

# PUBLIC PROCUREMENT GUIDELINES FOR GOODS AND SERVICES

Version 2: Issued January 2019



Oifig um Sholáthar Rialtais  
Office of Government Procurement



An Roinn Caiteachais  
Phoiblí agus Athchóirithe  
Department of Public  
Expenditure and Reform



These guidelines are dynamic in nature and will be subject to amendment and review periodically. Updated versions will be published from time to time on the Office of Government Procurement's website [www.ogp.gov.ie](http://www.ogp.gov.ie).

These guidelines replace the following previously issued guidelines in respect of goods and services:

- ▶ “Public Procurement Guidelines - Competitive Process” issued by the NPPP Unit of Department of Finance in 2010
- ▶ “Public Procurement Guidelines - Competitive Process” issued by the NPPP Unit of Department of Finance in 2004
- ▶ The “Green Book” on Public Procurement issued by the Department of Finance in 1994

The guidelines are not intended as legal advice or a legal interpretation of Irish or EU law on public procurement. Legal or other professional advice should be obtained in relation to large or complex projects, or in relation to contracts with non-standard features, or if there is any doubt about the correct procedures to be followed.

Separate policy and guidance relating to works and works related services is published on the [Construction Procurement Reform website](#) where the Capital Works Management Framework (CWMF) provides a suite of best practice guidance, standard contracts and template documents.

Version 1 of National Public Procurement Guidelines for Goods and Services was published in July 2017. Version 2 of these guidelines was published in January 2019, this version takes account of the revised EU procurement thresholds and incorporates a number of minor amendments and additions to the text.

# FOREWORD



Procurement is a key element of the Government's Public Service Reform Programme. The State spends approximately €8.5 billion on goods and services annually and it is essential that this money is spent in a way that achieves maximum value for money and a sustainable delivery of public services for the taxpayer. I welcome the publication of these guidelines as another important step in underpinning the Government's goal of increasing the professionalisation of public procurement. The guidelines are aimed primarily at public contracting authorities. However, suppliers interested in doing business with public bodies should also find them useful. Public procurement needs to be conducted in a manner which is fair and transparent and affords an equal opportunity for all suppliers to compete. This is the key message underlying these guidelines.

**Paschal Donohoe T.D.,  
Minister for Finance and Public Expenditure and Reform**



I welcome these guidelines and I would like to acknowledge the contribution of my predecessor Minister Eoghan Murphy to their publication. The guidelines follow the transposition of new EU Directives on public procurement into Irish law. These new rules usher in important changes on how public procurement will be conducted across Europe in future years. Some of the more significant changes include: shorter deadlines for submitting tenders; the phased implementation of electronic procurement; a new “light-touch” regime for health, social, educational and cultural services and the use of life-cycle costing to promote sustainable procurement. A number of specific provisions are aimed at ensuring that SMEs are given an equal opportunity to compete with larger companies, including reduced turnover requirements and lotting arrangements. As the Minister of State with a specific responsibility for public procurement, I hope that these guidelines will foster and encourage improved best practice, standardisation and consistency among practitioners and help ensure that public procurement is conducted in a manner which is business friendly.

**Patrick O'Donovan T.D.,**

**Minister of State at the Department of Finance and the Department of Public Expenditure and Reform with special responsibility for Public Procurement, Open Government and eGovernment**



As Chief Procurement Officer in the Office of Government Procurement, I would encourage all involved in public procurement, either directly or indirectly, to become familiar with these guidelines. They are intended to serve as a toolkit for practitioners, and a general reference document for suppliers. They have been written in plain language with a view to providing a clear appreciation of the rules and best practice attached to the various stages of the procurement process from specification, through to selection and award stages, and through to the contract management stage. The guidelines form part of the OGP National Procurement Policy Framework which consists of 5 strands: Legislation (Directives, Regulations); Policy (Circulars etc.); General Guidelines; the Capital Works Management Framework; and detailed technical guidelines, template documents and notes that issue periodically. The guidelines, while not intended to be interpreted as legal advice, will facilitate Public Bodies in meeting their corporate governance requirements in relation to procurement.

**Paul Quinn,**  
**Chief Procurement Officer,**  
**Office of Government Procurement**

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# INTRODUCTION



## DEFINITION

1. Public procurement refers to the process by which public bodies purchase works, goods or services from suppliers which they have selected for this purpose. It ranges from the purchase of routine goods or services to large scale contracts for infrastructural projects and involves a wide and diverse range of contracting authorities.

## PURPOSE OF GUIDELINES

2. The purpose of these guidelines is to promote best practice and consistency of application of the public procurement rules in relation to the purchase of goods and services. The guidelines form part of the National Procurement Policy Framework which consists of five strands:
  - ▶ Legislation (Directives, Regulations)
  - ▶ Policy (Circulars etc.)
  - ▶ Capital Works Management Framework
  - ▶ General Procurement Guidelines
  - ▶ More detailed technical guidelines, template documents and notes issued periodically by the Policy Unit of the Office of Government Procurement (OGP)
3. The guidelines replace previous guidelines published by the Department of Finance and take account of the 2014 Directives, as implemented in Ireland. They set out the procurement procedures to be followed by Government Departments and State Bodies under national and EU rules. The guidelines are to support contracting authorities, including the OGP, the four key sectors (Health, Education, Local Government and Defence), individual Departments, Offices, commercial and non-commercial State bodies, and private entities which are subsidised 50% or more by a public body, when awarding contracts for goods and services.

## GOVERNMENT PROCUREMENT REFORM PROGRAMME

4. Procurement is a key element of the Government's Public Service Reform. The State spends approximately €8.5bn every year on goods and services. In this context, it is essential that the Public Service operates in a co-ordinated and efficient way.
5. The OGP commenced operations in 2014 and, together with four key sectors (Health, Defence, Education and Local Government), has responsibility for sourcing goods and services on behalf of the Public Service. In addition, the OGP also has responsibility for procurement policy and procedures for the entire Public Sector.
6. Government Departments and State Bodies are encouraged to consult with the OGP prior to going to market for goods and services in excess of €25k.

## EU PROCUREMENT DIRECTIVES

7. To create a level playing field for all businesses across Europe, EU law sets out minimum harmonised public procurement rules. These rules govern the way public authorities and certain utility operators purchase goods, works and services. The rules are set out in three principal EU Directives which are transposed into national legislation and apply to tenders for public contracts whose monetary value exceeds a certain threshold. For tenders of lower value, national rules apply. Nevertheless, these national rules also have to respect the general principles of EU law.
8. The current EU Directives are:
  - ▶ Directive 2014/24/EU on public procurement (goods, services and works)
  - ▶ Directive 2014/25/EU on procurement by entities operating in the Utilities Sector, i.e. the water, energy, transport and postal services sectors
  - ▶ Directive 2014/23/EU on the award of Concession contracts
9. The EU Procurement Directives were transposed into Irish Law in 2016 and 2017 by way of the following regulations: S.I. No. 284/2016 (the “2016 Regulations”); S.I. No. 286/2016 (the “2016 Utilities Regulations”) and S.I. No. 203/2017 (the “2017 Concessions Regulations”).
10. Much of the content of the EU Procurement Directives broadly reflect the pre-existing framework of procurement law (which was set out in a now repealed set of EU Directives dated 2004) and will, therefore, be familiar to practitioners. In line with previous practice, the 2014 Directives incorporate important procurement principles emerging from the case law of the Court of Justice of the European Union over the intervening period since 2004.
11. The public procurement rules are seen as an important policy instrument to promote and support the Europe 2020 strategy for smart, sustainable and inclusive growth by increasing the efficiency of public spending, reducing “red tape” facilitating the participation of SMEs, improving the conditions for business to innovate and keeping procurement markets open EU-wide.

## DYNAMIC GUIDELINES

12. These guidelines are dynamic in nature and will be subject to amendment and review periodically. Updated versions will be published from time to time on the Office of Government Procurement’s website [www.ogp.gov.ie](http://www.ogp.gov.ie).

# KEY PRINCIPLES



## EU TREATY

13. The rationale for the EU public procurement regime is to open up the public procurement market and to ensure the free movement of goods, services and works within the EU. This is reflected in primary EU Law where the EU Treaty on the Functioning of the European Union promotes the fundamental principles of non-discrimination, free movement of goods and services and freedom of establishment. These principles are reinforced in secondary EU law where the EU Directives on public procurement set out precise rules and procedures designed to ensure equal treatment, mutual recognition, proportionality and transparency in the awarding of public contracts. The EU Directives on public procurement are transposed into national law by Member States which in the case of Ireland is implemented by way of Statutory Instrument.
14. Even in the case of procurement which might not be subject to the full scope of the Directives, the EU Commission and the Court of Justice of the European Union (“CJEU”) have ruled that the Treaty principles must be observed. CJEU case law implies a requirement to publicise contracts to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

## ACCOUNTABILITY

15. Procurement transactions and decisions must in all respects be fair, equitable and ensure value for money. Contracting authorities must be able to justify decisions made and actions taken. Procurement practices are subject to audit and scrutiny under the Comptroller and Auditor General (Amendment) Act 1993, and the Local Government Reform Act 2014, and Accounting Officers are publicly accountable for expenditure incurred. Contracting authorities are responsible for establishing arrangements for ensuring the proper conduct of their affairs, including conformance to standards of good governance and accountability with regard to procurement.

## SEPARATION OF DUTIES

16. In organising the procurement function, management in contracting authorities must ensure appropriate separation of duties within the procurement cycle. For example, insofar as possible, ordering and receiving goods and services should be separate from payment for goods and services.

## RISK ASSESSMENT

17. Contracting authorities should engage in risk assessment and management in procurement where:
  - ▶ the value of the purchase is high
  - ▶ the procurement process is complex
  - ▶ adverse consequences could significantly affect a public body’s operation
  - ▶ delivering the public body’s core services to the community is significantly affected
18. When risk is being considered with respect to procurement, contracting authorities should ensure that risk is assessed in relation to each category of goods and services with reference, for example, to the following factors:



- ▶ the nature of the supply market, e.g. does it favour the buyer or the supplier
- ▶ probability of supply failure
- ▶ impact on the organisation of supply failure
- ▶ strategic importance to the organisation

## RECORD KEEPING

19. Appropriate records should be maintained by the contracting authority throughout the purchasing process and beyond for a minimum of three years. Records should provide an audit trail of the reasons for making a particular procurement decision. The type and detail of the record keeping will depend on the value of the procurement and the complexity or sensitivity of the particular purchasing issue. eTenders provides a detailed audit trail of the procurement process from Contract Notice through to Contract Award Notice. Contracting authorities should be aware that document retention periods are subject to any other document retention legislation that a public body may be required follow by law, e.g. the National Archives Act 1986 or the General Data Protection Regulation.

## TRAINING

20. There is an onus on each contracting authority to ensure that officials engaged in procurement are fully familiar with the relevant EU and national rules, and are compliant with these when performing the procurement function. [A list of key public procurement documents and websites is set out in Appendix I.](#)

## CONFLICTS OF INTEREST

21. Contracting authorities are required to take “appropriate measures” to prevent, identify and remedy conflicts of interest in the conduct of a procurement procedure to avoid any distortion of competition and to ensure equal treatment of tenderers. A conflict of interest includes any situation where a relevant staff member has directly or indirectly a financial, economic or other personal interest which might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure.
22. The 2016 Regulations define a relevant staff member as a staff member of the contracting authority or a procurement service provider acting on behalf of the contracting authority who is involved in the conduct of the procurement procedure or who may influence the outcome of the procurement procedure.
23. Separately, public officials who occupy “designated positions” for purposes of the Ethics in Public Office Acts 1995 and 2001 have a statutory obligation to furnish an Annual Statement of Interests disclosing any interest held by the person and any interests held, to the person's actual knowledge, by his or her spouse or civil partner, a child of the person, or a child of a spouse, which could materially influence the person in relation to the performance of his or her official functions. “Designated positions” include certain directorships in public bodies as well as positions of employment in the Civil Service and the wider Public Service that are remunerated at or above the level of a Principal Officer in the Civil Service. They also include positions of employment in the Civil Service and the wider Public Service that are remunerated below the level of Principal Officer where the parent department or public body believe they should be included for reasons of transparency or to put beyond doubt that the Ethics Acts apply to the position. This would include

those that interface with the commercial sector or have responsibility for public procurement. Any form of personal interest which may impinge, or might reasonably be deemed by others to impinge, on a public official's impartiality in any matter relevant to his or her duties should be disclosed in writing to line management. Personal interest includes an interest of a relative or connected person.<sup>1</sup> Line management must then decide if the exercise should be dealt with by another member of staff or seek further advice. Contracting authorities should consider carrying out conflict checks throughout the procurement process, e.g. at the Selection Stage, when the identities of the candidates become known, and at the tender Evaluation Stage

## PUBLIC FINANCIAL PROCEDURES

24. As all administrators in Government Departments, Offices and Public Bodies are responsible for managing and using State resources, it is essential that they have a clear understanding of the overall framework and underlying principles that govern the consumption of these resources. The [Public Financial Procedures](#) is a practical guide to assist all officials to gain a better understanding of the public service financial management framework. It sets out the relevant constitutional, statutory, parliamentary and administrative requirements; emphasises the need for economy, efficiency and effectiveness; and promotes good practice and high standards of propriety. The Public Financial Procedures state that in the case of goods and services, payment is due when the goods or services have been provided satisfactorily and the supplier has submitted their account.

## CODES OF CONDUCT

25. Public officials are required to maintain the highest standards of probity in the performance of their duties and to comply with codes of standards and behaviour that apply in respect of them. Separate statutory codes of conduct have been developed across the Public Sector including the Civil Service, the Local Authority sector, the HSE and State body sectors.
26. In the case of the Civil Service Code, for example, civil servants are required to conduct themselves with honesty, impartiality and integrity. They are not allowed to use their official positions to benefit themselves or others with whom they have personal, family, business or other ties, nor seek to influence decisions on matters pertaining to their official positions. They are not permitted to negotiate or arbitrate in any matter affecting a Government contract or the purchase from or sale of goods to the State where, in their private capacities, they are interested either as principals or as shareholders in a company being one of the principals in the matter under consideration.

## ACCEPTANCE OF GIFTS/BRIBES

27. Public officials should not accept benefits of any kind from a third party which might reasonably be seen to compromise their personal judgement or integrity. The actions of public officials should be above suspicion and their dealings with commercial and other interests should bear the closest possible scrutiny. The offering of a bribe and the acceptance of a bribe are both offences under the Prevention of Corruption Acts 1889 to 2010. These provisions apply to persons in the public and private sectors. Corruptly accepting or attempting to obtain any gift, consideration or advantage as an inducement to, or reward for, doing any act or making any omission in relation to one's office or position is an offence.

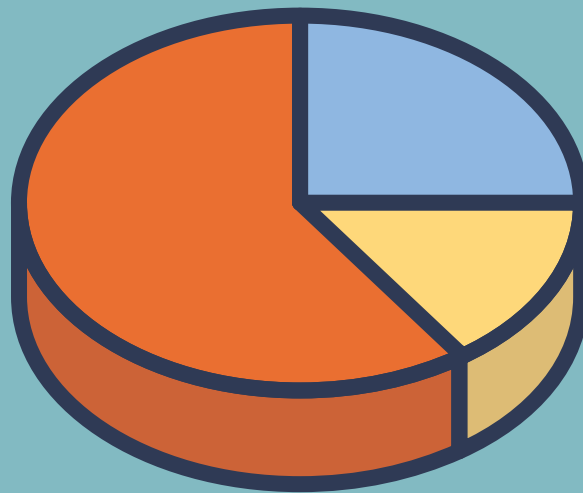
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1 As defined under Section 2(2)(a) of the Ethics in Public Office Act 1995

## COLLUSIVE TENDERING

28. Where a contracting authority suspects bid-rigging or collusive tendering, e.g. where a number of competitors seek to conspire in secret regarding who might win a particular tender competition, such activities represent serious infringements of competition law and should be brought to the attention of the Competition and Consumer Protection Commission.
29. It is an offence under the Criminal Justice Act 2011 to withhold information which he or she knows or believes might be of material assistance in preventing the commission by any other person of a relevant offence, or securing the apprehension, prosecution or conviction of any other person for a relevant offence, without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.

# ENCOURAGING SME PARTICIPATION



## SME ADVISORY GROUP

30. There are quarterly meetings of the SME Advisory Group, chaired by the Minister of State, to address issues affecting SME participation in public procurement. Representatives include the Office of Government Procurement, the Department of Business, Enterprise and Innovation, Enterprise Ireland, InterTrade Ireland, the Competition and Consumer Protection Commission, the Irish Business and Employers' Confederation, the Small Firms Association, the Construction Industry Federation, Chambers Ireland and the Irish Small and Medium Enterprises Association.

## SME LEGISLATION

31. The 2016 Regulations contain a number of provisions to make it easier for businesses and in particular SMEs to tender for Public Sector procurement contracts. Measures specifically designed to improve access for SMEs and start-ups include:
- ▶ the financial capacity criterion is generally limited to twice contract value
  - ▶ electronic methods of communication are mandated in parts of the tender process
  - ▶ the introduction of the European Single Procurement Document (ESPD), a self-declaration form aimed at reducing red tape for suppliers
  - ▶ discretion to divide public contracts into lots, with the proviso that opting not to divide a contract into lots must be explained in the procurement documents or the report on the procurement process
  - ▶ provision for “consortia bidding” may assist SMEs to participate in procurement procedures where they would not have the relevant capability or scale if they were to bid as sole tenderers
  - ▶ explicit provision for pre-market discussion with suppliers and independent experts, subject to safeguards against distorting competition or violating transparency and non-discrimination principles
  - ▶ reductions in the time limits for receipt of tenders by approximately 30% compared to the position under the 2006 Regulations
  - ▶ Member States are required to report back to the Commission every three years on SME participation in public procurement

## POLICY ON SME PARTICIPATION

32. Circular 10/14: Initiatives to assist SMEs in Public Procurement which issued in April 2014 accelerated a number of these SME measures into public policy prior to the transposition of the 2014 Directives. It specifically made provision for:

- ▶ Improved Market Analysis prior to tendering - Buyers should undertake market analysis prior to tendering in order to better understand the range of goods and services on offer, market developments and innovation, what commercial models are available, the competitive landscape, and the specific capabilities of SMEs etc.
- ▶ Sub-dividing Contracts into Lots - The sub-division of contracts into lots facilitates access by SMEs, both quantitatively (the size of the lots may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely to the specialised sector of the SME)
- ▶ Consortium Bidding - SMEs are encouraged to consider using consortia where they are not of sufficient scale to tender in their own right. Template tender and contract documents allow for consortia to tender for public procurement opportunities
- ▶ Less use of “restricted” tendering and greater use of “open” tendering
- ▶ Capacity requirements - Buyers should ensure that any capacity levels set for candidates/ tenderers are relevant and proportionate to the circumstances of a particular contract
- ▶ Turnover requirements - In assessing the financial capacity of a supplier to do a job, buyers, as a matter of general policy, should not for routine (e.g. low-value, high volume) goods and services competitions set company turnover requirements at more than twice the estimated contract value
- ▶ Framework Agreements - Breaking framework agreements into lots can be an effective way of opening up opportunities to SMEs. Depending upon requirements, framework agreements can be divided into lots on the basis of geography, specialism and/or value
- ▶ eTenders - The use of electronic tendering aligns to the Government’s e-commerce strategy and reduces costs for buyers and suppliers. The benefits of the eTenders system are:
  - ▶ Advertising of contract opportunities to promote SME participation as well as publication of Contract Award Notices for contracts valued above €25,000 (exclusive of VAT)
  - ▶ OGP encourages suppliers to register company information to ensure maximum exposure to tendering opportunities. Email alerts are provided to registered suppliers in relation to procurement opportunities arising in their respective areas as determined by the Common Procurement Vocabulary (CPV) codes
  - ▶ Prior Information Notices (PINs) - Buyers should communicate long term purchasing plans to the market as early as possible by publishing Prior Information Notices (PINs) on the eTenders website
  - ▶ Requests for Tenders / Expressions of Interest - Buyers should publish RFTs or EOIs on eTenders for direct downloading by suppliers
- ▶ Insurance - Buyers should only require such types and levels of insurance which are proportionate and reasonable in the context of the particular contract

- ▶ Life Cycle Costing - where appropriate, buyers should take into account not just the current but the whole life-cycle costs
- ▶ No charging for tendering opportunities
- ▶ Feedback to unsuccessful Tenders - For contracts above EU thresholds for which advertising of contracts in the Official Journal of the EU is obligatory, buyers are required to give appropriate feedback to companies who have participated in a public procurement competition. For all other contracts buyers are strongly encouraged to provide written feedback as a matter of good practice

# ENVIRONMENTAL, SOCIAL AND LABOUR PROVISIONS





## MINIMUM STANDARDS

33. The 2016 Regulations require tenderers to comply with applicable obligations in the fields of environmental, social and labour law that apply at the place where the works are carried out or the services provided that have been established by European Union law, national law, collective agreements or by international, environmental, social and labour law. The agreements and conventions listed are:
- ▶ ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise
  - ▶ ILO Convention 98 on the Right to Organise and Collective Bargaining
  - ▶ ILO Convention 29 on Forced Labour
  - ▶ ILO Convention 105 on the Abolition of Forced Labour
  - ▶ ILO Convention 138 on Minimum Age
  - ▶ ILO Convention 111 on Discrimination (Employment and Occupation)
  - ▶ ILO Convention 100 on Equal Remuneration
  - ▶ ILO Convention 182 on Worst Forms of Child Labour
  - ▶ Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer
  - ▶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)
  - ▶ Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention)
  - ▶ Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10/09/1998 and its 3 regional Protocols
34. The requirement features in key aspects of the new rules at relevant stages in the procurement process, i.e. when applying the discretionary Exclusion Grounds, when deciding whether to award a contract to the most economically advantageous tenderer, when assessing abnormally low tenders and, where appropriate, in relation to subcontracting. Contracting authorities must also take appropriate measures to ensure contract performance is in accordance with these obligations.

