and technologists to open up and transform government contracting worldwide. We bring open data and open government together to make public contracting reforms more agile, more impactful and more durable.

OCP was spun out of the World Bank in 2015 and is now an independent not-for-profit program based in Washington D.C. that is fiscally sponsored by Fund for the City of New York (FCNY). OCP works in over 30 countries around the world supporting systemic reforms, helping innovations jump scale and fostering a culture of openness about the policies, tools, data, and innovations needed to make sure public contracts give better results for citizens everywhere.

OCP is a high performing team of 18 people based in DC (5 people), it also has two smaller hubs in UK (3 people) and Colombia (3 people) and staff based in Africa (1), Europe (2), Latin America (1) and Canada (2).

The Fund for the City of New York (FCNY), a tax-exempt organization under 501(c)(3) of the Internal Revenue Code (IRC), is currently serving as the direct fiscal sponsor of OCP. Under this arrangement, OCP is an integrated, but autonomous project, of FCNY. OCP has its own Executive Director who is accountable to FCNY for the program's governance and financial management, and to an independent Advisory Board for the program's strategy and impact.

FCNY confers its 501(c)(3) tax exempt status and certain administrative benefits onto OCP so that it can receive grants and tax-deductible contributions. FCNY directly receives donations and grants for OCP and employs OCP's staff. Due to the employee-employer relationship, FCNY

is both fiscally and legally liable for the actions of OCP. Therefore, FCNY must exercise significant control over OCP's actions and funding to safeguard itself from legal liability and losing its 501(c)(3) status. FCNY charges OCP a 9 percent service (or management) fee on all expenditures.

FCNY uses a Global Employer Organization (GEO) and a foreign subsidiary to hire employees on behalf of OCP in Canada and UK respectively. Appendix 1 outlines the services being provided by FCNY to OCP.

There is a sponsorship agreement between FCNY and OCP that supports this and sets out the relevant responsibilities of both parties which is attached in Appendix 2.

## **Objectives and Procedures**

OCP needs to determine whether leaving fiscal sponsorship is beneficial to the mission and purpose of the organization (Phase 1). If so, OCP would like to present a detailed plan to FCNY and OCP's own Advisory Board for this spin-out. If the plan is approved, we would set in motion the legal processes for spin-out in Phase 2 and then proceed with Phase 3 if approved.

Leaving fiscal sponsorship could be beneficial for OCP as a result of:

- Control and visibility over funds
- Control over human resources administration and employment benefits
- Efficiency through using administration technologies and simplified reporting tools such as expense management and invoice tracking apps not supported by FCNY;
- Cost savings on overhead and thus better potential use of donor funds.

FCNY is very supportive of this development as organisations incubated by it regularly spin-out when they grow to a certain size. Determining whether to proceed with separation from fiscal sponsorship will be decided by the OCP Advisory Board in two phases as follows.

### **Phase 1**

Initially, during phase 1, OCP would like to commission a law firm to conduct a feasibility study that outlines legal implications of leaving fiscal sponsorship. Through this process, the attorneys should determine the following for an independent entity outside of FCNY:

- Feasibility of US tax exemption and type of structure
  - This should include a preliminary public support test and measuring lobbying activity test
- Confirm state of registration
- Study and determine international requirements and implications:
  - UK
    - FCNY employs OCP's UK staff (including its Executive Director) through a subsidiary called the International Centre for Civic Innovation (ICCI) UK Ltd. This is managed by a corporate secretary known as European Business Services (EBS) Ltd. ICCI UK LTD also employs other staff members of FCNY outside of OCP. What set-up is needed in the UK to ensure that an independent OCP could continue to employ UK team members and not be liable for UK taxes such as V.A.T.?

- o Canada
  - FCNY is currently using a global employment organisation (GEO) known as TMF Ltd to hire employees in Canada. Would a corporate subsidiary be required or can we continue to use a GEO?
- Governance structure
  - o Fiduciary responsibilities of Board of Directors (and any requirements to have U.S. Nationals on the Board)
  - o Structure and roles of any separate Advisory Committee or Advisory Board
  - o Confirm no private inurement, private benefit, conflict of interest, or other common obstacles with establishing a tax-exempt organization.
- Consequences and limitations of independence on raising revenue
  - o Will our contract revenue be subject to Unrelated Business Income Tax (UBIT)?
  - o Is there work that we can't do?
- Impact of our current fiscal sponsorship agreement with FCNY on separation
- Transfer of funds from FCNY to OCP

At the end of Phase 1 and in good time for our Board meeting in March 2020, we would want our lawyers to provide:

- A written report covering the above items and any other matters that arise during the course of the feasibility study.
- An indication of which items in Phase 2 would need legal support and a budget for provided that support along with a likely timeline for the separation.

## **Phase 2**

Based on the results in Phase 1, OCP's Advisory Board will determine whether to proceed with leaving fiscal sponsorship. If it's determined that this is the best course of action, then OCP would continue with the following:

1. Apply for tax exempt status and set up separate legal entity in the US. Acceptance of the tax-exempt application can take anywhere from 2-12 months.
  - a. Draft bylaws
  - b. Articles of Incorporation
  - c. Form 1023 with IRS
  - d. Employer Identification Number
2. Register as non-profit corporation in an appropriate U.S. State.
3. Register all tax accounts in Washington, DC or another appropriate jurisdiction.
  - a. SUI and Paid Family Leave
  - b. Income tax withholding
  - c. Personal Property
4. Open bank account (based on results in Phase 1)
5. Begin international process
  - a. UK: Form a new subsidiary or transfer ICCI stock to OCP or engage GEO for payroll set up.
  - b. Canada: Form a new subsidiary or engage GEO for payroll set up.