## STRATEGIC POLICY INSTRUMENT

35. The 2016 Regulations promote the use of public procurement as an important strategic policy instrument. Contracting authorities can stipulate criteria linked to the production process awarding more marks, for example, to sustainable production processes or fair trade, or requesting eco-labels or environmental management measures. Contracting authorities may also, where appropriate, use Award Criteria or contract performance conditions to encourage or mandate the employment of long-term job-seekers or training for unemployed or young persons during the course of the contract.

## ENVIRONMENTAL CONSIDERATIONS

36. Public procurement can play a role in promoting environmental measures. The appropriateness of including environmental measures in public procurement projects will vary from contract to contract and is a matter for individual contracting authorities.
37. Comprehensive guidance on the use of environmental clauses is set out in:
  - ▶ **Green Tenders - An Action Plan on Green Public Procurement**, published in 2012 by the Department of Environment, Community and Local Government and the Department of Public Expenditure and Reform, and
  - ▶ **Green Procurement Guidance for the Public Sector** published in 2014 by the Environmental Protection Agency
38. Eight priority areas of procurement activity are identified in these guidance documents as most suitable for inclusion of environmental measures including; construction; energy; transport; food and catering services; cleaning products and services; paper; clothing and textiles; information and communications technology. Core and comprehensive criteria are identified for use throughout the procurement process. Once a decision has been taken by a contracting authority to use environmental measures they should be clearly signalled at all stages of the procurement process from business case and specification stages through to the selection, award and contract management stages.
39. Additional guidance is available to contracting authorities interested in buying goods and services with a lower environmental impact in "**Buying Green!**" which is the EU Commission's main guidance document in this area.

## SOCIAL CONSIDERATIONS

40. Public procurement can be used to encourage suppliers to perform actions that are focussed on the inclusion of broader social policy considerations. In general, the inclusion of social considerations in a procurement process are most effective where the benefit is a core requirement and can be directly linked to objectives of the contract. In general, the social objectives should be clear and verifiable through the inclusion of an appropriate monitoring process. The appropriateness of including social considerations needs to be examined on a contract by contract basis and there needs to be sufficient flexibility to allow each individual contracting authority to decide what, how and when social clauses can be used. EU law allows Member States the option to take social considerations into account provided the fundamental principles of the Treaties are respected.
41. Contracting authorities are advised to plan and carry out a proportionate level of consultation and stakeholder engagement before any decision is made on whether to use social clauses prior to the commencement of the Procurement stage.
42. This can be a complex area and the inclusion of social considerations at any stage in a procurement process may come at a premium. Therefore, contracting authorities need to ensure that:

- ▶ the clauses are not discriminatory
  - ▶ value for money is not adversely affected
  - ▶ additional costs are not placed on domestic or smaller suppliers relative to other potential suppliers
  - ▶ social clauses are linked to the subject matter of the contract
  - ▶ the targeted benefit is capable of being measured and monitored during the execution of the contract
43. The OGP has developed an information note on Incorporating Social Considerations into Public Procurement and it is available at [www.ogp.gov.ie/information-notes/](http://www.ogp.gov.ie/information-notes/). This note is primarily aimed at Government Departments and Public Bodies and pays particular attention to the role of Policy Departments, Central Procurement Bodies, Procurement Officials and contracting authorities in the development and use of social considerations. This note outlines the various stages involved in the development of social considerations for use in public procurement such as planning and developing a business case, specifications and selection/award criteria through to contract management.

## LABOUR LAW

44. EU rules require tenderers to be compliant with relevant labour law in order to participate in a public procurement process. The Directive makes it clear that non-compliance with the relevant obligations may lead to exclusion of a tenderer from the procedure for the awarding of a public contract. The obligations on suppliers in relation to compliance with labour law are reflected in the template RFT and contract documents for goods and services developed by the Office of Government Procurement in conjunction with the Office of the Chief State Solicitor.

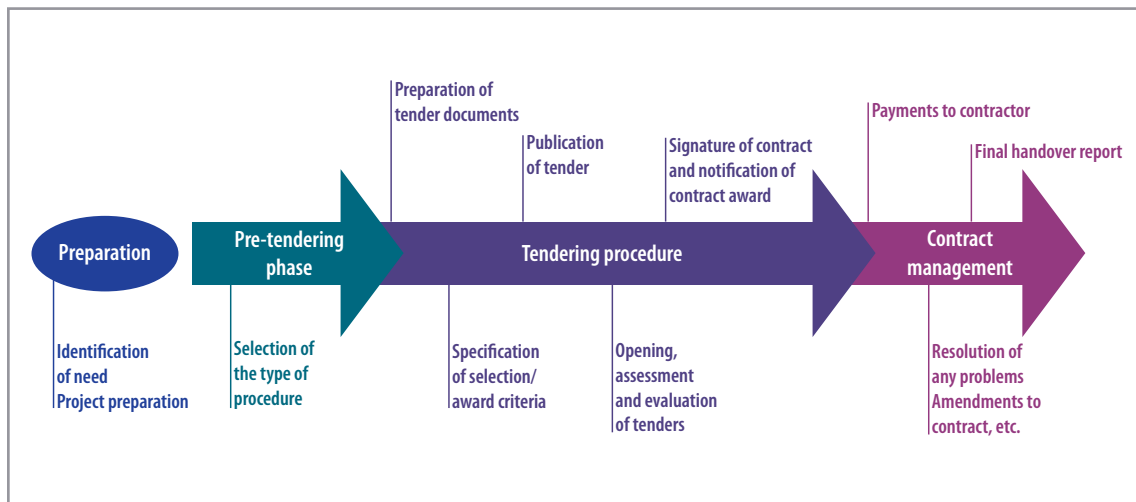
## RESERVED CONTRACTS

45. The 2016 Regulations extend the concept of a sheltered workshop. Under the 2016 Regulations, contracting authorities may decide to reserve the right to tender for any contract to a sheltered workshop which is now defined as one in which at least 30 per cent of the employees are either disabled or disadvantaged (rather than disabled only which was the case under the 2004 Directives). The term 'disadvantaged' is not defined in the 2016 Regulations. However, Recital 36 of Directive 2014/24/EU indicates that the term includes the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups.
46. Contracting authorities may also reserve certain contracts for health, social and cultural services (these contracts are specifically listed by CPV code in Regulation 77 of the 2016 Regulations) to organisations such as not-for-profit organisations which meet certain conditions, namely the pursuit of a public service mission linked to the delivery of the relevant services and reinvestment of profits in the organisation. The management and ownership structure of the organisation performing the contract should be based on employee ownership or participatory principles or have active participation from employees or stake holders. The organisation should not have been awarded a contract for the services concerned in the preceding three years.

# MAIN PHASES OF PUBLIC PROCUREMENT



47. The main phases of public procurement procedures are set out in the diagram below reproduced with the permission of the European Court of Auditors.



48. These Guidelines have been broadly structured to reflect the different phases of public procurement as illustrated in this diagram

a. **Pre-Tendering Phase**

The Pre-tendering phase consists of project preparation and may include preliminary market consultation by the contracting authority.

b. **Tendering Procedure**

The conduct of this phase will differ depending on whether the procurement is subject to national rules or EU rules but it generally comprises:

- ▶ the preparation of tender documents
- ▶ the publication of an advertisement or call for competition requesting expressions of interest or tenders
- ▶ the evaluation of expressions of interest and/or tenders according to Selection and Award criteria
- ▶ the notification to bidders of the outcome of the procedure and contract award

c. **Contract Management**

This phase of the process comprises the execution, management and monitoring of the awarded contract.

# PRE-TENDERING PHASE



## IDENTIFY NEED

49. The contracting authority should first establish whether there is a clear business need for the good or service for example, by way of preparation of a business case. The procurement should be essential for the conduct of normal business or to improve performance. Stating that the need for the procurement 'is a good idea' is not a sufficient business case. The contracting authority should ensure that the business case addresses future phases of the service or purchase of goods that may be required. **Part B of The Public Spending Code** provides guidance on the Appraisal and Planning Stages of public projects before expenditure is incurred.

## STRATEGY

50. Contracting authorities should adopt a procurement strategy that will minimise casual or 'once-off' purchases and promote best value. Contracting authorities should check if the Office of Government Procurement has existing or planned procurement arrangements which may meet their needs for the good or service. If such an arrangement does exist but is not being used on this occasion, a contracting authority should document the reasons why.

## PRELIMINARY MARKET CONSULTATION

51. The 2016 Regulations explicitly allow a contracting authority to conduct market consultations with suppliers and expert bodies before the start of a procurement process which may facilitate improved specifications, better outcomes and shorter procurement times. Preliminary market consultation can provide insights about the capacity of the market to deliver on the requirements of the contracting authority and the risks involved. It may reduce procurement timescales during the formal procurement process and/or reduce the need for complex and sometimes costly procedures such as competitive dialogue. In addition, it has the potential to drive a more responsive market and allows suppliers to ask questions at an earlier stage prior to the commencement of the formal process.
52. It is essential, however, that this practice does not create advantages for certain market players or result in specifications and tender documents being drafted in their favour. Market consultation should be sufficiently broad to provide the contracting authority with meaningful feedback on the relevant market. Requests for information can be issued via eTenders to a wide number of suppliers according to their Common Procurement Vocabulary (CPV) codes.
53. If the market consultation is followed by a tender competition, it is important that there is no basis for any assertion of bias, unfairness, discrimination or lack of transparency. Therefore, the process adopted and information received during market consultation should be clearly recorded in writing. Contracting authorities should take appropriate measures to ensure that participation by potential tenderers in pre-market consultations does not distort competition, that any relevant information exchanged in the context of, or resulting from, the involvement of a tenderer in the pre-market consultation is made available to all other participating tenderers, and the adequate time limits for receipt of tenders are fixed to ensure each tenderer has the opportunity to submit a tender.
54. Compliance with the obligation of transparency requires that the process of obtaining market intelligence is kept separate from the tendering and award phase of the competition.

## TIME

55. Contracting authorities should ensure that there is an adequate amount of time in the procurement programme and take account of the nature of the specifications and the complexity of the contract when fixing the timescale for submitting responses. This should allow suppliers reasonable and sufficient time for submitting the necessary information and preparing the tenders (taking into account holiday periods etc.). In the case of contracts for goods or services above the EU financial thresholds, contracting authorities must also ensure that the timescale complies with the minimum periods specified in the 2016 Regulations - see Appendix V.

## ESTIMATE COST

56. A realistic estimate of the value of all phases of the service or good to be procured is essential as this will determine the rules applicable to the procurement procedure to be followed and is important for budgeting purposes. When valuing a contract in order to ascertain the applicable procurement procedure the contracting authority must make a genuine pre-estimate of the contract value at the date of publication of the Contract Notice, exclusive of VAT, taking into consideration the entire term of the contract, i.e. assuming all extensions and all options under the contract are exercised. Contracts without a fixed term should generally be valued on the basis of four years anticipated supply. No project or purchase may be artificially split or sub-divided to prevent it coming within the scope of the National Guidelines or EU Directives. The valuation of Framework Agreements and Dynamic Purchasing Systems must take into account the value of all potential call-off contracts under these agreements/systems over their lifetime. Where a project or purchase involves separate lots, the value of all lots must be included in estimating the value of the contract.

## BUDGET APPROVAL

57. The contracting authority should establish whether funds are available to meet the purchase, and ensure that all necessary budgetary approvals are sought in adequate time.

## CORRECT PROCEDURE

58. For contracts below the relevant EU financial thresholds, contracting authorities should follow the national rules as set out in these Guidelines. For contracts above the relevant EU financial thresholds, the 2016 Regulations apply. The EU financial thresholds applying to public procurement for the period 1 January 2018 to 31 December 2020 are set out in Appendix II. These are normally revised by the EU Commission every two years.

## TEMPLATES

59. Contracting authorities should ensure that the correct template tender documentation is used. The Standard Template RFTs for Goods and Services are available to download on the Office of Government Procurement's website at [www.ogp.gov.ie](http://www.ogp.gov.ie).



## SPECIFICATION

60. Contracting authorities should base their specifications on the needs identified in the business case and ensure that the specifications are clear and comprehensive and not discriminatory. In particular, specifications should use generic technical specifications and avoid proprietary brand names.

## DOCUMENTATION

61. Contracting authorities should prepare tender documents, setting out Selection Criteria and Award Criteria and ensure compliance with the procurement rules. Contracting authorities should carefully check all documents for completeness, accuracy and consistency prior to issuing. Clarity and completeness at this stage will help eliminate the need for clarifications later. Contracting authorities must set out all the criteria that will be applied in the award process, together with the relative weightings of each. This is a vital part of the process. These criteria will form the basis against which tenders will be comparatively evaluated and are the key to an objective, transparent award procedure.

## SUPPORT AND ADVICE

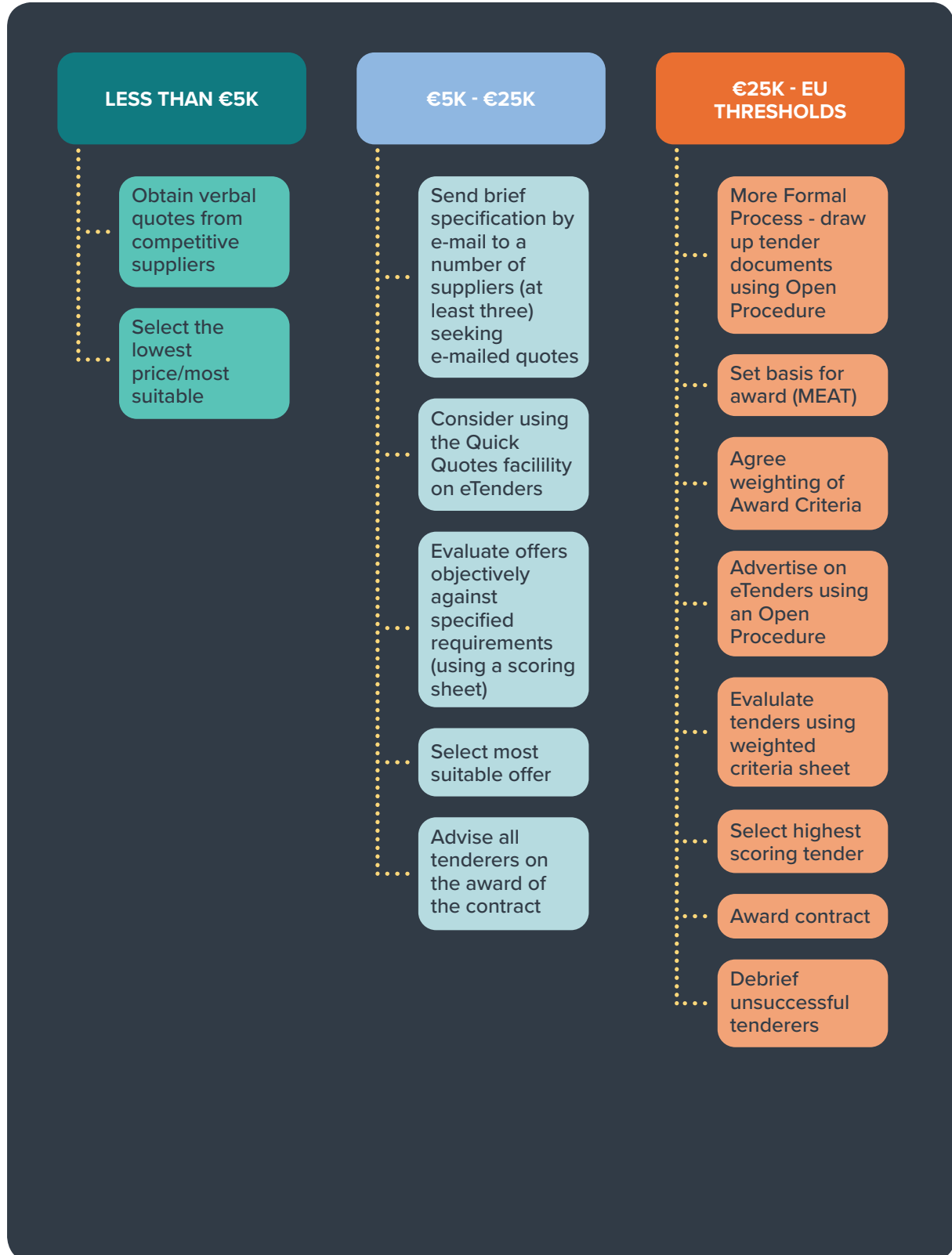
62. Contracting authorities may wish to liaise with the OGP and/or their own legal advisor in relation to the preparation of their tender documents.

# TENDERING PHASE

## BELOW THRESHOLD – NATIONAL GUIDELINES



## STEPS IN BELOW THRESHOLD TENDERING



## CONTACT OFFICE OF GOVERNMENT PROCUREMENT

63. Before undertaking any procurements themselves, public bodies should contact the Office of Government Procurement to see if there are any existing or planned procurement arrangements which may meet their needs. The OGP is also available to provide procedural advice and administrative assistance with any procurement process.

## COMPETITIVE PROCEDURES

64. For contracts or purchases below the EU threshold values (which are not “call- off” contracts under a Framework Agreement or Dynamic Purchasing System) the specific procurement procedures set out in the 2016 Regulations do not apply and, contracting authorities should be guided by the following less formal procedures:
- ▶ contracts for goods and services with an estimated value of less than €5,000 (exclusive of VAT) can be purchased on the basis of verbal quotes from one or more competitive suppliers (best practice is to seek a minimum of three quotes confirmed by email)
  - ▶ contracts for goods and services with an estimated value between €5,000 and €25,000 (exclusive of VAT) can be awarded on the basis of responses to written specifications (e.g. sent by email) to at least three suppliers or service providers - the Quick Quotes facility on eTenders allows contracting authorities to search for appropriate suppliers using CPV codes which match their particular procurement needs and may facilitate this process
  - ▶ contracts for goods and or services, with an estimated value of €25,000 (exclusive of VAT) and up to the value of the EU thresholds should normally be advertised as part of a formal tendering process on eTenders using the Open Procedure in line with DPER Circular 10/14
65. The values and procedures outlined above are indicative only and should be adapted as appropriate to suit the type of contracting authority and the nature and scale of the project.

## TIME LIMITS

66. There are no prescribed time limits in relation to below threshold procedures. However, sufficient time must be permitted for preparation and submission of tenders to allow for genuine competition and SMEs to participate in the tender process. Contracting authorities should consider the complexity of a contract when placing time limits on the receipt of tenders.

## EVALUATION

67. In relation to larger contracts (with an estimated value of €25,000 and above), tender evaluation should be carried out by a team with the requisite competency. Transparency and objectivity is achieved by the use of weighted criteria, including price, which allows a comparative assessment of tenders under each criterion. All tenderers should be informed of the result of a tendering process without delay.

## NOTIFICATION

68. Where formal tenders have been received in a below threshold competition, a contracting authority should inform all tenderers of the outcome as soon as possible after an award decision has been taken. Appendix III contains template letters for notifying successful and unsuccessful candidates in such cases.
69. Contracting authorities are encouraged to give constructive feedback to unsuccessful tenderers. This encourages better tenders in the future and promotes competition in the market. From the point of view of tenderers this provides reassurance about the integrity of the process and helps them to understand and operate the different procedures and practices that apply in the Public Sector. Care should be taken to ensure that confidential information such as the identity of other unsuccessful tenderers, prices or pricing strategies of other tenderers or information that could compromise the competitive situation or infringe the intellectual property rights of others, is not disclosed.

## REPORTING NON-COMPETITIVE PROCEDURES (40/02 RETURNS)

70. It is a basic principle of public procurement that a competitive process should be used unless there are justifiably exceptional circumstances for not doing so, such as those that apply when using the Negotiated Procedure without Prior Publication as dealt with later in these Guidelines.
71. In relation to contracts above €25,000 (exclusive of VAT) awarded without a competitive process, Department of Finance Circular 40/02 requires Government Departments to send an Annual Report signed by the Accounting Officer to the Comptroller and Auditor General explaining why a competitive process was not used. A template for the Annual Report is set out in Appendix A of Circular 40/02. A copy of each Annual Report should be sent to the Policy Unit of the Office of Government Procurement (email: [returns@ogp.gov.ie](mailto:returns@ogp.gov.ie))

# TENDERING PHASE

ABOVE THRESHOLD – EU RULES



## CONTACT OFFICE OF GOVERNMENT PROCUREMENT

72. Before undertaking any procurements themselves, public bodies should contact the Office of Government Procurement to see if there are any existing or planned procurement arrangements which may meet their needs. The OGP is also available to provide procedural advice and administrative assistance with any procurement process.

## GENERAL REGIME

73. The procurement of all goods and most services contracts require the full application of the public procurement rules in the 2016 Regulations as set out below. It is a legal requirement that contracts with estimated values equal to or above the EU thresholds must be advertised in the OJEU (which may be accessed via [eTenders](#)) and awarded in accordance with the provisions of the 2016 Regulations. Any infringement of the terms of the Regulations can have serious legal and financial consequences for contracting authorities.
74. The 2016 Regulations also introduced a simplified award regime (a “light-touch” regime) for certain services, notably health, social, educational and cultural services, to take into account the specific nature of these services. [Appendix IV details the rules in relation to the Light Touch Regime.](#)

## PUBLICATION OF NOTICES

75. Standard OJEU Notices are available on eTenders and can be processed through eTenders which automatically transmits to the OJEU. The accurate completion of the publication notices is crucially important.

## PRIOR INFORMATION NOTICE (PIN)

76. Contracting authorities are encouraged to publish a Prior Information Notice (PIN) in the OJEU setting out their intentions with respect to planned procurements. The PIN is normally submitted by the contracting authority at the start of the budgetary year and sets out the categories of goods and services likely to be procured during the year. The period covered by the PIN should not be more than 12 months from the date on which it was published.
77. A PIN must contain the information listed in Part 2 of Schedule 3 of the 2016 Regulations. Publication of a PIN does not commit contracting authorities to purchasing or proceeding with a project if circumstances change. The purpose of a PIN is to alert the market to the upcoming procurement opportunities and it is intended as an aid to transparency for the benefit of suppliers. Publication of a PIN also permits a contracting authority to reduce the minimum time period for tendering if certain conditions are met (namely that the PIN was published between 35 days and 12 months before the date on which the Contract Notice was sent and that all the required information listed in Part 2 of Schedule 3 of the 2016 Regulations was contained in the PIN). In most cases, public bodies will be required to follow up the publication of a PIN with a Contract Notice when they are ready to carry out the procurement exercise. However, sub-central contracting authorities may use a PIN as a call for competition provided certain conditions are met.

## CONTRACT NOTICE

78. Contract Notices are generally used as the means of calling for competition in respect of all procedures and should be published in the OJEU (which may be accessed via eTenders). Contract Notices set out the key details of the procurement process and the type of contract being advertised, The information which is required to be provided in the Contract Notice is set out in Part 3 of Schedule 3 of the 2016 Regulations.

## CONTRACT AWARD NOTICE

79. Within 30 days of the award of a contract, Framework Agreement or Dynamic Purchasing System a Contract Award Notice must be sent to OJEU via eTenders. The information which is required to be provided in the Contract Award Notice is set out in Part 4 of Schedule 3 of the 2016 Regulations. The obligation to publish a Contract Notice in the OJEU extends only to the award of the Framework Agreement itself and does not apply to the award of specific contracts under the Framework. However, in line with DPER Circular 10/14, contracting authorities are required to publish all Contract Award Notices over €25,000 (exclusive of VAT) on the eTenders website on completion of the award. This is a separate step to publishing on the OJEU aimed at facilitating measurement of SME participation in public procurement. In the case of a Dynamic Purchasing System, a Contract Award Notice is required to be published for each call-off contract.
80. Contracting authorities may refrain from publishing certain information required in a Contract Award Notice where its release would impede law enforcement, be contrary to the public interest, would harm the legitimate commercial interests of a particular tenderer or may prejudice fair competition between tenderers.
81. It should be noted that under DPER Circular 10/14 buyers are required to publish Contract Award Notices for all contracts over €25,000 (exclusive of VAT) on eTenders on completion of the award.

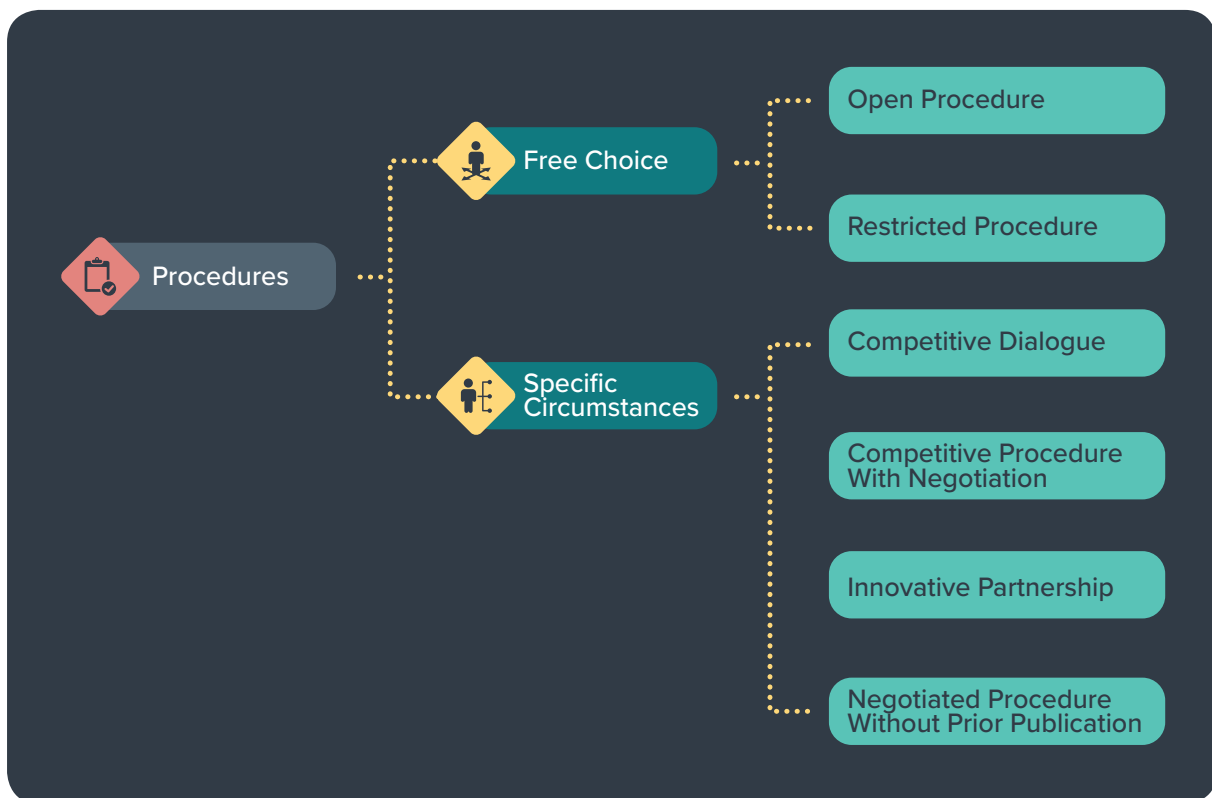
## MINIMUM TIME LIMITS

82. For contracts above the EU thresholds, minimum time-limits are set down for the different stages of the particular contract award procedure chosen in the 2016 Regulations. Under the 2016 Regulations, the statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third as compared with the previous rules. This flexibility speeds up simpler or off-the-shelf procurements, but still permits longer timescales for requirements where tenderers will need more time to respond. The time limits in the 2016 Regulations are minimum time limits and contracting authorities should take into account the complexity of the tender and the volume of information that the tenderers are required to submit when setting any time limits. The revised minimum time limits are set out in Appendix V.



## TYPES OF PROCEDURE

83. There are six award procedures that contracting authorities may utilise when awarding contracts under the 2016 Regulations as follows:



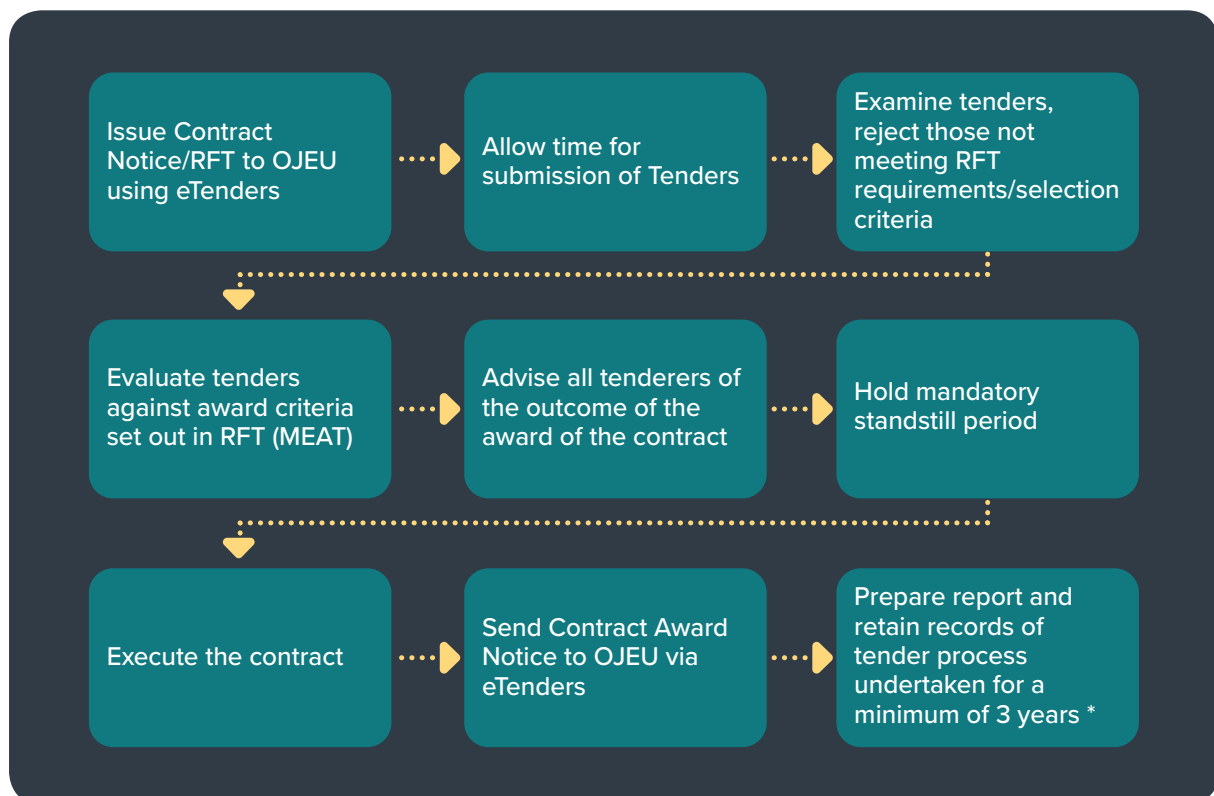
## OVERVIEW OF PROCEDURES

84. Whatever procedure is used care should be taken to ensure that project specifications are as open and generic as possible in order to avoid favouring any one solution or any one party.
85. The most commonly used procedure is the Open Procedure. The advantage of the Open Procedure is that it invites an unlimited amount of offers and, therefore, unlimited competition (unlike other procedures there is no maximum number of participants). Its main disadvantage to contracting authorities is the potential administrative burden of having to examine a large number of tender documents. Accordingly, this procedure may not be appropriate for complex procurements.
86. The Restricted Procedure tends to be used where there is a need to pre-qualify suppliers where there is evidence that the number of potential suppliers is very large or where a contracting authority wants to limit the number of people who will have access to certain confidential and/or sensitive information. The procedure can be used to reduce the number of candidates (and the paperwork) to be examined by the contracting authority. The disadvantage of the procedure is that it takes longer and is sometimes more complicated to run.

87. The Competitive Dialogue Procedure and the Competitive Procedure with Negotiation may only be used for works, goods and services contracts where one or more of the following circumstances apply:
- ▶ the needs of the contracting authority cannot be met without adaption of readily available solutions
  - ▶ the contract includes design or innovative solutions
  - ▶ the technical specifications cannot be established with sufficient precision
  - ▶ a contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attached to the works, goods or services
  - ▶ in response to an Open or Restricted Procedure where only irregular or unacceptable tenders were submitted
88. These procedures tend to be used in the case of complex high-value projects where the above conditions are met, e.g. a major integrated transport infrastructure project or a large computer networks project. They are not intended to be used for off-the-shelf goods and services which are available from many different suppliers on the market. In relation to the difference between the two procedures, the Competitive Dialogue Procedure provides for some clarification and optimisation after the final call for tenders making it much better for highly complex outcome based procurement. It offers a more structured procedure than the Competitive Procedure with Negotiation and arguably, therefore, offers more safeguards for contracting authorities. However, it offers less scope for negotiating once the contracting authority has identified a solution/solutions for meeting its needs. The Competitive Dialogue procedure can also be very expensive to run both in cash and resource terms.
89. The Innovation Partnership is a new procedure aimed at allowing the development of innovative goods, services or works and the subsequent purchase provided that it corresponds to the performance levels and maximum costs agreed between the contracting authority and the participants.
90. The Negotiated Procedure without Prior Publication can only be used in very limited and narrowly defined circumstances, e.g. where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an Open or Restricted Procedure, or where for technical or artistic reasons, or the protection or exclusive rights, the contract can only be carried out by a particular supplier. The burden of proof is on the contracting authority to justify using this procedure.
91. It should be borne in mind that the reason for choosing a particular procurement process must be included in the procurement report, required to be produced under Regulation 84 of the 2016 Regulations. In addition all contract award procedures should include a verifiable audit trail and where a competitive process was not deemed appropriate, this should be clearly recorded.
92. Under the 2016 Regulations contracting authorities must prepare a written report setting out the details of the procurement process and keep these records for at least three years from the date of the award of the contract. Contracting authorities should be aware that document retention periods are subject to any other document retention legislation that a public body may be required follow by law e.g. the National Archives Act 1986 or the General Data Protection Regulation. date of the award of the contract.
93. A more detailed description of each of the six procedures is set out below.

94. Under the 2016 Regulations contracting authorities must prepare a written report setting out the details of the procurement process and keep these records for at least three years from the date of the award of the contract. Contracting Authorities should be aware that document retention periods are subject to any other document retention legislation that a public body may be required follow by law, e.g. the National Archives Act 1986 or the General Data Protection Regulation.

## OPEN PROCEDURE



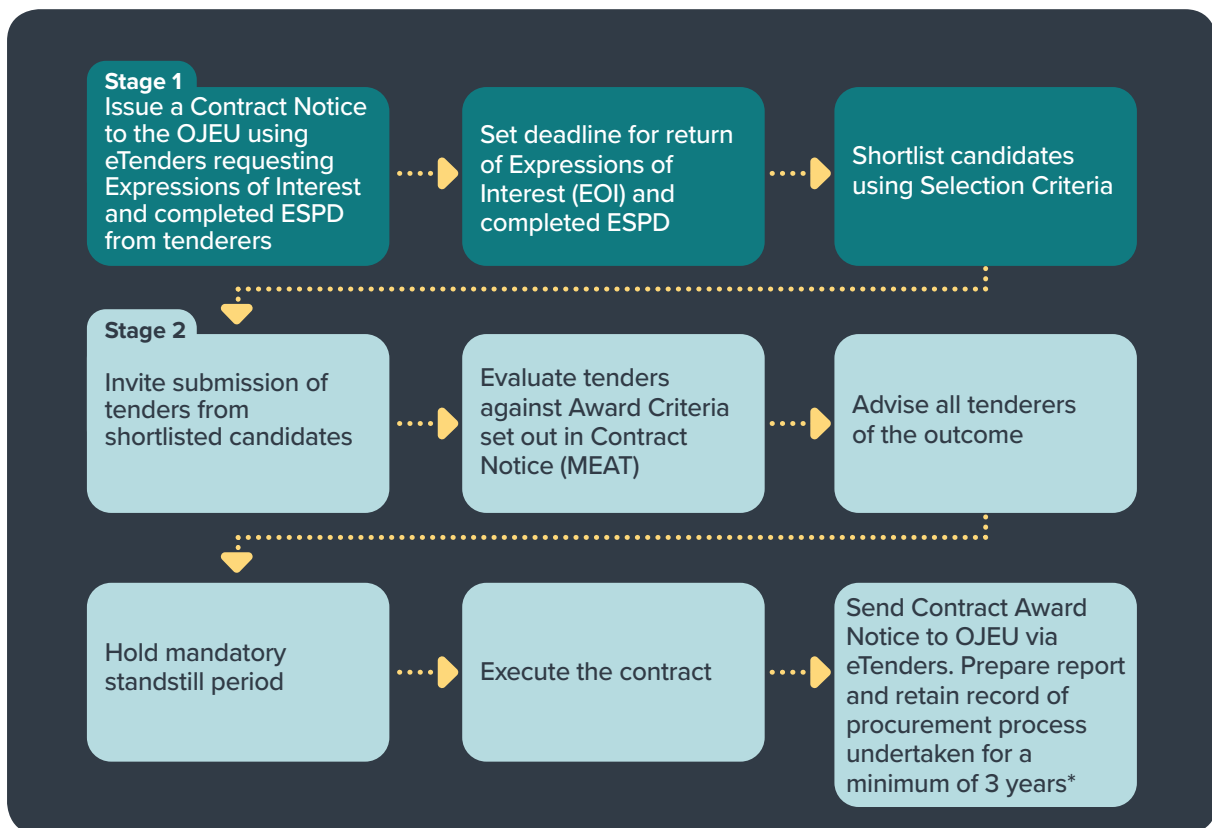
\* Document retention periods are subject to any other document retention legislation that a public body may have to follow by law, e.g. the National Archives Act 1986

95. The Open Procedure is a single stage procedure where a Contract Notice and Request for Tender document (RFT) is placed in the OJEU (via eTenders). The Contract Notice will clearly state that the contract is being carried out using the Open Procedure. All interested parties may submit tenders. It is important that the Selection Criteria and Award Criteria are made clear in the Contract Notice and the RFT so that all potential tenderers can understand how the procurement process will be run and how they will be evaluated. Only tenderers who are not disqualified on Exclusion Grounds and meet the Selection Criteria are evaluated against the Awards Criteria set out in the RFT.
96. The closing date for the receipt of tenders is generally no less than 35 days from the day after the date of dispatch of the Contract Notice to OJEU. Reductions in timescales are available in the following limited circumstances: if a Prior Information Notice (PIN) was issued within the relevant timeframe, where a state of urgency duly substantiated by the contracting authority renders the time limit impractical or where public bodies will accept a tender response electronically.A

contracting authority may seek clarifications in relation to tenders submitted by tenderers.

97. Potential tenderers may be invited to a supplier information session to inform them about the requirements of the contracting authority. Any relevant information should subsequently be made available to all potential suppliers, including those who are not in a position to attend. A supplier information session will not be necessary for every tender exercise.
98. A suite of template RFTs and contract documents for goods or services has been developed in conjunction with the Chief State Solicitor's Office and the Office of the Attorney General, and is available on the Office of Government Procurement website ([www.ogp.gov.ie](http://www.ogp.gov.ie)) for use by contracting authorities in conducting an Open Procedure. They should be used for all routine, and low to medium risk procurements.