## **Phase 3**

Once the legal process has been finalized, we enter the execution phase. This is when the accounting systems, HR policies, and other administrative policies and procedures will be implemented. Below is a list of the key administrative items which we do not think needs legal support but please correct us or advise us on any legal implications thereof or if we have missed anything.

1. Accounting and HR
  - a. Engage accounting firm and/or HR firm
  - b. Set-up Quickbooks Online using the new account
  - c. Set-up payroll and HR system
    - i. Adding all employees to the new system
    - ii. Linking with Quickbooks Online
    - iii. Linking state tax accounts to payroll system
    - iv. Set up health insurance deductions
    - v. Set up 403(B) deductions and employer contributions
    - vi. Integrate PTO policy
    - vii. Employee Handbooks
  - d. Set-up 403(B) retirement contribution system and policy
  - e. Implement streamlined accounts payable policies and procedures using Bill.com or other similar software
    - i. Set-up payment processing for international vendors, if not supported by the Accounts Payable software
  - f. Implement streamlined employee expense reporting policies and procedures using Expensify or other similar software
  - g. Coordinate with international payroll providers to integrate payroll processing into accounting workflows of the organization
  - h. Set-up health insurance for employees through DC Health Link (DC based organizations are required to purchase employer plans through DC Health Link).
  - i. Prepare annual form 990
  - j. Hire additional independent accounting firm for annual audit
2. Other Insurance
  - a. General and Professional Liability
  - b. Directors' and Officers' Liability for the Board and Executive
  - c. Cyber security insurance
  - d. Workers Compensation
3. Other Administrative Work
  - a. Update vendor contracts
  - b. Update all legal documents that contain reference to FCNY
  - c. Update grant agreements

## **Roles & Responsibilities**

A qualified team should be commissioned to manage the different phases of this project. The team will be as follows:

- Law firm
  - o Requirements
    - The firm or legal team should be well versed in nonprofit law

- The firm should have experience with fiscal sponsorship spin-offs
  - The firm should have proper contacts and willingness to study implications in UK and Canada as outlined in Phase 1 of the project
- Advisory Board will approve the separation process at each phase. Between phases, the Advisory Board's Executive Committee will monitor progress and be available for consultation. Its members are: Sally Hughes, Chair; Mukelani Dimba, Deputy Chair; and Alan Detheridge, Treasurer.
- OCP's existing executive team will implement the Advisory Board's decisions and oversee legal and administrative procedures necessary to execute that plan.
  - Gavin Hayman, Executive Director, OCP
  - Kathrin Frauscher, Deputy Executive Director, OCP
  - Raffi Yousefian, CFO of OCP/Managing Principal of RY CPAs

## Appendix 1:

The following outlines the current services being provided by FCNY to OCP under the fiscal sponsorship agreement:

1. Tax-exempt status under 501(c)(3) of IRC
2. Payroll Processing
  - a. FCNY deploys the ADP platform to administer and process payroll for OCP
  - b. FCNY deploys the TMF Group to administer and process payroll in Canada
    - i. According to FCNY, they are the current employer of the Canadian employees. It is unclear whether they have a Global Employment Organization (GEO) relationship with the TMF Group, but this will need to be determined. The GEO relationship is similar to that of the Professional Employment Organization (PEO), in which you lease employees from a company that is already established in that jurisdiction.
  - c. FCNY deploys EBS firm to administer and process payroll in the UK
    - i. EBS has registered a for-profit subsidiary, the International Center for Civic Innovation (ICCI), in the UK, that operates solely for the purposes of a cost or payroll processing center for OCP.
3. Human Resources and Benefits
  - a. Provision of Employee Benefits
    - i. Retirement
    - ii. Medical
    - iii. Dental
    - iv. Life Insurance
    - v. Disability
    - vi. NY Paid Family Leave
      1. Employees who take Paid Family Leave will receive 55% of their average weekly wage (AWW), capped at 55% of the New York State Average Weekly Wage. Your AWW is the average of your last eight weeks of pay prior to starting Paid Family Leave. The maximum weekly benefit for 2019 is \$746.41.
      2. Up to 10 weeks
    - vii. Timesheets
  - b. Regulatory compliance (ERISA, FLSA, EEO, and other federal and state regulations)
4. Insurance Coverage & Risk Management
  - a. General and Professional Liability
  - b. Director's and Officer's Liability for Board
  - c. Workers Compensation
  - d. Property
  - e. Automobile (if applicable)
  - f. Guidance on a host of risk management matters
    - i. Assumption of liability on contracts
    - ii. Intellectual property
    - iii. Additional insurance needs

5. Compliance

- a. FCNY's 990 filing
- b. FCNY's state charitable organization annual returns (NY and other states if applicable)
- c. FCNY's registration with and reporting to NYS Commission on Public Integrity and the NYC Lobbying Bureau
- d. FCNY's NYS Education Department waiver allowing the provision of certain professional service (social work, etc.)
- e. FCNY's NYC Vendex and NYS Vendor Responsibility filings

**Appendix 2:**

[Link to the Sponsorship Agreement between FCNY and OCP](#)