## RESTRICTED PROCEDURE

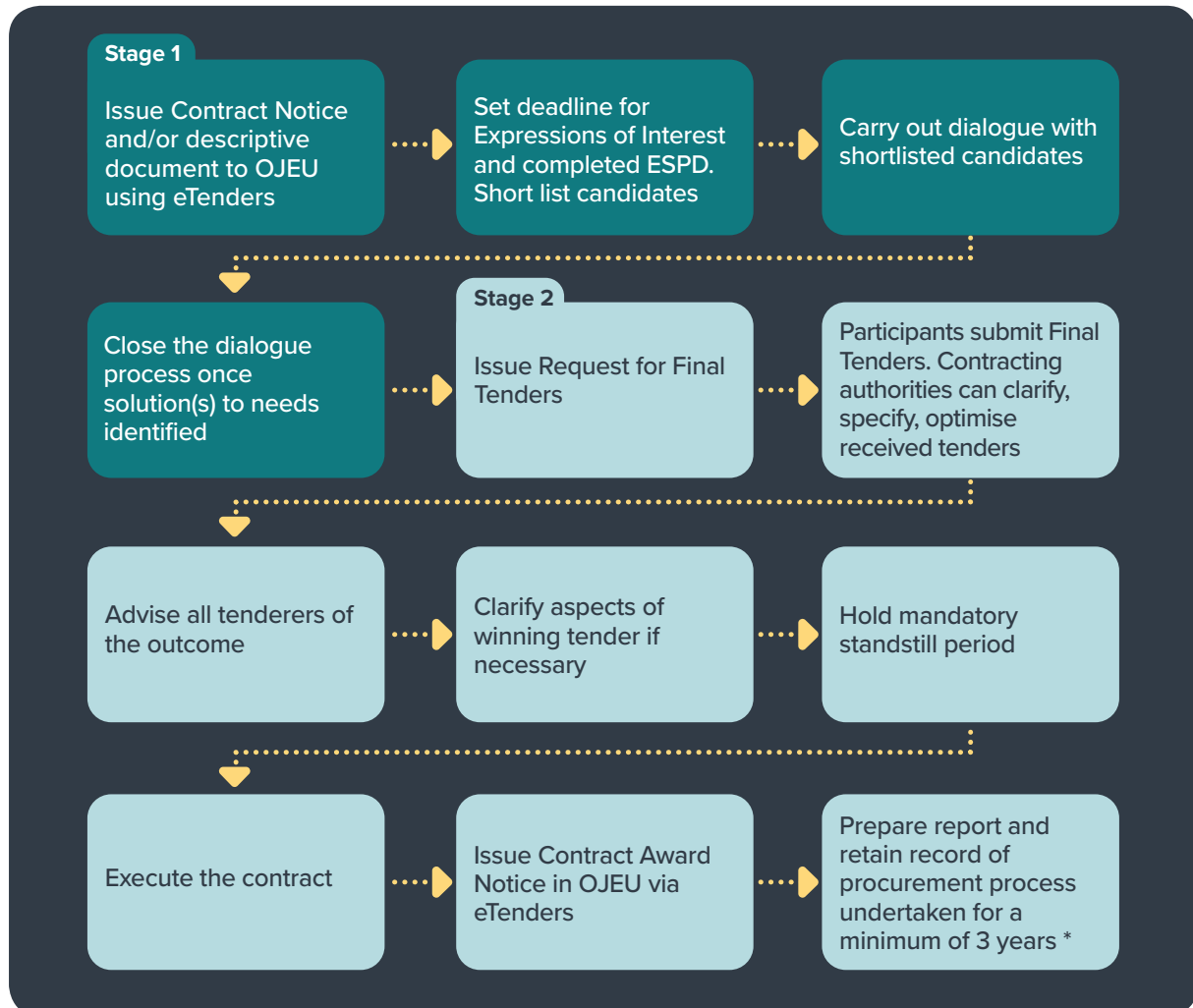


\* Document retention periods are subject to any other document retention legislation that a public body may have to follow by law, e.g. the National Archives Act 1986

99. The Restricted Procedure is a two-stage procedure, a pre-qualification stage open to all interested parties who wish to submit an expression of interest, and an award stage where candidates shortlisted at the pre-qualification stage are invited to submit tenders and are assessed against Award Criteria set out in the Request for Tender (RFT).

100. The first stage requires interested suppliers to submit an Expression of Interest (EOI) and to self-declare using an ESPD form that they are not subject to any of the Exclusion Grounds (set out in Regulation 57 of the 2016 Regulations) and can meet the relevant Selection Criteria set for the competition. Once the Contract Notice is published, suppliers have a minimum of 30 days to submit an EOI and ESPD and if shortlisted a further 30 days for submission of tenders. Reductions in timescales are available in the following limited circumstances: if a Prior Information Notice (PIN) was issued within the relevant timeframe, where a state of urgency duly substantiated by the contracting authority renders the time limit impractical or where public bodies will accept a tender response electronically.
101. The purpose of the Selection Criteria is to assess the capability of each candidate to carry out the required services or provide the required goods. The Contract Notice must state the number of candidates that will be invited to tender. If this is not done, all candidates who meet the Selection Criteria must be invited to submit tenders. A minimum of five candidates should be invited to tender (provided there is at least this number who meet the Selection Criteria). Unsuccessful candidates should be advised of the reasons they have not been selected. Records should be kept of this notification in accordance with the rules on record keeping and retention of records under Regulation 84 of the 2016 Regulations. If candidates have not been advised at the end of the Selection Stage that they were unsuccessful, then this must be disclosed to them at the Standstill Stage, before the contract is concluded. Candidates who are shortlisted may be asked to provide evidence and supporting documents that they meet Selection Criteria and are not subject to any Exclusion Grounds as declared in their ESPD prior to being invited to tender.
102. In the second stage shortlisted candidates are invited to submit tenders and are assessed against the Award Criteria set out in the Request for Tender (RFT) document, i.e. most economically advantageous tender (MEAT).
103. It is important to bear in mind when using this or any of the other two stage procedures that contracting authorities must offer unrestricted and full direct access to the procurement documents (RFT and draft contract) from the date of publication of the Contract Notice or the date on which an invitation to confirm interest is sent.

## COMPETITIVE DIALOGUE



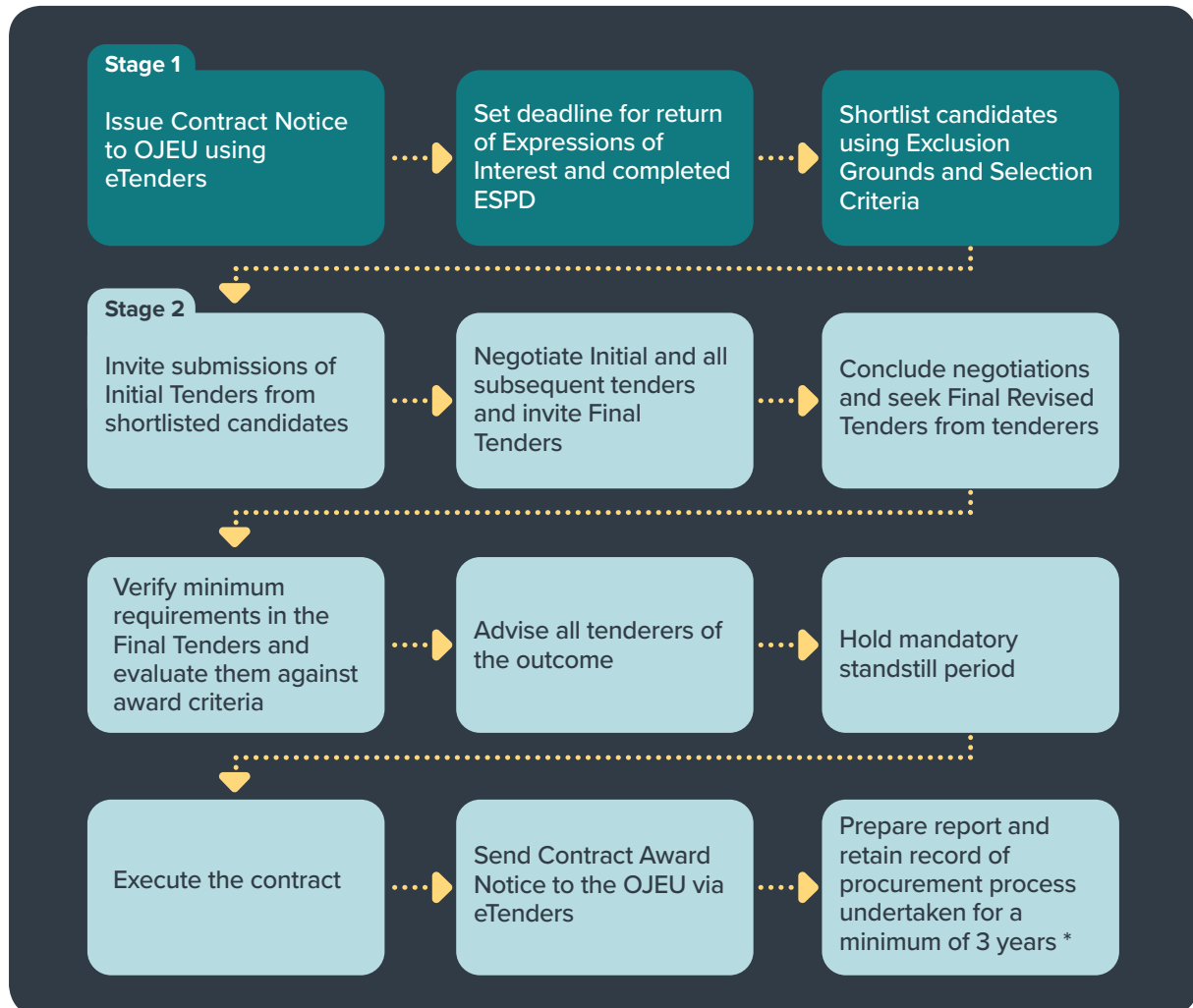
\* Document retention periods are subject to any other document retention legislation that a public body may have to follow by law, e.g. the National Archives Act 1986

104. The Competitive Dialogue Procedure may only be used for works, goods and services contracts where one or more of the following circumstances apply:

- ▶ the needs of the contracting authority cannot be met without adaption of readily available solutions
- ▶ the contract includes design or innovative solutions
- ▶ the technical specifications cannot be established with sufficient precision
- ▶ a contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attached to the works, goods or services
- ▶ in response to an Open or Restricted Procedure where only irregular or unacceptable tenders were submitted

105. The Contract Notice must set out and define the needs and requirements of the contracting authority and it will make it clear that the Competitive Dialogue procedure is being used. The Contract Notice will also set out the Award Criteria which the public body will apply during the dialogue stage.
106. A selection is made of those who respond to the advertisement and the contracting authority enters into dialogue with those selected to develop one or more suitable solutions for its requirements. The contracting authority may reduce the number of solutions throughout the dialogue and then invite tenderers to tender on the basis of the specified solution(s).
107. In relation to the procedure, the contracting authority sets out its “needs and requirements” in a Contract Notice and/or in a descriptive document and defines its chosen Award Criteria and the indicative timeframe. The substantial or fundamental elements of the Contract Notice and/or of the descriptive document may not be modified during the award procedure. Those who respond to the Contract Notice are chosen following the same process as the Restricted Procedure above, i.e. shortlisting of candidates following examination of their completed ESPDs. There should be a minimum of three candidates. A dialogue is then begun with the qualified participants with the aim of identifying and defining how the contracting authority’s needs can be best satisfied. The dialogue should be carried out individually with each of the participants to ensure the principles of equal treatment and transparency are adhered to and that a genuine competition has taken place. Contracting authorities must not provide information in a discriminatory manner which may give some participants an advantage over others. A contracting authority must respect the intellectual property rights of all candidates and protect the confidentiality of information provided by candidates to them. Contracting authorities must not disclose the proposed solutions of participants without their agreement. The complexity of the contract, coupled with the necessity to be able to compare several solutions and take decisions which can subsequently be justified, requires that the application of the Award Criteria be based on written documents. Whether these documents are qualified as “outline solutions”, “project proposals”, “tenders” or other is not specified in the Directive. Contracting authorities must continue the dialogue phase until it can identify the solution or solutions.
108. When satisfied about the best means of meeting its requirements the contracting authority issues an RFT and asks the participants to submit their “final” tenders which will be assessed on the basis of the Award Criteria set out in the Contract Notice or descriptive document. Once these final tenders have been received, the contracting authority may ask for them to be clarified, specified and optimised. Such clarification, specification, optimisation or additional information may not involve changes to the essential aspects, including the needs and requirements set out in the Contract Notice and/or descriptive document. The Directive provides that “these tenders shall contain all the elements required and necessary for the performance of the project”. They are, therefore, complete tenders. The most economically advantageous tender will then be selected. Post-tender negotiations are specifically permitted with the tenderer identified as having submitted the best tender. These negotiations may be carried out to confirm financial commitment or other terms contained in the tender provided this does not have the effect of materially modifying essential aspects of the tender including the needs and requirements set out in the Contract Notice and/or descriptive document and does not risk distorting competition or causing discrimination. A record of clear reasons for selecting this approach (as required under Regulation 84 of the 2016 Regulations) is required and commercial confidentiality is of key importance in employing this procedure.

## COMPETITIVE PROCEDURE WITH NEGOTIATION



\* Document retention periods are subject to any other document retention legislation that a public body may have to follow by law, e.g. the National Archives Act 1986

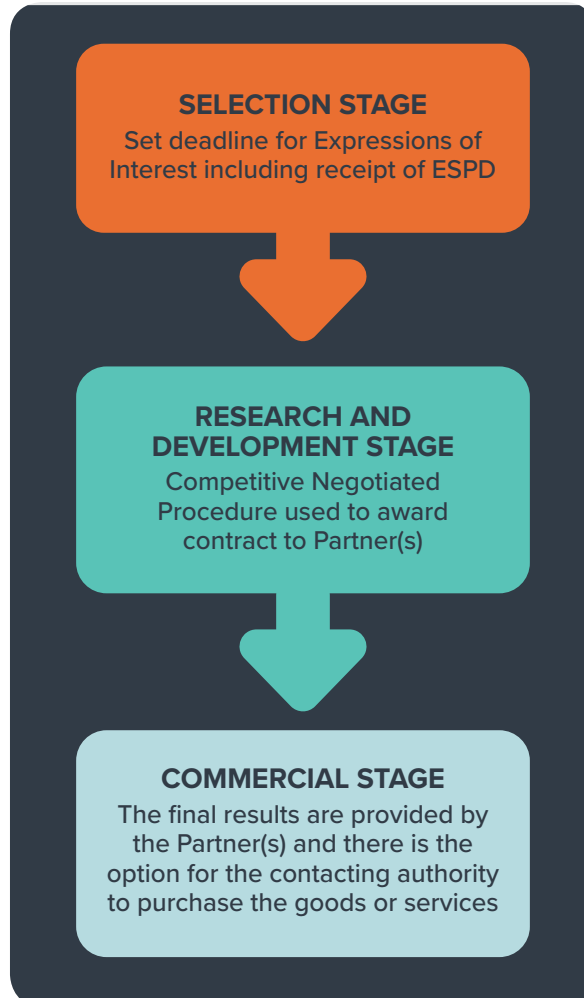
109. The Competitive Procedure with Negotiation may only be used for works, goods and services contracts where one or more of the following circumstances apply:

- ▶ the needs of the contracting authority cannot be met without adaption of readily available solutions
- ▶ the contract includes design or innovative solutions
- ▶ the technical specifications cannot be established with sufficient precision
- ▶ a contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attached to the works, goods or services
- ▶ in response to an Open or Restricted Procedure where only irregular or unacceptable tenders were submitted



110. The Competitive Procedure with Negotiation is a two stage procedure that generally starts with a call for competition.
111. The Contract Notice must make it clear that the Competitive Procedure with Negotiation is being used. There is an obligation on the contracting authority to provide a description of its needs, to specify the Award Criteria and to define the minimum requirements that must be met by all tenderers. The information provided by a contracting authority to tenderers must be sufficiently precise to enable them to identify the nature and scope of the procurement so they can decide whether or not to request to participate. Any supplier may make a request to participate. The request to participate must be accompanied by a completed European Single Procurement Document (ESPD). Contracting authorities can limit the number of candidates it invites to participate.
112. Following assessment of the submitted requests to participate and ESPDs, the contracting authority will invite suppliers that meet the Selection Criteria to the initial tender phase. Only suppliers invited to participate may submit an initial tender which shall be the basis for the negotiations. This can be followed by several rounds of negotiation in order for the contracting authority to seek better offers. There is the possibility of reducing the number of tenders during the process by applying published Award Criteria as set out in the Contract Notice.
113. While a contracting authority may negotiate the initial and all subsequent tenders submitted by a tenderer, a tenderer's final tender cannot be negotiated. There is an obligation on contracting authorities to ensure equal treatment of all tenderers during the negotiations. Contracting authorities must not provide information in a discriminatory manner which may give some participants an advantage over others and they must inform all tenderers, who have not been eliminated, of any changes to the technical specifications and provide tenderers with sufficient time to modify or re-submit amended tenders.
114. A contracting authority must not disclose to other participants the confidential information communicated to it by a tenderer participating in the negotiations without the agreement of that tenderer.
115. Where the contracting authority intends to conclude the negotiations it must inform the remaining tenderers and set a deadline for receipt of revised tenders. It must assess the final tenders against the Award Criteria set out in the Contract Notice. No negotiation is permitted after the receipt of final tenders.
116. Contracting authorities may award contracts on the basis of initial tenders submitted by tenderers without negotiation where the contracting authority has reserved the possibility of doing so in the Contract Notice.
117. A record of clear reasons for selecting this approach (as required under Regulation 84 of the 2016 Regulations) is required and commercial confidentiality is of key importance in employing this procedure.

## INNOVATION PARTNERSHIP PROCEDURE



118. Innovation Partnerships can be used where there is no existing good or service currently available on the market that meets a contracting authority's needs. Contracting authorities can set up innovative partnerships with one or several partners conducting separate research and development activities. The aim of an innovation partnership is the development of innovative goods, services or works and its subsequent purchase provided it corresponds to the performance levels and maximum costs agreed between the contracting authority and the participants. A record of clear reasons for selecting this approach is required.
119. Under this procedure the Contract Notice must identify the need for an innovative good, service or works that cannot be met by purchasing goods or services already on the market and set out the minimum requirements that all tenderers must meet. This information must be sufficiently precise to enable suppliers to identify the nature and scope of the required solution.

120. Any supplier may make a request to participate in response to a Contract Notice. However, only those tenderers invited by the contracting authority following the assessment against the ESPD and Selection Criteria can participate in the procedure. A contracting authority in selecting tenderers for an innovative partnership must apply criteria concerning the capacity of the candidate in the field of research and development and of developing and implementing innovative solutions.
121. There is the possibility of reducing the number of tenderers during the process by applying published Award Criteria. This must be set out in the Contract Notice.
122. A contracting authority must negotiate the initial and all subsequent tenders submitted by a tenderer. However, a tenderer's final tender cannot be negotiated. There is an obligation on contracting authorities to ensure equal treatment of all tenderers during the negotiations. Contracting authorities must not provide information in a discriminatory manner which may give some participants an advantage over others. They must also inform all tenderers, who have not been eliminated, of any changes to the technical specifications and provide tenderers with sufficient time to modify or re-submit amended tenders.
123. A contracting authority must not disclose to other participants the confidential information communicated to it by a tenderer participating in the negotiations without the agreement of that tenderer.
124. An Innovative Partnership must set intermediate targets to be attainable by the participants and must provide for payment in appropriate instalments and on the basis of these targets. Based on the targets provided the contracting authority may decide after each phase to terminate the innovative partnership, or where there are several partners on the innovative partnership provide an option to reduce the number of partners by terminating individual contracts.
125. The commercial stage of the resulting innovative good, service or works can then take place provided that they correspond to the performance levels and maximum costs agreed between the contracting authority and the participants. A contracting authority must define the arrangements applicable to intellectual property rights and must not disclose partners proposed solutions or confidential information without that partner's agreement.
126. The structure, duration and value of the different phases of the innovative partnership must reflect the degree of innovation of the proposed solution and the sequence of research and development activities required for a solution that is not already on the market.

## NEGOTIATED PROCEDURE WITHOUT PRIOR PUBLICATION

127. The Negotiated Procedure without Prior Publication can only be used in a limited number of narrowly defined circumstances. Regulation 32 sets out an exhaustive list of limited circumstances. The absence of a call for competition is a departure from the core principles of openness, transparency and competition and as such is a very exceptional procedure. It should be noted that circumstances set out in Regulation 32 are strictly interpreted by the Commission and the Courts. Where one of these exemptions is invoked, the contracting authority must be able to justify the use of the exemption. It is important that there is an audit trail including, where relevant, why the Open and Restricted Procedures were not considered appropriate.
128. This procedure may be used for the purchase of goods and services:
  - ▶ where no tenders or no suitable tenders or no requests to participate or no suitable requests

to participate have been submitted in response to an Open or Restricted Procedure and where the initial conditions of the contract are not substantially altered - a tender will be considered not suitable where it is irrelevant to the contract, is manifestly incapable without substantial changes of meeting the contracting authorities needs and requirements, it is to be or may be excluded under Regulation 57 or it does not meet the Selection Criteria

- ▶ in so far as is strictly necessary in cases of extreme urgency not attributable to the contracting authority and brought about by events unforeseeable by the contracting authority when the time limits for the Open or Restricted Procedure or Competitive Procedures with Negotiation cannot be complied with
- ▶ the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance and can only be supplied by a particular supplier or service provider
- ▶ when competition is absent for technical reasons or due to the protection of exclusive rights, including intellectual property rights, there is only one possible supplier or service provider - these derogations can only be used where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement
- ▶ for additional deliveries by the original supplier which are intended as either a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance - the duration of such contracts shall not, as a general rule, exceed three years
- ▶ where the goods are manufactured purely for the purposes of research, experimentation, study or development
- ▶ for supplies quoted and purchased on the commodity market
- ▶ for the purchase of supplies on particularly advantageous terms, from either a supplier definitively winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure
- ▶ for repetition of similar works or services by the original supplier where such works or services are in conformity with a basic project for which the original contract was awarded - however, the original project must indicate the extent of any possible works and services and the conditions under which they will be awarded and can only be availed of during the three years following the conclusion of the original contract
- ▶ for service contracts where the contract follows a design contest and is awarded to the winner or winners of the design contest
- ▶ a contracting authority may consider publishing a “Voluntary Ex-Ante Transparency Notice” (VEAT) when they use the Negotiated Procedure without Prior Publication. In completing a VEAT notice the contracting authority must give sufficient information as to the justification for direct award of a contract without OJEU advertising and observe the minimum standstill period before the contract is awarded. This allows economic operators the opportunity to challenge the decision of the contracting authority and obtain pre-contractual remedies should a challenge be upheld.

## RECEIPT AND OPENING OF TENDERS

129. Contracting authorities should ensure that proper procedures are in place for opening tenders to prevent any risk of abuse or impropriety at this stage.
130. Where tenders are not received electronically a formal opening of tenders received must take place. At least two officials should open the tenders. When tenders are opened they should be

date stamped and initialled. In particular, the pages containing pricing details should be stamped and initialled. Tenders received after the tender deadline should be rejected and returned to their owners, with their arrival time recorded. Tenderers cannot submit modifications to their tenders after the closing date for receipt of tenders. The stamped and initialled prices are the prices that must be used in determining the price of the tender. A report on the tenders received, those present at the opening of the tenders, and details of any tenders rejected and the reasons for the rejection should be produced, signed off at the appropriate level and placed in the project file.

131. eTenders facilitates the tracking of electronically received tenders and may be used for receipt and processing of tenders.

## EVALUATION OF TENDERS

132. Examination of tenders should be carried out by a team with the necessary competence. The team may include independent representation. External experts can be used in complex evaluations to provide advice or recommendations on the technical aspects of the tenders to the evaluation team.
133. External experts should sign confidentiality and non-disclosure agreements and comply with any other security or confidentiality requirements of the contracting authority and should return to the contracting authority all documentation, materials and notes received or made during the evaluation.

## EXCLUSION GROUNDS (MANDATORY)

134. At the selection stage contracting authorities are required to exclude from further consideration any tenderers who have been convicted of specified offences. The mandatory Exclusion Grounds are where a tenderer has been convicted of one or more of the following offences:
  - ▶ participation in a criminal organisation
  - ▶ corruption
  - ▶ fraud
  - ▶ terrorist offences or offences linked to terrorist activities
  - ▶ money laundering or terrorist financing
  - ▶ child labour and human-trafficking related offences
  - ▶ breach of tax or social security obligations
135. In relation to tax and social security obligations, there is a mandatory obligation to exclude a tenderer who (i) has been subject to a binding and final legal or administrative decision which found breach of obligations to pay tax or social security obligations and (ii) where no such binding decision has been made the contracting authority may at its discretion exclude a tenderer where it can demonstrate “by any appropriate means” non-payment of taxes or social security contributions by the tenderer. In the case of both (i) and (ii), this can be remedied by the tenderer making full payment or “entering into a binding arrangement with a view to paying” including where applicable any interest accrued or fines.
136. The mandatory obligation to exclude tenderers also applies where the person convicted of any of the above is a member of the administrative, management or supervisory body of the tenderer or has powers of representation, decision or control in the tenderer’s organisation. There are

derogations from the application of the mandatory exclusions for overriding requirements in the public interest, e.g. provision of vaccines in emergency public health scenario. A contracting authority can disregard tax and social security obligation breaches where the exclusion would be clearly disproportionate, i.e. where only minor non-payment amounts are involved.

137. Where a contracting authority becomes aware at a later stage in the process that a tenderer is subject to any of the mandatory Exclusion Grounds, the 2016 Regulations also allow for exclusion of the tenderer during the procurement procedure.

## EXCLUSION GROUNDS (DISCRETIONARY)

138. Contracting authorities have discretion to disqualify candidates for competing in a public procurement competition for the following reasons:
- ▶ where the contracting authority can demonstrate violations of environmental, social and labour law obligations including rules on accessibility for disabled persons
  - ▶ bankruptcy
  - ▶ insolvency or winding-up procedures
  - ▶ assets being administered by liquidator or by the Court
  - ▶ arrangements with creditors
  - ▶ where the contracting authority can demonstrate grave professional misconduct
  - ▶ where a contracting authority has sufficiently plausible indications to conclude that candidates have entered into agreements with other tenderers aimed at distorting competition
  - ▶ past poor performance where the candidate has shown significant or persistent deficiencies in a prior public contract which led to termination, damages or other comparable sanctions
  - ▶ where a conflict of interest cannot be remedied by any less intrusive means
  - ▶ where a distortion of competition arises from direct or indirect involvement in the preparation of the procurement procedure
  - ▶ the tenderer has been guilty of serious misinterpretation in supplying information required for the verification of the absence of Exclusion Grounds or the fulfilment of the Selection Criteria, has withheld such information or is not able to submit supporting documents in relation to the ESPD
  - ▶ where the tenderer has undertaken to unduly influence the decision-making process of the contracting authority or obtained confidential information which may confer upon it undue advantages in the procurement procedure or where the tenderer has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award
139. Contracting authorities may exclude the tenderer at any time during the procedures. In applying discretionary Exclusion Grounds, contracting authorities should pay particular attention to the principle of proportionality.

## SELF-CLEANING

140. The 2016 Regulations provide for a long-stop date of 5 years from the date of conviction for the mandatory exclusionary grounds. The 2016 Regulations provide for a long-stop date of three years from the date of the relevant event for the discretionary exclusion grounds.
141. Where any of the mandatory or discretionary exclusion grounds apply to a tenderer, it may utilise the self-cleaning mechanism under the 2016 Regulations to demonstrate its “reliability despite the existence of relevant grounds for exclusion”. Tenderers must not be excluded under the mandatory exclusion grounds or the discretionary exclusion grounds if they have provided sufficient evidence of each of the following by payment of compensation in respect of any damage caused, active cooperation with investigating authorities by clarifying the facts and circumstances, implementation of technical, organisational or personnel measures that are appropriate to prevent further misconduct. A tenderer should have the opportunity to provide evidence at tender stage on self-cleaning measures and must not be excluded if the evidence is considered sufficient. This self-cleaning option cannot, however, be extended in the case of exclusion from participation in procurement procedures because of a final court judgment. A contracting authority must provide a statement of reasons to the tenderer where it considers the measures taken by the tenderer to be insufficient.

## SELECTION CRITERIA

142. Where suppliers are not excluded from tendering for reasons based on the exclusion grounds, they are assessed based on information concerning their suitability to pursue a professional activity, economic and financial standing and/or as technical capacity and ability. At this stage only the supplier’s ability to perform the contract is being considered and not whether they have made the best offer or not. For Open Procedures, all tenderers that meet the Selection Criteria have a right to have their tenders evaluated at the award stage. For two stage procedures (Restricted, Competitive Dialogue, Competitive Procedure with Negotiation, and Innovation Partnership), contracting authorities may limit the number of candidates to be invited to tender (or negotiate) based on the Selection Criteria but they must state this in the Contract Notice. Candidates have a right to be advised of the reasons they have not met the Selection Criteria. Records should be kept of this notification in line with contracting authorities’ obligations under Regulation 84.
143. Selection Criteria are addressed in Section 3.2 of the Standard Template RFTs for Goods and Services which are available to download on the Office of Government Procurement’s website at [www.ogp.gov.ie](http://www.ogp.gov.ie).

## ECONOMIC AND FINANCIAL STANDING

144. The assessment of a tenderer's economic and financial standing is a key part of any procurement process because the contracting authority must be reasonably satisfied that a contractor will have the necessary economic and financial capacity to carry out any contract which may be awarded. Establishing the appropriate Selection Criteria that are relevant and proportionate to the subject matter of a particular contract is a matter for the contracting authority concerned but might include a minimum yearly turnover or asset to liability ratios. This is because the contracting authority is in the best position to gauge the appropriate levels of financial capacity that are appropriate to the needs and subject matter of the specific contract.

145. Any such requirements should be related and proportionate to the subject-matter of the contract. In particular, the turnover requirement should normally not exceed twice the estimated contract value. However, in duly justified circumstances, it is possible to apply higher requirements. The maximum yearly turnover limit for contracts based on a Framework Agreement, following a mini-competition should be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the Framework Agreement.
146. Tenderers are asked to confirm by way of their completed ESPD that they meet the minimum standards required by the contracting authority. They will generally be required to produce the necessary documentation (e.g. bank statements, audited accounts, proof of professional indemnity, etc.) only when provisionally short-listed in a Restricted Procedure or provisionally chosen as the successful tenderer in an Open Procedure. However, they can be asked for this documentation at any stage in the procurement process where this is necessary for the proper conduct of the procurement process.

## PROFESSIONAL AND TECHNICAL CAPACITY

147. Where a tenderer's professional and technical capacity is being evaluated, a contracting authority may request information, (e.g. a list of the main services provided by the tenderer over the past three years) to show that the tenderer possesses the required professional and technical capacity to carry out the contract and that it possesses the necessary human and technical resources and experience to perform the contract. Where experience is specified as a selection criterion, it should not be framed in such a way as to unduly narrow a field of eligible tenderers (by specifying an exact work type or industry) or constitute a barrier to non-national tenderers. Contracting authorities may consider the previous experience of individuals in the case of a start-up business that has yet to establish a track record as a business entity. Where particular profiles of technical ability (i.e. educational and professional qualifications) are required, contracting authorities should request copies of the curriculum vitae of the tenderer's proposed project team for assessment against the required technical profiles. For example, if a contracting authority requires the tenderer's team to be headed by a project manager educated to degree level with a specified number of years' experience of project management or a computer programmer to have a specified number of years' experience of a particular programming language, the requirements for such technical ability must be specified as a Selection Criteria, and the received curriculum vitae evaluated against the specified technical profiles. Tenderers can be asked in the RFT to confirm that the project team proposed in the tender will be the project team that will work on the project, and, that in the event of being awarded a contract, any changes to the project team will be made only after agreement with the contracting authority. Contracting authorities can choose to evaluate CVs and people's experience to carry out the required service at either the selection or award stage but not at both stages. Contracting authorities must ensure that in evaluating curriculum vitae they do so only once.

## INSURANCE

148. Contracting authorities should only require such types and levels of insurance as agreed are proportionate and reasonable in the context of the particular contract. Factors which may be considered by buyers for the supply of goods and general services should include: the risks involved, the value of the contract and the subject matter of the contract. The required insurance coverage will vary from contract to contract. Any requirement for insurance cover must be signalled in the tender documentation.



149. Documentary evidence of the required insurance will only be required when a candidate is being assessed for shortlisting in a Restricted Procedure or has been identified as a successful tenderer in an Open Procedure procurement competition. The candidate must demonstrate that it can obtain the relevant insurance in accordance with the requirements set out. The evidence required to pass this criterion is confirmation from an insurance provider that the candidate has the current required level of insurance. Alternatively, if the candidate does not currently have cover at the levels stipulated they must produce evidence from the insurance provider confirming that the candidate can obtain cover at the stated levels if awarded the contract.
150. In carrying out competitions for the acquisition of routine low-to-medium-risk goods and services, contracting authorities should refer to Appendix 2 of DPER Circular 10/14 for guidance in relation to setting insurance level requirements. For bespoke and or complex competitions or if the contracting authorities have concerns with regard to any aspect relating to the subject matter of the procurement then they should contact the State Claims Agency for assistance in specifying appropriate insurance types and levels .

## CONSORTIA AND SUB-CONTRACTING

151. Companies, and in particular SMEs, are encouraged to consider forming a consortium, where they are not of sufficient scale to tender in their own right. The template RFT requires that there is a Lead/Prime Contractor for all such groupings and undertakings who assumes full responsibility for the delivery of the contract.
152. If a tender is submitted by a group of tenderers or involves subcontractors, each must show that they have the required economic and financial capacity and the professional and technical ability to perform the tasks assigned to them in the tender by completing an ESPD.
153. Contracting authorities cannot require groups of tenderers to take on a specific legal form at tender stage but they may require that a successful bidding consortium assume a specific legal form once the contract has been awarded to the extent that this is necessary for the satisfactory performance of the contract.
154. Companies considering forming a consortium to bid for Public Sector opportunities should seek legal advice in relation to the structure and operation of the consortium to ensure that it is fit for purpose and complies with their legal obligations particularly in relation to competition law. Specialist advice in relation to forming consortia may be obtained from Enterprise Ireland and InterTrade Ireland. Suppliers should also consider the Guide on Consortium Bidding “How to comply with competition law when tendering as part of a consortium” published by the Competition and Consumer Protection Commission.
155. Tenderers can rely on the capacity of third parties (including sub-contractors) to demonstrate compliance with the economic and financial standing requirements and/or the technical and professional ability requirements regardless of the legal nature of the link between the parties. However, a tenderer will only be able to rely on third party resources where that entity will perform the works or services for which its capacity is required. Tenderers will be obliged to produce a commitment indicating that they have the resources in question at their disposal including separate completed ESPD forms (see section dealing with ESPD below).
156. Contracting authorities may ask tenderers to indicate in its tender whether it intends to sub-contract any of the contract if it is awarded the contract. Contracting authorities will require the details of its sub-contractors and to inform the contracting authority during the life of the contract if such details change. Sub-contractors may, where specified be required to submit a separate.

## EUROPEAN SINGLE PROCUREMENT DOCUMENT (ESPD)

157. The “European Single Procurement Document” (ESPD) is a self-declaration form introduced under the 2016 Regulations which allows a tenderer to declare that it is not excluded from a competition on the basis of Exclusion Grounds and that it meets the Selection Criteria that have been set. In general, documentary evidence need only be provided when candidates are provisionally short-listed in a Restricted Procedure or when provisionally identified as the successful tenderer in an Open Procedure. The ESPD is currently a paper based form which will be offered as an online process early in 2019.
158. Contracting authorities are entitled to request all or part of the supporting documents at any time where they consider this to be necessary in view of the proper conduct of the procedure. This might in particular be the case in two-stage procedures in which the contracting authorities make use of the possibility to limit the number of candidates invited to submit a tender. Requiring submission of the supporting documents prior to the shortlisting of candidates may avoid candidates being unable to submit the supporting documents at the award stage thus depriving otherwise qualified candidates from participation.
159. Where a tenderer/candidate relies on the capacities of other entities a separate ESPD is required to be completed in respect of each entity.
160. A tenderer may reuse an ESPD which it has used in a previous procurement where it confirms that the information contained in that ESPD continues to be correct.
161. From April 2018 onwards the ESPD is required to be provided exclusively in an electronic form. Until this date, the ESPD is a Word format document contained in Appendix 4 of the Template RFT documents on eTenders. From October 2018 onwards tenderers will not be required to submit supporting documents where the contracting authority having already awarded a contract or concluded a Framework Agreement with the relevant tenderers and is already in possession of the documents but may seek verifications that the candidates/tenderers circumstance have not changed.

## QUERIES

162. Candidates can raise queries or request clarification from contracting authorities in relation to tender documentation. The date and time for acceptance of queries is stated in the Contract Notice.
163. If additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

## CLARIFICATION

164. A contracting authority can, under the 2016 Regulations, in certain circumstances request the tenderer to submit, supplement, clarify or complete information where information submitted by a tenderer appears, to a contracting authority, to be incomplete or erroneous or where specific documents are missing. Legal advice should be obtained before a contracting authority seeks any such clarifications from tenderers.

## AWARD STAGE

165. Where a tenderer meets the Selection Criteria, and otherwise meets the requirements set out in the RFT (i.e. a compliant tender) then their tender is entitled to be given due consideration under the Award Criteria. In the event that the tender then proves to be the most economically advantageous tender under the Award Criteria, the contracting authority may at any point up to the contract award ask the successful tenderer to reconfirm any of the qualification information.
166. The awarding authority may at its own discretion decide not to award any contract and to cancel the entire contract award procedure at any time during the procurement process. In doing so it must so notify tenderers of its decision and provide reasons.
167. The 2016 Regulations provide that the contract should be awarded to the Most Economically Advantageous Tender (MEAT). To identify the most economically advantageous tender, the contract award decision should be based on:
- ▶ price, or
  - ▶ cost, using a cost-effectiveness approach such as life-cycle costing, or
  - ▶ the best price-quality ratio to be assessed on the basis of criteria including qualitative, environmental or social aspects, linked to the subject matter of the contract, or
  - ▶ quality only where the cost element is fixed price
168. Life-cycle costing can be used to encourage more sustainable and/or better value procurements which may save money over the long term although they may appear more costly on the initial purchase price. The notion of life-cycle costing includes all costs over the life-cycle of works, goods or services. It includes costs, such as research and development, production, transport, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored. The methods which contracting authorities use for assessing costs imputed to environmental externalities should be established in advance in an objective and non-discriminatory manner and be accessible to all interested parties. Such methods can be established at national, regional or local level, but they should, to avoid distortions of competition through tailor-made methodologies, remain general in the sense that they should not be set up specifically for a particular public procurement procedure. If a common method for calculation of life-cycle costs has been made mandatory by EU law this should be applied, e.g. the procurement of motor vehicles. Where a contracting authority intends to use life-cycle costing in its procurement process it must indicate in the procurement documents the data which tenderers must provide and the method that the contracting authority will use to determine the life-cycle costs.
169. In relation to quality, the contracting authority is required to adopt criteria linked to the subject matter of the contract, which might include:
- ▶ delivery date or period of completion
  - ▶ delivery process
  - ▶ running costs
  - ▶ cost effectiveness
  - ▶ aesthetic and functional characteristics
  - ▶ accessibility
  - ▶ design for all users
  - ▶ technical merit
  - ▶ after-sales service, (e.g. the extent of advisory and replacement services)

- ▶ organisation, qualification and experience of staff assigned to performing the contract where the quality of staff assigned can have a significant impact on the level of performance of the contract
  - ▶ social, environmental and innovative characteristics
  - ▶ any other relevant factors chosen by the awarding body
170. The contracting authority must state in the procurement documents the relative weighting which it gives to each of the criteria. Where it is not possible to provide weightings a contracting authority must indicate the Award Criteria in descending order of importance. Objectivity and transparency is best achieved by the use of a scoring system or marking sheet based on the weighted criteria, indicating a comparative assessment of tenders under each criterion.

## PRESENTATIONS

171. In Open or Restricted Procedures, tenderers may be asked to make a presentation on their proposals. These presentations should only be used as an aid to understanding and for purposes of clarification and cannot be scored unless this is stated in the RFT. Such presentations are not an opportunity for “post tender negotiation” on price or specifications. Negotiations of any kind cannot take place where an Open or Restricted procedure are used.

## ABNORMALLY LOW TENDERS

172. The 2016 Regulations oblige contracting authorities to investigate tenders they consider abnormally low and to seek explanations from suppliers about the price or cost. In this context, acceptable explanations from tenderers could include:
- ▶ the economics of the manufacturing process or the construction method
  - ▶ the technical solutions chosen
  - ▶ any exceptionally favourable conditions available to the tenderer
173. The contracting authority may reject the tender where the evidence supplied does not satisfactorily account for the low price. Rejection is mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with all applicable obligations in the fields of environmental, social and labour applying under national and EU law and relevant international conventions at the place where the works are carried out or the services provided. Where it is found that the low price is the result of State Aid, the contracting authority may reject the tender if the supplier is unable to prove that the aid is compatible with EU State Aid rules.

## TAX CLEARANCE

174. It is a condition of a contract award that the successful tenderer(s) shall, for the term of such contract(s), comply with all EU and domestic tax laws. Prior to the award of a contract, the successful tenderer is required to supply its Tax Clearance Access Number and Tax Reference Number to facilitate online verification of its tax status by the contracting authority. By supplying these numbers the successful tenderer acknowledges and agrees that the contracting authority has the permission of the successful tenderer to verify its tax cleared position online.

175. In relation to payments under Public Sector contracts, the contracting authority is required to verify the tax clearance of contractors prior to making payment.

## NOTIFICATION AND STANDSTILL PERIOD

176. As soon as possible after the award decision has been taken, the contracting authority must inform all tenderers of the outcome using a “standstill letter” for above threshold procurements.
177. The contracting authority will inform the preferred tenderer that it has been identified as the most economically advantageous tenderer, subject to the contracting authority being satisfied with the evidence provided by the preferred tenderer to support its completed ESPD. A contracting authority will notify the preferred tenderer of the standstill period applicable.
178. The day after the contract decision notice has been issued the “standstill period” will begin. The standstill period is 14 days where the notice is sent electronically or 16 days where the letter is sent by post. The standstill period will not commence until all relevant letters have been despatched. This period is designed to ensure that the procedures which have been followed are open to review before the conclusion of a contract. The standstill process can be managed via eTenders. During the standstill period a contract cannot be concluded.
179. A compliant standstill letter must include the following information:
- ▶ the Award Criteria
  - ▶ the name of the successful tenderer
  - ▶ the score of the recipient
  - ▶ the score of the successful tenderer
  - ▶ details of the reason for the decision, including the characteristics and relative advantages of the successful tender
  - ▶ confirmation of the date before which the contracting authority will not enter into the contract or Framework Agreement (i.e., the date after the end of the standstill period)
180. It is not enough to state in a general way that the successful tenderer’s response was superior to that of the unsuccessful tenderer; rather the letter should contain reference to specific matters, examples or facts which explain why the decision about relative advantage was made.
181. Appendix VI contains a set of Model Letters for use in relation to above EU threshold Open Competitions.

## MANAGING THE CONTRACT

182. A contract should be actively and effectively managed and monitored by the contracting authority. Active involvement in the management of the contract is essential to maximise value for money (VFM).
183. The following are standard steps that should be followed in managing a contract:
- ▶ have a programme of checking goods or services against the contract specification
  - ▶ ensure that there are regular procedures for reporting and for identifying inadequacies/poor performance and appropriate remedial action

- ▶ maintain a record of supplier performance
- ▶ review the whole procurement process at the conclusion of the contract, not just the supplier's performance but also the effectiveness of the earlier stages. This review process can provide information for future procurements in respect of developing and specifying needs, supplier selection and contract management

## CONTRACT MODIFICATION

184. A substantial modification of the provisions of a public contract or Framework Agreement during its term will be considered a new award for the purposes of the 2016 Regulations and will require a new procurement procedure. Substantial modifications are those where the modification renders the contract or Framework Agreement materially different in character from the contract or Framework Agreement initially concluded. One or more of the following conditions must be met for a modification to be substantial:

- ▶ the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected, allowed for the acceptance of a tender other than that originally accepted, or attracted additional participants in the procurement procedure
- ▶ the modification changes the economic balance of the contract or Framework Agreement in favour of the contractor in a manner which was not provided for in the initial contract or Framework Agreement
- ▶ the modification extends the scope of the contract or Framework Agreement considerably
- ▶ a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than a review clause or universal or partial succession

185. The 2016 Regulations set out the following list of changes which are specifically permitted during the life of a contract without a new procurement procedure.

- ▶ A contract may be modified irrespective of its monetary value and without a new procurement procedure where the modifications have been provided for in the initial procurement documents by way of clear, precise and unequivocal review clauses, which may include price revision clauses or options. A review clause (i) must state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and (ii) does not provide for modifications or options that would alter the overall nature of the contract or the Framework Agreement.
- ▶ Where additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor (i) cannot be made for economic or technical reasons, including requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority. The modification in question shall not exceed 50% of the value of the original contract price and where several successive modifications are made that limitation shall apply to the value of each modification. Consecutive modifications must not be aimed at circumventing the 2016 Regulations and an OJEU "Contract Modification Notice" must be published.
- ▶ Where the need for modification to a contract is brought about by circumstances which a diligent contracting authority could not have foreseen provided that the modification itself does not affect the overall nature of the contract, the modification in question shall

not exceed 50% of the value of the original contract price and where several successive modifications are made that limitation shall apply to the value of each modification. Consecutive modifications must not be aimed at circumventing the 2016 Regulations and an OJEU “Contract Modification Notice” must be published.

- ▶ Where a new contractor replaces the original contractor following a corporate restructuring such as a merger, acquisition, takeover or insolvency provided the new contractor fulfils criteria for qualitative selection initially established and that this does not entail other substantial modification to the contract.
- ▶ Where there is a change of contractor on foot of an unequivocal review clause.
- ▶ Where the value of the modification does not exceed the relevant EU thresholds and does not exceed 10% (services/supplies) or 15% (works) of the initial contract value.

186. It is recommended that contracting authorities seek legal advice when modifying contracts by relying on one of the safe harbours set out in Regulation 72.

## CONTRACT TERMINATION

187. The 2016 Regulations require contracting authorities to include provisions in all contracts that allow them to terminate the contract in the following circumstances:

- ▶ the contract has been subject to substantial modification that would have required a new procurement procedure
- ▶ where if it is discovered after the contract award that the contractor should have been excluded under the mandatory exclusion provisions, e.g. as a result of conviction for corruption
- ▶ where the CJEU has declared that there was a serious infringement by the contracting authority of its obligations under the Regulations or the Treaty on the Functioning of the European Union and accordingly the contract should not have been awarded to the contractor

## VERIFIABLE AUDIT TRAIL

188. Accurate written records (including computer records) are essential in demonstrating that proper ethical standards have been observed. Therefore, appropriate records should be maintained throughout the purchasing process. eTenders provides a detailed audit trail of the procurement process from contract notice through to award notice and contract management. [A checklist for assessing the necessary elements of a Procurement and Contract File is contained in Appendix VII: Checklist for Procurement and Contract File.](#)

# FRAMEWORK AGREEMENTS





189. A Framework Agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity. They are in effect umbrella agreements with one or more suppliers or service providers that set out rules under which specific purchases (“call-off” contracts) can be made during the term of the Framework Agreement. The most appropriate use of a Framework Agreement is where a contracting authority has a repeated requirement for goods or services but the exact quantities are unknown.
190. The benefits arising from Framework Agreements include: administrative savings from reduced duplication of tendering; improved consistency; and enhanced service levels. In line with DPER Circular 16/13, public bodies are encouraged to promote the use of Framework Agreements put in place by the OGP or other Central Purchasing Bodies (CPBs) in the Local Authority, Health, Education and Defence Sectors. It is Government policy that public bodies, where possible, should make use of all such central arrangements. Where public bodies do not utilise these arrangements, they should be in a position to provide a value for money justification for not doing so.
191. The key features of Framework Agreements are:
- ▶ they can be placed by an individual contracting authority or a CPB
  - ▶ they can be with a single supplier or multiple suppliers
  - ▶ “mini competitions” may be held between Framework members as required or Framework clients can directly draw-down goods or services in accordance with the rules set out in the Framework Agreement
  - ▶ the maximum duration is four years (unless in exceptional circumstances justified by the subject of the Framework Agreement)
  - ▶ the terms and criteria for awarding contracts under a Framework Agreement must be published at the outset and must not change
192. The obligation to publish a Contract Notice in the OJEU extends only to the award of the Framework Agreement itself and does not apply to the award of specific contracts under the Framework. However, in line with DPER Circular 10/14, contracting authorities are required to publish all Contract Award Notices over €25,000 on the eTenders website on completion of the award. This is a separate step to publishing on the OJEU aimed at facilitating measurement of SME participation in public procurement.
193. Contracts awarded under a Framework Agreement may have a completion date after the end of the Framework. It is important, however, that any “overhang” should not act to distort the market.
194. When a Framework Agreement is being established on behalf of a group of contracting authorities by a Central Purchasing Body, the Framework Agreement must clearly indicate which contracting authorities are party to it. This can be done either by listing the contracting authorities in the Contract Notice or Framework Agreement documentation or describing them in a way that makes the scope and range of the Framework clear to market operators.
195. Although it is possible to use any one of the 5 main competitive procedures to put in place a Framework Agreement, in practice the Open and Restricted Procedures are more commonly used. This is because Framework Agreements are generally more suited to the procurement of straightforward commodity and non-complex purchases. Framework Agreements may also be used for procurements below the EU thresholds.
196. In awarding a contract under an established Framework Agreement (a “call- off”) there are in general two main options:

## OPTION 1: DIRECT DRAW DOWN

197. Awards can be made directly, without re-opening a competition amongst framework members, on the basis of an objective procedure set out in the Framework Agreement. For example, a contracting authority may opt to use a cascade approach for call-off where a contract is always offered first to the first ranked tenderer at the framework award stage and, if this party is not in a position to perform the contract it is then offered to the second ranked tenderer and so on. Alternatively the award of contracts may rotate between framework members in a pre-determined order. Care needs to be taken to ensure that whatever method is used is set out in the Framework Agreement and that it is transparent and objective.

## OPTION 2: MINI-COMPETITION

198. This is where awards are made based on a further competition, inviting all framework members on the framework to participate (a mini-competition). The contracting authority may use the second option of a mini-competition where not all terms governing supply are laid down in the Framework Agreement. This process allows the terms referred to in the specification to be more precisely formulated. This is still subject to the principle that the parties may under no circumstances make substantial amendments to the terms laid down in the Framework Agreement. The call-off contract Award Criteria and the weightings (or weighting ranges) must be clearly stated in the documents sent to framework members in relation to a mini-competition. The mini-competition phase can be fully managed on the eTenders system. All of the framework members on the framework capable of performing the contract must be invited to participate in a mini-competition on this basis. Contracting authorities must fix a time limit for submission of tenders which is sufficiently long enough to allow tenders for a call-off contract to be submitted. Tenders must be submitted in writing and shall not be opened until the timeframe for reply stipulated in the supplemental request for tenders has expired. The contracting authority shall award the call-off contract to the best tender on the basis of the Award Criteria specified in the procurement documents for the Framework Agreement.

# ELECTRONIC PROCUREMENT



199. The long term vision of European public procurement reform envisages an eProcurement environment, which facilitates the seamless interaction of businesses with public buyers. The 2016 Regulations will make the use of eProcurement in all procedures mandatory on a phased basis as follows:
- ▶ electronic notification and electronic access to tender documents is currently mandatory
  - ▶ by April 2017, electronic submission of tenders and requests to participate will become mandatory for Central Purchasing Bodies
  - ▶ by April 2018, the ESPD must be provided exclusively in electronic form
  - ▶ by October 2018, electronic submission of tenders and requests to participate will become mandatory
  - ▶ by October 2018, contracting authorities must have recourse to e-Certis
  - ▶ Dynamic Purchasing Systems must currently be operated as a completely electronic process
  - ▶ E-auctions rules apply if contracting authorities choose to use e-auctions
  - ▶ E-catalogues rules apply if contracting authorities choose to accept or require use of e-catalogues
200. Contracting authorities are not obliged to require electronic means of communication in the submission process in the following situations:
- ▶ due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications
  - ▶ the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority
  - ▶ the use of electronic means of communication would require specialised office equipment that is not generally available to contracting authorities
  - ▶ the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means
201. Where a contracting authority does not use electronic means of communication for one of the reasons set out above it must indicate in its report of the procurement process the reasons why it did not use electronic communications.

## DYNAMIC PURCHASING SYSTEMS (DPS)

202. A DPS is a completely electronic system which may be established by a contracting authority to purchase commonly used goods, works or services which are generally available on the market. It is unlikely to be suitable for one-off, bespoke and/or highly-complex requirements. Contracting authorities, including Central Purchasing Bodies, may set up a DPS. The DPS should be set up for identified requirements, which may be divided into categories of goods, works or services.
203. The rules on DPS have been greatly simplified and streamlined under the 2016 Regulations. Suppliers no longer have to submit an “indicative tender” with their request to join the DPS. The previous obligation for contracting authorities to publish a further simplified advertisement in the OJEU each time they wish to award a contract under a DPS no longer applies. The default four-year limit on the duration of a DPS has also been removed. There is now no specific maximum duration of a DPS. These improvements are intended to make the DPS significantly more useable and useful.

204. A DPS can streamline procurement for both suppliers and contracting authorities. Suppliers do not have to demonstrate suitability and capability every time they wish to compete for a public contract. Likewise the award of individual tenders can be quicker than under some other procedures. The DPS is more flexible in some respects than the use of Framework Agreements, particularly as suppliers may join it at any time during its period of validity. Dynamic participation means that suppliers, once on a DPS, may submit offers for each contract awarded under a DPS. As each contract is a separate procurement, suppliers can submit different offers each time.

## SET-UP

205. To set up a DPS, a contracting authority must place a Contract Notice in the OJEU to make known the intention to establish a DPS, and suppliers must be allowed at least 30 days to respond. (As with other procedures, contracting authorities may use a Prior Information Notice to make known their intention and reduced time limits may apply in limited other cases.) The initial set-up phase only covers the assessment of Exclusion Grounds and Selection Criteria as used in other two stage procedures. All suppliers who pass this assessment must be admitted to the DPS. Unlike Framework Agreements, suppliers can also apply to join the DPS at any point during its lifetime. The Contract Notice must make it clear that a DPS is involved. The procurement documents must specify the nature of the requirements and the approximate quantities or values envisaged and the necessary information tenderers will need about the DPS and how it operates. The “period of validity” of the DPS must be stated on the Contract Notice but the 2016 Regulations indicate that the period can be later amended (extended, shortened, terminated) subject to notification on the relevant OJEU standard form. This provides useful flexibility if the contracting authority’s circumstances change, or is warranted by developments in technology, or changes in the market, etc. The contracting authority is required to evaluate suppliers’ requests within 10 working days of receipt of their responses. This may be extended to 15 days if justified, for example, by the need to examine documents or to verify whether the Selection Criteria have been met. Contracting authorities must ensure participants have unrestricted and full access to all the procurement documents as long as the DPS is in operation.

## AWARD

206. Individual contracts are awarded at the second stage of the procurement process under the DPS. The Award Criteria to be used for the award of individual contracts must be set out in the original Contract Notice advertising the DPS. These criteria may be “formulated more precisely” for specific contracts. The minimum timescale for return of tenders is 10 days. Where the contracting authority is a sub-central body, this time limit can be reduced by mutual agreement between the contracting authority and all suppliers in the relevant DPS category. The authority may choose to require that tenders for a specific contract include electronic catalogues, adapted to the specific requirement. There is no obligation to undertake a “standstill” period, for award of contracts under a DPS although there may be some benefits in doing so.
207. Contracting authorities can, at any stage during the life of the DPS, ask participants to provide a new or updated ESPD within 5 days of when the contracting authority makes a request.
208. There is a requirement to publish Contract Award Notices within 30 days of award for specific contracts awarded under the DPS. However, contracting authorities can choose to group DPS Contract Award Notices on a quarterly basis, which must be sent within 30 days after the end of each quarter.

## ELECTRONIC CATALOGUES

209. Electronic catalogues are expressly permitted by the 2016 Regulations, removing any doubt as to their legality. Tenders can be sought by authorities in electronic catalogue form or to include an electronic catalogue provided the OJEU call for competition makes this clear and also specifies the required technical format, equipment, and technical connection arrangements and specifications for the catalogue connection requirements etc. Contracting authorities can seek tenders in the form of catalogues but these should not be the supplier's general catalogue. They must be adapted to the contracting authority's requirement.
210. Where a Framework Agreement has been established following the submission of electronic catalogues a contracting authority may at mini-competition stage allow the mini-competition to take place on the basis of an updated catalogue adapted to the requirements of the contract. The response time should be adequate to allow the supplier to respond.
211. E-catalogues may also be used under Dynamic Purchasing Systems.

# MONITORING AND REPORTING



## MEMBER STATES

212. The new Directives introduce new monitoring and reporting arrangements in order to improve the efficacy and uniform application of EU law in the field of public procurement. The State is required to submit to the European Commission a monitoring report every three years covering where applicable:
- ▶ information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the procurement rules
  - ▶ the level of SME participation in public procurement
  - ▶ the prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities
  - ▶ a statistical report for above threshold contracts indicating an estimation of the aggregated total value of such procurement during the period concerned based on data available under national publication requirements or on sample-based estimates
  - ▶ information on their institutional organisation related to the implementation, monitoring and enforcement of the new Directives on public procurement, as well as on national initiatives taken to provide guidance on or assist in implementation of European Union rules on public procurement, or to respond to challenges confronting the implementation of those rules
213. The European Commission will regularly issue a report on the implementation and best practices of national procurement policies in the internal market, based on Member States' reports.

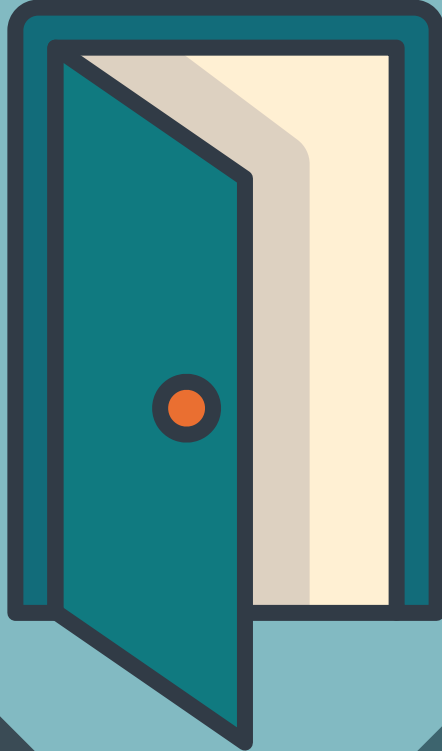
## CONTRACTING AUTHORITIES

214. **Part C of the Public Spending Code** should be consulted in relation to implementation and post implementation of project management.
215. In relation to contracts above €25,000 (exclusive of VAT) awarded without a competitive process, Department of Finance Circular 40/02 requires Government Departments to send an Annual Report signed by the Accounting Officer to the Comptroller and Auditor General explaining why a competitive process was not used. A template for the Annual Report is set out in Appendix A of Circular 40/02. The Policy Unit of the Office of Government Procurement should also be copied with this report (email: [returns@ogp.gov.ie](mailto:returns@ogp.gov.ie)).
216. Contracting authorities are obliged to maintain documentation, for at least 3 years from the date of the award of a contract, to record the progress of all procurement procedures, whether or not they are conducted by electronic means, and to justify decisions taken at all stages of the procurement procedure, including the following:
- ▶ communications with tenderers and internal deliberations
  - ▶ preparation of the procurement documents
  - ▶ dialogue or negotiation, if any
  - ▶ selection and award of the contract
217. Contracting authorities (subject to EU and national law obligations) are required, at least for the duration of the contract, to keep copies of, and grant access to, all concluded contracts with a value equal to or greater than:



- ▶ €1,000,000 in the case of goods and service contracts
  - ▶ €10,000,000 in the case of public works contracts
218. Regulation 84 of the 2016 Regulations requires all contracting authorities to prepare a written report for every above threshold contract, Framework Agreement (other than mini-competitions), and on the establishment of every Dynamic Purchasing System. This report should be lodged in the project file and must contain the following information:
- ▶ the name of the contracting authority
  - ▶ the subject matter and value of the contract, Framework Agreement or Dynamic Purchasing System
  - ▶ the results of the Selection stage, i.e. the names of the successful candidates and reasons provided for selection, the names of unsuccessful candidates and reasons for non-selection
  - ▶ the reasons for rejecting abnormally low tenders
  - ▶ the name of the successful tenderer and the reasons why the tender was selected
  - ▶ the name(s) of sub-contractors and the share of the contract to be sub-contracted
  - ▶ justification, where appropriate, for the use of the Competitive Dialogue/Competitive Procedure with Negotiation
  - ▶ for Negotiated Procedures without Prior Publication the circumstances which justify the use of those procedures
  - ▶ the reasons for not awarding a contract or a Framework, or to establish a Dynamic Purchasing System
  - ▶ an explanation for not using an electronic submission
  - ▶ measures taken to address potential conflicts of interest of the evaluators
  - ▶ an indication of the main reasons why the contracting authority considers there to be a justified case for requiring turnover that is greater than the standard permitted maximum of twice the estimated contract value
  - ▶ the main reasons for decision of the contracting authority not to subdivide the requirement into lots
219. To the extent that the Contract Award Notice contains the information required under this Regulation, a contracting authority may refer to that notice.
220. Contracting authorities are required to send a copy of the above written report to the Minister for Public Expenditure and Reform if requested to do so. The report may also be communicated to the European Commission at its request.
221. Contracting authorities are also required to send the Minister for Public Expenditure and Reform a statistical report containing such other information as the Minister may from time to time request in respect of procurement covered by the 2016 Regulations. This report shall be forwarded to the European Commission by the Minister every three years and shall contain an estimate of the aggregate value of procurement during the period to which the report relates.

# FREEDOM OF INFORMATION



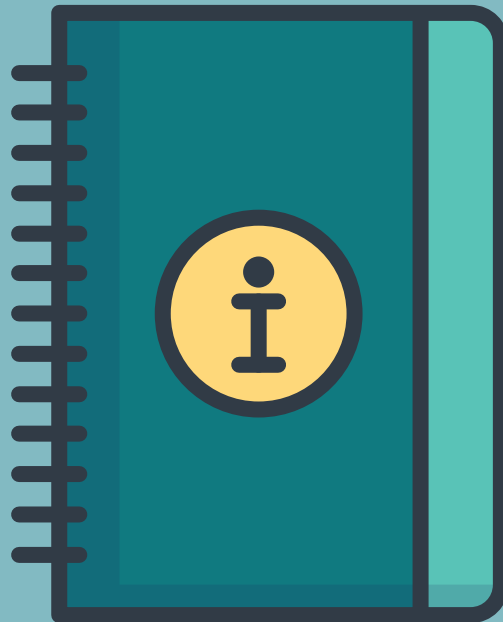
222. Bodies subject to Freedom of Information Legislation are required to provide the following details in relation to public procurement under the Model Publication Scheme, published by the Department of Public Expenditure and Reform in July 2016:
- ▶ procurement policies
  - ▶ a link to all current tender competitions on the eTenders website
  - ▶ public contracts awarded including contract type, contractor, value, award date, duration and brief description (tabular format) over €25,000 (exclusive of VAT) for both ICT and other contracts
223. This requirement does not extend to contracting entities operating under the Utilities Directive. In the case of those public bodies in line with this directive they should publish the advertisement on eTenders, including the indicative amount, the duration of the contract and the winner.
224. Freedom of Information legislation applies to a wide range of public bodies and information may be requested on records relating to a tendering procedure of a contracting authority covered by the FOI Act. Certain records may be exempt from the provisions of the Act on various grounds including confidentiality, personal information or commercial sensitivity. Tenderers are normally requested to indicate, with supporting reasons, any information included within their tenders which they wish to be regarded as confidential. A contracting authority's FOI Decision Maker will normally consult with a tenderer before deciding on whether to disclose such information on foot of an FOI request. However, no category of tender related records is subject to either release or exemption as a class. Therefore, each record must be examined on its own merits. To reduce the incidence of FOI requests, contracting authorities should endeavour to always provide a full objective assessment of the comparative strengths and weaknesses of tenders having due regard to commercial sensitivity. Further guidance on these exemptions and appropriate consultation procedures are available on the FOI Central Policy Units website. A general summary of the Information Commissioner's views on the treatment of tender related records is set out in Appendix VIII.

# CONTACTS



225. The Office of Government Procurement (OGP) has a dedicated Customer Services team committed to providing a user-friendly, high quality service to all of its customers. The role of the Customer Services team is to promote and communicate the new procurement model and new OGP arrangements to our customers (Public Sector bodies) and to resolve any queries they may have regarding the OGP.
226. All customer queries should be directed to the OGP Helpdesk which is available to provide assistance and support via our telephone and email services. Where necessary the Helpdesk will liaise with the appropriate Sourcing Portfolios and Policy Unit to ensure a speedy response to all queries. Office hours are from 9:15 am to 5:15 pm Monday to Friday. The Office is open all year except public holidays.
227. The contact details for the Helpdesk are as follows:
- ▶ telephone support will be available by calling 076 100 8000 during office hours. Calls received out of office hours will be followed up on the next working day
  - ▶ email support will be available by emailing [support@ogp.gov.ie](mailto:support@ogp.gov.ie) during office hours; email submitted outside of office hours will be dealt with during the next working day
228. The OGP website can be found at [www.ogp.gov.ie](http://www.ogp.gov.ie) and contains the most relevant and up to date information regarding current and upcoming arrangements, general guidance material and FAQs.

# GLOSSARY



## Award Criteria

The 2016 Regulations provide that a contract should be awarded on the basis of MEAT (most economically advantageous tender). This typically means a combination of price and quality where quality might include factors such as delivery date or period of completion, delivery process, running costs, aesthetic and functional characteristics, accessibility, and technical merit. The contracting authority decides the relative weightings in relation to price and quality.

## Award Notice

Publication in the OJEU which may be accessed via eTender of the details of who has been successful in an above threshold public procurement competition.

## Call-off Contract

This refers to a contract for the provision of particular services, goods or works that has been awarded under a Framework Agreement.

## Capital Works Management Framework (CWMF)

This is the separate policy and guidance relating to works and works related services that is published on the [Construction Procurement Reform website](#). It consists of a suite of best practice guidance, standard contracts and generic template documents.

## Central Purchasing Body

Defined as “a contracting authority which provides centralised purchasing activities and which may also provide ancillary purchasing activities.” The Office of Government Procurement commenced operations in 2014 and, together with four key sectors (Health, Defence, Education and Local Government), has responsibility for sourcing goods and services on behalf of the Public Service. In addition, the OGP also has responsibility for procurement policy and procedures for the entire Public Sector.

## Competitive Dialogue Procedure

This procedure allows contracting authorities to discuss different options with tenderers before deciding on a solution. This procedure is designed for certain particularly complex contracts, e.g. technical solutions are difficult to define or where a discussion of the best legal or financial structure is needed.

## Competitive Procedure with Negotiation

A new process introduced by the 2016 Regulations which allows contracting authorities to negotiate with more than one supplier in order to identify a preferred tenderer and to award a contract.

## Conflict of Interest

A ‘conflict of interest’ involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities ([OECD Guidelines for Managing Conflict of Interest in the Public Service](#)).

## Consortium

Refers to two or more economic operators that have come together specifically for the purpose of tendering for a specific public procurement opportunity. This may occur when economic operators are not of sufficient scale to tender in their own right.

## Contracting Authority

Refers to individual Government Departments or Offices; local or regional authority; any public body, commercial and non-commercial State bodies, and private entities which are subsidised 50% or more by a public body, when awarding contracts for goods, services or works.

## Contract Notice

A standard notice is used as the means of calling for competition. It is placed in the OJEU via eTenders and indicates that a Central Purchasing Body or a contracting authority is intending to procure goods, services or works.

## CPV Codes

The 'Common Procurement Vocabulary' (CPV) is a detailed system of codes for describing works, goods and services to be advertised in the OJEU. It is available on [simap.europa](http://simap.europa) website.

## Direct Draw Down

A Direct Draw Down can be used in the 2nd stage of a Framework Agreement procurement process provided it has been laid down in the terms of the Framework Agreement. Awards can be made directly, without re-opening a competition amongst framework members, on the basis of an objective procedure set out in the Framework Agreement. For example, a contracting authority may opt to use a cascade approach for call-off where a contract is always offered first to the first ranked tenderer at the framework award stage and, if this party is not in a position to perform the contract it is then offered to the second ranked tenderer and so on. Alternatively the award of contracts may rotate between framework members in a pre-determined order. Care needs to be taken to ensure that whatever method is used is set out clearly in the Framework Agreement and that it is transparent and objective.

## Directives

Three new Directives on Public Procurement were adopted in 2014.

- ▶ Directive 2014/24/EU on public procurement (Goods, Services and Works)
- ▶ Directive 2014/25/EU on procurement by entities operating in the Utilities Sector, i.e. the water, energy, transport and postal services sectors
- ▶ Directive 2014/23/EU on the award of Concession contracts, which does not directly replace any previous Directive

The EU Procurement Directives were transposed into Irish Law in 2016 and 2017 by way of the following regulations: S.I. No. 284/2016 (the "2016 Regulations"); S.I. No. 286/2016 (the "2016 Utilities Regulations") and S.I. No. 203/2017 (the "2017 Concessions Regulations").

## DOF

This refers to the Department of Finance.

## DPER

This refers to the Department of Public Expenditure and Reform.

## Dynamic Purchasing System (DPS)

Is a completely electronic system which can be used to procure commonly used goods, services or works. It is typically used by Contracting authorities to procure lower value goods. Unlike a Framework Agreement which restricts tenderers joining, tenderers can be added to a DPS at any time subject to the published eligibility criteria.



## Economic and Financial Standing

A contracting authority uses information provided by a tenderer regarding its company's economic and financial standing as a measure in deciding whether a business has the financial capacity and strength to deliver the proposed contract.

## Electronic Procurement

Refers to the use of electronic communications, e.g. online portals such as eTenders and the EU online portal, Tenders Electronic Daily (TED), by the public sector to facilitate the procurement of goods, services and works. See OJEU section for further details.

### eTenders

eTenders is the national platform for conducting eProcurement. It was developed as part of the Irish Government's Strategy for the Implementation of eProcurement in the Irish Public Sector. The site is designed to be a central facility for all Public Sector contracting authorities to advertise procurement opportunities and award notices. The site displays, on a daily basis, all Irish Public Sector procurement opportunities currently being advertised in the Official Journal of the European Union ([OJEU](#)), as well as other lower-value contracts uploaded to the site by contracting authorities.

## EU Procurement Threshold

European directives set detailed mandatory procedures for contracts whose value equals or exceeds various financial thresholds. The EU revise the thresholds every two years. See Appendix II of these Guidelines.

## European Single Procurement Document (ESPD)

The ESPD is a self-declaration used as preliminary evidence confirming that a supplier meets the Exclusion Grounds/Selection Criteria at the time of submitting a request to participate or tender. The ESPD is currently a paper based form which will be offered as an online process early in 2019.

## Framework Agreement

Typically this is established as part of a two-stage procurement process. Only suppliers who were successful during the first stage of process and were awarded a place on the Framework Agreement can take part in the second stage of the process.

## GPA

The [Government Procurement Agreement](#) is a formal agreement concluded by a number of Member States of the World Trade Organisation to observe an open and non-discriminatory public procurement policy and practice among its signatories. Under the GPA, signatories undertake to give equal treatment and equal opportunity to suppliers and service providers from other signatory States.

## Innovation Partnership

A new process under 2016 Regulations that can be used by contracting authorities where there is no existing good or service currently available on the market that meets its needs. The aim of an innovation partnership is the development of an innovative good, service or works and its subsequent purchase provided it corresponds to the performance levels and maximum costs agreed between the contracting authority and the participants. A record of clear reasons for selecting this approach is required.

## Life-Cycle Costing

Life-cycle costing allows a contracting authority to calculate all of the costs that will be incurred during the lifetime of a good, service or works. In addition to the purchase price and the associated costs of delivery, installation etc., it also includes the operating costs, i.e. energy, fuel, spares and maintenance and the end-of-life costs i.e. decommissioning and disposal. The 2016 Regulations specifically permit use of this approach, however, the method of calculating such costs must be objectively verifiable and transparent.

## Light-Touch Regime

This is a new regime introduced under Regulation 74 of the revised and updated 2016 Regulations and replaces the Part B Services regime of the old regulations. The services covered by this regime are listed in Annex XIV of the EU Directive 2014/24/EU. Under this new regime a contracting authority is required to advertise a contract with a value over €750,000 in the OJEU, however, the new regime facilitates flexibility with regard to the design of the remainder of the procurement process.

## Lot

A public procurement contract can be sub-divided into a number of separate lots. The sub-division of a contract into lots can be based on geography, i.e. a lot can be for a particular region; or specialism, i.e. legal expertise; or value, i.e. low and/or high value lots. The use of lots in public procurement is intended to increase the potential for multiple providers to be appointed following one procurement process.

## Mini-Competition

A mini-competition is the 2nd stage of a Framework Agreement procurement process and is undertaken to meet a particular requirement. Only suppliers who have been successful during the 1st stage of the Framework Agreement procurement process and have been awarded a place on the framework will be invited to compete in the mini-competition.

## Most Economically Advantageous Tender (MEAT)

The criterion used to select the winning tender. The most economically advantageous tender (MEAT) is the tender which, following assessment of the award criteria, is the most beneficial to the contracting authority and represents value for money. It may include the best price-quality ratio, or instead may use lowest price alone.

## Negotiated Procedure Without Prior Publication

Under certain circumstances this procedure can be chosen without publication of a notice in the [\(OJEU\)](#). This is only permitted in extremely limited circumstances under Regulation 32 of S.I. No. 284 of 2016 “European Union (Award of Public Authority Contracts) Regulations 2016”. The absence of a call for competition is a departure from the core principles of openness, transparency and competition and as such is a very exceptional procedure. It should be noted that circumstances set out in Regulation 32 are strictly interpreted by the Commission and the Courts. Where one of these exemptions is invoked, the contracting authority must be able to justify the use of the exemption. If a competitive process is not used, DOF Circular 40/02 requires Government Departments to send an Annual Report signed by the Accounting Officer to the Comptroller and Auditor General explaining why this was the case.

## OGP

OGP stands for the Office of Government Procurement. The OGP commenced operations in 2014 and, together with four key sectors (Health, Defence, Education and Local Government), has responsibility for sourcing goods and services on behalf of the Public Service. In addition, the OGP also has responsibility for procurement policy and procedures for the entire Public Sector.

## OJEU

The Official Journal of the European Union is the publication in which all contracts from the public sector that are valued above a certain threshold must be published. The ([OJEU](#)) is published in all official languages of the European Union every working day, i.e. 5 days a week, excluding bank holidays. It consists of three series, series L contains EU legislation; series C contains EU information and notices, e.g. judgements of the European Courts; and the supplementary S series which contains invitations to tender for public procurement opportunities. Invitations to tender can be found on the EU online portal [Tenders Electronic Daily \(TED\)](#).

## Open Procedure

A single stage procurement process which allows a tenderer to simultaneously submit suitability assessment material and a tender for evaluation in a tender competition; but only those who pass the suitability test progress to the tender evaluation. The procedure ends when an award is made.

## Prior Information Notice (PIN)

Contracting authorities can publish a PIN in ([OJEU](#)) informing potential tenderers of possible upcoming tenders. When the tender referred to in the PIN is subsequently published, the time limit to submit and receive tenders can be reduced.

## Pre-Qualification Questionnaire (PQQ)

A PQQ allows a contracting authority to assess a potential supplier's suitability in relation to their technical knowledge and experience, capacity, and financial and economic standing in relation to a particular contract. PQQs can be used as a means of selecting the candidates to go forward to the next stage of the procurement process in a Restricted Procedure; Competitive with Negotiation Procedure or Competitive Dialogue Procedure.

## Professional or Technical Capacity

One of the permitted criteria for selecting suppliers at the Selection Stage of a Restricted/Competitive with Negotiation/Competitive Dialogue procedure. Contracting authorities assess a tenderer's technical or professional capacity using information submitted by the tenderer.

## Public Financial Procedures

As all administrators in Government Departments, Offices and Public Bodies are responsible for managing and using State resources, it is essential that they have a clear understanding of the overall framework and underlying principles that govern the consumption of these resources. [The Public Financial Procedures](#) is a practical guide to assist all officials to gain a better understanding of the public service financial management framework. It sets out the relevant constitutional, statutory, parliamentary and administrative requirements; emphasises the need for economy, efficiency and effectiveness; and promotes good practice and high standards of propriety.

## Public Spending Code

The Public Spending Code is the set of rules and procedures that apply to ensure that these standards are upheld across the Irish Public Service. The Code brings together in one place all of the elements of the value-for-money framework that has been in force up to now, updated and reformed in some respects.

## Regulation 84 Report

Regulation 84 of the 2016 Regulations mandate that contracting authorities must draw-up a report in relation to each procurement process i.e. every contract or Framework Agreement covered by the Regulations, and on the establishment of every Dynamic Purchasing System. Remedies Directive

Remedies are available to suppliers in relation to above EU Threshold competitions if a contracting authority is found to have breached the 2016 Regulations. The relevant EU Directives are 89/665/EEC, 92/13/EEC, amending remedies Directive 2007/66/EC. These Directives were transposed into Irish law by way of regulation, S.I. No. 130 and S.I. No. 131 of 2010; and S.I. No. 192 and S.I. No. 193 of 2015.

## Request for Tender (RFT)

Is a document which invites contractors and suppliers to bid for the provision of goods, services or works; it includes all the documentation related to the tendering process. It normally includes a general overview of the tender requirements, a detailed specification of requirements, the format and structure for submission of tenders, how tenders will be examined and the criteria on which they will be evaluated, and some general conditions of tendering. The RFT should normally include a set of conditions for a contract which will be concluded with the successful tenderer.

## Restricted Procedure

This is a two stage procurement process and can be used for any procurement. During the first stage, expressions of interest to compete in the tender competition will be considered by the contracting authority. Only those who meet the criteria set out in the Selection Criteria will be invited to submit a tender i.e. second stage.

## Scoring Methodology

Tenders are scored based on the Award Criteria set out in the Request for Tender.

## Selection Criteria

To be used in pre-selecting candidates who are to be invited to submit tenders. The criteria relates to a candidates professional conduct and standing, professional or technical expertise, financial or economic standing, general capacity and competency, i.e. criteria which relate to a candidate's character and capability to perform a particular contract.

## Standstill Letter

A communication sent to all tenderers informing them of the award decision and which commences the standstill period. Formally called an Award Decision Notice.

## Standstill Period

The day after the contract decision notice has been issued the "standstill period" will begin. The standstill period is 14 days where the notice is sent electronically or 16 days where the letter is sent by post. The standstill period will not commence until all relevant letters have been despatched. This period is designed to ensure that the procedures which have been followed are open to review before the conclusion of a contract.

## Template Notification Letters

Template Notification letters are contained in [Appendix III and Appendix VI of these Guidelines](#).

## Template RFTs and Contracts

A suite of template RFTs and contract documents for goods or services has been developed by the OGP in conjunction with the Chief State Solicitor's Office and the Office of the Attorney General, and is available on the eTenders website for use by contracting authorities in conducting an Open Procedure. They should be used for all routine, and low to medium risk procurements.

## VEAT Notice

A “Voluntary Ex-Ante Transparency Notice” (VEAT) can be published where a contracting authority deems that a contract does not require prior publication of a contract notice in the European Journal (OJEU).

# FREQUENTLY ASKED QUESTIONS



## Why did we need a new suite of Directives?

While the 2014 procurement Directives are a development and an extension of the previous procurement regime based on the 2004 Directives, they also introduce new provisions and procedures which were not included in the 2004 Directives. The 2014 Directives also reflect and codify changes in CJEU case law since 2004 that have clarified key issues in the operation of the regime. The European Commission brought forward proposals for the modernisation of EU public procurement policy at the end of 2011. There were a number of objectives including the streamlining of public procurement processes and the introduction of more simplified and flexible rules to allow tender procedures to be conducted faster and with less red tape.

## When did the new rules come into force and what are the transitional arrangements?

Directive 2014/24/EU and the implementing Irish regulations (the 2016 Regulations) apply to procedures commenced on or after 18 April 2016. Contract award procedures which commenced prior to 18 April 2016 remain subject to the 2004 Directives (as implemented in Ireland by the 2006 Irish Regulations). Contract award procedures are considered to have been “commenced” before 18 April 2016 if, before that date, a contracting authority has done any of the following:

- ▶ sent a notice to the Publications Office in order to invite tenders or requests to be selected to tender, or to negotiate in respect of, a proposed public contract or Framework Agreement
- ▶ published any form of advertisement seeking offers or expressions of interest in a proposed public contract or Framework Agreement
- ▶ contacted any economic operator in order to:
  - ▶ seek expressions of interest or offers in respect of a proposed public contract or Framework Agreement, or
  - ▶ respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed public contract or Framework Agreement
- ▶ sent a notice to the OJEU in order to publicise its intention to hold a design contest

Framework agreements concluded pre or post 18 April 2016 and contracts awarded on foot of such Framework Agreements are also excluded from the 2016 Regulations as long as the contract award procedure for the relevant Framework Agreement commenced prior to 18 April 2016 in the manner set out above.

The one exception to these transitional arrangements is Regulation 72 of the 2016 Regulations which governs the modification of awarded contracts during their term. All contract modifications, even to contracts awarded on foot of award procedures which were commenced prior to 18 April 2016, are subject to the rules in Regulation 72 of the 2016 Regulations.

## Are there any exemptions from the 2016 Regulations?

The vast majority of public contracts above the EU thresholds are subject to the provisions of the 2016 Regulations. However, certain express exclusions to the procurement rules are specified in the Regulations as set out below:

- ▶ public contracts and design contests for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services
- ▶ the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable

- ▶ property or any interest in or right over such property
- ▶ the acquisition, development, production or co-production of programme material intended for audio-visual media services or radio media services, that are awarded by audio-visual or radio media service providers, or contracts for broadcasting time or programme provision that are awarded to audio-visual or radio media service providers
- ▶ arbitration and conciliation services
- ▶ certain legal services namely legal representation of a client by a lawyer in (i) an arbitration or conciliation or (ii) judicial proceedings; legal advice given in preparation of any of the foregoing proceedings or where there is a tangible indication that the matter to which the advice relates will become the subject of such proceedings; certain legal services provided by trustees or appointed guardians; and document certification and authentication services provided by notaries
- ▶ financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC, central bank services or operations conducted with the European Financial Stability Facility and the European Stability Mechanism
- ▶ loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments
- ▶ employment contracts
- ▶ certain civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations
- ▶ public passenger transport services by rail or metro
- ▶ certain political campaign services awarded by a political party in the context of an election campaign
- ▶ public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision compatible with the Treaty of the Functioning of the European Union
- ▶ research and development services under certain conditions specified in Regulation 14 of the 2016 Regulations

It should be noted that concession contracts (governed by Directive 2014/23/EU), contracts awarded by public or private utility entities in connection with their utility activities (governed by Directive 2014/25/EU) and certain defence and security contracts (governed by Directive 2009/81/EC) are subject to separate procurement regimes which are outside the scope of these guidelines.

## What are the rules in relation to public contracts between entities within the Public Sector?

The general rule is that public contracts between two or more public bodies are still subject to the procurement rules set out in the 2016 Regulations in the normal way. By way of exception to this principle, CJEU case law has created two limited exceptions where public contracts between public bodies may fall outside the public procurement rules.

Regulation 12 of the 2016 Regulations codifies the situations where public contracts between public bodies fall outside the scope of the 2016 Regulations. There are two types of exempted public-public co-operation: vertical co-operation (commonly known as the In House or “Teckal” Exception) and horizontal co-operation (commonly known as the “Hamburg” exception). It is recommended that contracting authorities obtain legal advice when seeking to rely on one of the exceptions set out in Regulation 12.



#### ▶ **Vertical co-operation: In-House or Teckal exception**

The 2016 Regulations provide that certain types of vertical arrangements between public bodies fall outside the Regulations where the following conditions are fulfilled:

- ▶ the contracting authority exercises over the legal person concerned a control similar to that which it exercises over its own departments;
- ▶ more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- ▶ there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person

A contracting authority will exercise the required level of control where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person, or the control is exercised by another legal person, which is itself controlled in the same way by the contracting authority.

Regulation 12 also permits “reverse Teckal” where the controlled company (which is a contracting authority in its own right) awards contracts to its parent and any other company controlled by the same parent, as long as there is no direct private capital participation in the legal person being awarded the public contract.

#### ▶ **Horizontal Co-operation: Hamburg Exception**

The 2016 Regulations also provide that certain types of horizontal arrangements fall outside the Regulations where the following conditions are met:

- ▶ the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common
- ▶ the implementation of that co-operation is governed solely by considerations relating to the public interest
- ▶ the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation

## What is eTenders?

eTenders is the national eProcurement portal [www.etenders.gov.ie](http://www.etenders.gov.ie), which is managed by the Office of Government Procurement (OGP). It was developed as part of the Irish Government’s Strategy for the Implementation of eProcurement in the Irish public sector. The OGP sets the policy on content and functionality of the site, however, the day to day management and maintenance, as well as development has been outsourced to EU-Supply. The site is designed to be a central facility for all public sector contracting authorities to advertise public procurement opportunities and award notices (both nationally and in the Official Journal of the European Union (OJEU)). The site can be used by the wider public sector including semi-state bodies, both commercial and non-commercial. Voluntary and community groups which are publicly funded are also entitled to use the site for their procurement activity. There is no charge to contracting authorities or suppliers for use of this service.

eTenders has the functionality to allow contracting authorities to complete OJEU notices on the site which are then sent automatically to the OJEU. The site displays Irish public sector procurement opportunities advertised in the OJEU as well as below EU threshold opportunities, in the form of Contract Notices, Prior Information Notices (PIN); and Contract Award Notices (CAN). It also provides associated tender documents, which can be downloaded from the site. Other functionality includes:

- ▶ a facility for conducting online clarifications of published tender documents via a Q&A facility
- ▶ online submission of tenders; user and notice management facilities for contracting authorities
- ▶ email alerts and response management facilities for suppliers
- ▶ a comprehensive notice search and help functions

## What is e-Certis?

e-Certis is an on-line repository established by the European Commission which will provide on-line information on the (official) documents and certificates which may be required from (and available to) tenderers in Member States to demonstrate compliance with Exclusion Grounds and Selection Criteria and information on any accessible national databases containing relevant information on tenderers. It is intended to help tenderers understand what information may be required by contracting authorities and to assist contracting authorities to understand what information may be available to tenderers. Member States must keep this information up to date. The requirement for contracting authorities to use e-Certis has been delayed until 18 October 2018 in line with Regulation 61(3) of the 2016 Regulations.

## How do I prepare a Request for Tenders (RFT)?

Template RFTs and contract documents can be found on eTenders for use in an Open Procedure. They should be used for all routine, non-bespoke and low to medium risk procurements. For bespoke procurements, or if the contracting authority has any concerns regarding any aspect of the procurement process or documentation, legal or other appropriate advice should be sought.

## How do I get my contract notices/advertisements published in the OJEU?

Contracting authorities are required to publish their notices online via [www.etenders.gov.ie](http://www.etenders.gov.ie) or the EU public procurement website [www.simap.europa.eu](http://www.simap.europa.eu). There is guidance for users in completing online publication on both websites. eTenders has the functionality to allow contracting authorities to publish notices on the site which will then be sent to the OJEU automatically.

## Is publication of a Prior Information Notice (PIN) in the OJEU mandatory?

No, under the 2016 Regulations publication of a PIN is not mandatory. Publication is encouraged as an aid to transparency and as a means of enabling suppliers and service providers to prepare in advance to tender for upcoming contracts. Contracting authorities who publish a PIN with the required amount of information can avail of shortened minimum times for submitting expressions of interest or tenders.

## Why is it important to get a Specification right?

A poor specification can result in:

- ▶ non-compliance and potential challenge
- ▶ no response from the market
- ▶ poor value for money
- ▶ buying the wrong thing or paying too much for the right one
- ▶ having to re-do the procurement
- ▶ inability to realise benefits
- ▶ poor performance and difficulties in contract management

## What rules apply to the procurement of works and works-related services?

The 2016 Regulations apply to above threshold works procurements. For all works and works-related services (above and below the relevant threshold) contracting authorities should consult the Capital Works Management Framework (CWMF). The CWMF is a structure that has been developed to deliver the Government's objectives in relation to Public Sector construction procurement reform. The CWMF is for the use by contracting authorities involved in the expenditure of public funds on construction projects and related consultancy services. It includes a range of standard template documents and guidance material defining procedures to be followed for the procurement of works contractors and service providers such as architects, engineers, quantity surveyors, etc.

## What remedies are available to suppliers if a contracting authority were found to have breached the 2016 Regulations?

If a court finds that the 2016 Regulations have been breached, it may:

- ▶ set aside, vary or affirm a decision of the contracting authority
- ▶ declare the contract ineffective, impose alternative penalties on a contracting authority and make any necessary consequential orders
- ▶ make an interlocutory order correcting an alleged infringement or preventing further damage
- ▶ set aside any discriminatory, technical, economic or financial specifications in any of the procurement documents
- ▶ suspend the operation of a decision or contract

In addition, a tenderer may claim damages for its losses resulting from the breach.

## What are the time limits for an unsuccessful tenderer to bring a claim?

The time limit for unsuccessful tenderers to bring a claim differ depending on whether their claim relates to a below threshold or above EU threshold procurement. For above EU threshold procurements, the rules in the Remedies Regulations and Order 84A of the Rules of the Superior Courts apply. An unsuccessful tenderer can bring a claim within 30 days from the day on which the tenderer first knew or ought to have known that grounds for starting the proceedings had arisen. The Court has a discretion to extend this where there is a good reason for doing so. Any claim for a declaration of ineffectiveness is required to be brought within the earlier of (i) 30 days after issue of an award letter to the unsuccessful tenderer; (ii) 30 days after the publication of a Contract Award Notice, or (iii) six months from the date of contract award.

For below EU threshold procurements, and contracts which otherwise fall outside of the Remedies Regulations, the time limits in the Remedies Regulations do not apply. These actions can be brought by way of normal judicial review under Order 84 of the Rules of the Superior Courts. These applications are to be made "within three months from the date when the grounds for the application first arose".

## What is the CPV?

The Common Procurement Vocabulary (CPV) is a detailed system of codes for describing works, goods and services to be advertised in the OJEU. It is available on [www.simap.europa.eu](http://www.simap.europa.eu).

## What is the GPA?

The Government Procurement Agreement (GPA) is a formal agreement concluded by a number of Member States of the World Trade Organisation to observe an open and non-discriminatory public procurement policy and practice among its signatories. The EU and its Member States, as well as the major economies of the United States, Canada, Norway, Switzerland, Japan, Korea, Hong Kong (China) and Singapore are

among the signatories giving a significant global dimension to the public procurement regime. Under the GPA, signatories undertake to give equal treatment and equal opportunity to suppliers and service providers from other signatory States.

## What is the Tender Advisory Service (TAS)?

The Tender Advisory Service (TAS) was established by the Office of Government Procurement (OGP) in consultation with SME stakeholders, to address concerns in relation to perceived barriers for SMEs in competing for tender opportunities. TAS is an informal outlet, provided free of charge, to suppliers in order to raise concerns in relation to a live tender process carried out by the OGP or other public sector contracting bodies.

TAS can be used by individuals and companies in the following circumstances:

- ▶ where a Request for Tender (RFT) has been published;
- ▶ the supplier must have registered an interest in a specific live tender process;
- ▶ the supplier has sought answers to their queries through the normal clarification process with the contracting authority; and
- ▶ where the supplier is not satisfied with the response from the contracting authority

A TAS query must be submitted after the clarification process has been utilised and no less than six days before closing date for receipt of tenders to allow for concerns/issues to be fully communicated and processed by TAS. The service has been developed to assist suppliers and in no way impedes them from pursuing their rights formally under the remedies legislation. Further information is available by following this link [Tender Advisory Service](#).

## How can testing the market be used to promote Green Public Procurement?

- ▶ Preliminary market consultation can help ensure that a sufficient number of suppliers are able to meet green criteria
- ▶ Publish a PIN and invite potential bidders to comment on draft GPP criteria to be included in the tender – are they able to meet them and would they have an effect on cost, delivery time or any other factors?
- ▶ Alternatively GPP criteria can be included as variants or award criteria if you are not certain of the market's ability to deliver
- ▶ Framework agreements, dynamic purchasing systems and electronic catalogues can all be used to incorporate green options over time – be sure to include a reference to this in initial tender documents

## Can you give me examples of Green Procurement?

Green procurement refers to contracting authorities seeking to procure goods, services and works with a reduced environmental impact throughout their life-cycle. The concepts of life-cycle analysis and life-cycle costing are at the heart of Green Procurement and require buyers and suppliers to consider not just the up-front purchase costs of a given solution, but its total economic and environmental cost. Examples of Green Procurement include:

- ▶ purchasing energy efficient or water saving products in order to cut utility bills
- ▶ buying timber products from legally harvested regions (fight against deforestation)
- ▶ using non-toxic cleaning products thus improving the health conditions of workers and users of

- ▶ buildings
- ▶ excluding harmful substances from the list of building materials
- ▶ improving animal welfare by purchasing organic food in canteens
- ▶ buying energy efficient computers, monitors
- ▶ supply of electricity from renewable energy sources
- ▶ purchase of vehicles which do not emit more than a certain quantity of pollutants
- ▶ inclusion of eco-labels in procurement specifications

## How do I choose Green Public Procurement criteria?

Contracting authorities should ask the following questions:

- ▶ Are GPP criteria available? Are there examples of these being used in the Irish market?
- ▶ Can a market engagement session be held to explain the GPP criteria to suppliers and ensure they can be met?
- ▶ Should you include the criteria at selection stage, technical specifications, award criteria, contract performance or some combination of these?
- ▶ What kind of evidence might bidders provide and can you verify it?
- ▶ How will you monitor compliance over the contract lifetime?

## What are the opportunities for Green Procurement under the 2016 Regulations?

The 2016 Regulations contain the following new provisions in relation to environmental considerations:

- ▶ **technical specifications** can be formulated with reference to production processes, e.g. organic agriculture or chlorine-free bleaching of paper
- ▶ **award criteria** may include social or environmental characteristics of the goods, services or works being purchased, e.g. electricity from renewable sources or fair-traded products
- ▶ **third-party eco-labels** can be requested to demonstrate compliance with technical specifications, and in relation to award criteria or contract performance conditions, provided these meet certain standards of openness and transparency
- ▶ **life-cycle costing** can be applied to measure and compare costs including environmental externalities such as greenhouse gas emissions. Where a common EU method for LCC has been developed (such as for the procurement of road transport vehicles) this must be used
- ▶ **minimum standards** – contracting authorities can refuse to award a contract to the operator submitting the most economically advantageous tender where it does not comply with certain minimum social and environmental obligations set out in Annex X of Directive 2014/14/ EU
- ▶ **abnormally low tenders** must be rejected where this is due to breach of certain international social or environmental conventions (e.g. on protection of the ozone layer, persistent organic pollutants and treatment of hazardous chemicals or waste) and suppliers can be excluded for breaches
- ▶ evidence of the **environmental management measures** which a supplier will be able to apply in the execution of any contract may be requested at Selection Stage of a competition
- ▶ **contract performance clauses** – key performance indicators, incentives, penalties or remedies can be inserted in contracts linked to environmental issues. To do this they must be indicated in the Contract Notice or procurement documents and must be linked to the subject-matter of the contract

## Are there any examples of 'Quick Wins' in Green Public Procurement?

- ▶ **Printing:** switch to double-sided printing, recycled paper products and consider managing print demand through (dis)incentives.
- ▶ **Vehicles:** switch to more fuel-efficient models and consult users about how journeys can be minimised or alternative transport modes used. If appropriate, provide training in eco-driving.
- ▶ **Catering services:** Ensure a vegetarian option is available and switch to reusable/reused packaging and service ware.

## What are the legal obligations in relation to the use of sustainability clauses/environmental clauses?

At European level, the use of sustainability clauses is a voluntary policy, meaning individual public authorities are not obliged to introduce the criteria in their tenders. However, Article 11 of the Treaty on the Functioning of the European Union (TFEU) states: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". Under the 2016 Regulations contracting authorities can refuse to award a contract to the operator submitting the most economically advantageous tender where it does not comply with certain minimum social and environmental obligations set out in Annex X of Directive 2014/14/ EU.

There are a number of areas where EU or national legislation creates specific environmental obligations which must be taken into account in public procurement:

- ▶ **construction works:** Environmental Impact Assessment, Energy Performance of Buildings, Construction Products, Waste Management and many other areas
- ▶ **IT equipment:** minimum energy-efficiency standards
- ▶ **timber, wood and paper products:** EU prohibits timber/wood products which cannot be traced to legal sources in the country of origin
- ▶ **food and catering services:** regulations dealing with waste management and packaging
- ▶ **vehicles:** emissions standards and noise levels, tyres, lubricants and other aspects
- ▶ **cleaning products and services:** regulations around harmful properties of chemicals and detailed health, safety and environmental information and advice about their products
- ▶ **energy:** the generation and use of electricity is governed by a number of EU Directives. Energy-using products such as lighting and white goods are subject to mandatory labelling requirements.
- ▶ **uniforms and textiles:** the chemicals, dyes and treatment agents used to produce textiles are subject to regulations that limits the use of certain dangerous substances and preparations

# **APPENDIX I: KEY DOCUMENTS /WEBSITES**

European Legislation	Implementation in Ireland
<p><b>Public Procurement</b> <u><a href="#">Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC</a></u></p>	<p><u><a href="#">S.I. No. 284/2016 - European Union (Award of Public Authorities Contracts) Regulations 2016</a></u></p>
<p><b>Water, Energy, Transport and Postal Service Sectors</b> <u><a href="#">Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC</a></u></p>	<p><u><a href="#">S.I. No. 286/2016 - European Union (Award of Contracts by Utility Undertakings) Regulations 2016</a></u></p>
<p><b>Concessions</b> <u><a href="#">Directive 2014/23/EU of 26 February 2014 on the award of concessions contracts</a></u></p>	<p><u><a href="#">S.I. No. 203/2017 - European Union (Award of Concession Contracts) Regulations 2017</a></u></p>
<p><b>Electronic Invoicing</b> <u><a href="#">Directive 2014/55/EU of 16 April 2014 on electronic invoicing in public procurement</a></u></p>	
<p><b>Remedies Directives</b> <u><a href="#">Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts</a></u></p> <p><u><a href="#">Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors</a></u></p> <p><b>Amendment to Remedies Directives</b> <u><a href="#">Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts</a></u></p>	<p><u><a href="#">S.I. No. 192/2015 - European Communities (Public Authorities Contracts) (Review Procedures) (Amendment) Regulations 2015</a></u></p> <p><u><a href="#">S.I. No. 193/2015 - European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015</a></u></p> <p><u><a href="#">S.I. No. 131/2010 - The European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010</a></u></p> <p><u><a href="#">S.I. No. 130/2010 - The European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010</a></u></p>
<p><b>Defence and Security</b> <u><a href="#">Directive 2009/81/EC of 26 of February 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2001/18/EC</a></u></p>	<p><u><a href="#">S.I. No. 62/2012 - European Union (Award of Contracts relating to Defence and Security) Regulations 2012 - Part 10 of S.I. also deals with implementation of Remedies Directive</a></u></p>



European Legislation	Implementation in Ireland
<p><b><u>Passenger Transport Regulation (1073/2009/EC)</u></b> Award procedures for services concessions for the award of services concessions for passenger transport services by bus, tram, rail and metro</p>	
<p><b><u>Energy Efficiency Directive (2012/27/EU)</u></b> Specific requirements apply to contracts for buildings, energy labelled products and products covered by the Ecodesign Directive.</p>	<p><b><u>S.I. No. 426/2014</u></b> - European Union (Energy Efficiency) Regulations 2014</p>
<p><b><u>Clean Vehicles Directive (2009/33/EC)</u></b> All contracting authorities must take emissions and efficiency into account when purchasing road transport vehicles, through specifications, award criteria or LCC.</p>	<p><b><u>S.I. No. 339/2011</u></b> - European Communities (Clean and Energy-Efficient Road Transport Vehicles) Regulations 2011</p>
<p><b><u>EnergyStar Regulation Directive 2012/27/EU</u></b> Central government bodies must buy IT equipment which at least meets EnergyStar standards.</p>	<p><b><u>S.I. No. 426 of 2014</u></b> - EUROPEAN UNION (ENERGY EFFICIENCY) REGULATIONS 2014</p>
<p><b><u>EU Timber Regulation No 995/2010</u></b> Suppliers must be able to provide information about the origin of all timber and trace it to legal sources.</p>	<p><b><u>S.I. No. 316/2014</u></b> - European Union (Timber and Timber Products) (Placing on the Market) Regulations 2014.</p>

## Key Circulars for Goods and Services

- DPER Circular 08/18:** Construction Procurement Reform - amendments to the Capital Works Management Framework to reflect the introduction of Sectoral Employment Orders in the construction sector and amend the Comparative Cost of Tender exercise
- DPER Circular 01/16:** Construction Procurement - revision of arrangements for the procurement of public works projects
- DPER Circular 02/16:** Arrangements for Digital and ICT-related Expenditure in the Civil and Public Service
- DPER Circular 10/14:** Initiatives to Assist SMEs in Public Procurement 2014
- DPER Circular 13/13:** The Public Spending Code: Expenditure Planning, Appraisal & Evaluation in the Irish Public Service - Standard Rules & Procedures
- DPER Circular 16/13:** Revision of arrangements concerning the use of Central Contracts put in place by the National Procurement Service
- DPER Circular 05/13:** Procurement of Legal Services and Managing Legal Costs
- DOF Circular 1/11:** Model Tender and Contract Documents for Public Service and Supplies Contracts
- DOF Circular 02/11:** Additional Arrangements for ICT Expenditure in the Civil and Public Service
- DOF Circular 40/02:** Public Procurement Guidelines - Revision of existing procedures for approval of certain contracts in the Central Government sector

## Key Guidance

[The Public Spending Code](#)

[Capital Works Management Framework](#)

[The Public Financial Procedures](#)

[Public Procurement Guidance for Practitioners on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds \(EC\)](#)

[NDA Procurement and Accessibility - 2012](#)

[Supply Market Analysis - Guidance Note - 2005](#)

[Buying Innovation: The 10 Step Guide to SMART Procurement and SME Access to Public Contracts](#)

[Buying Green! - A Handbook on Green Public Procurement \(EC\)](#)

[Green Procurement - Guidance for the Public Sector \(EPA\) - 2014](#)

[Green Tenders - An Action Plan on Green Public Procurement 2012](#)

[Buying Social - A Guide to Taking account of Social Considerations on Public Procurement \(EC\)-2011](#)

[Guidelines for the engagement of Consultants and other external support by the Civil Service - 2006](#)

[Code of Practice for the Governance of State Bodies - 2016](#)

[Ethics in Public Procurement - 2005](#)

[CCPC - Consortium Bidding - How to comply with competition law when tendering as part of a consortium](#)

[Guidelines for Fighting Bid Rigging in Public Procurement \(OECD\)](#)

[Managing Conflict of Interest in the Public Sector - A Toolkit \(OECD\)](#)

[Freedom of Information Model Publication Scheme](#)

[Civil Service Corporate Governance Standard](#)

[General Data Protection Regulation \(GDPR\)](#)

[The Concessions Directive](#)

[Application of Concession Contracts](#)

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## Useful Websites

[Irish Government website](#)

[eTenders](#)

[Office of Government Procurement](#)

[Construction Procurement](#)

[ICT Procurement](#)

[Green Public Procurement \(Department of Communications, Climate Action & Environment\)](#)

[Department of Enterprise and Innovation](#)

[Enterprise Ireland](#)

[InterTradeIreland](#)

[Irish Statute Book](#)

[Freedom of Information](#)

[Standards in Public Office](#)

[Competition and Consumer Protection Commission](#)

[EC Public Procurement](#)

[Tenders Electronic Daily \(TED\)](#)

[EC Green Public Procurement](#)

[Standard forms used in European public procurement can be accessed on-line via eNotices](#)

[European Structural and Investment Funds in Ireland](#)

[Case Law - Court of Justice of the EU and General Court](#)

[World Trade Organisation and Government Procurement Agreement \(GPA\)](#)

[Procura+ European Sustainable Procurement Network](#)

[European Institute of Public Administration](#)

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# **APPENDIX II: EU THRESHOLDS**

Thresholds (exclusive of VAT) above which advertising of contracts in the Official Journal of the EU is obligatory, applicable from 1 January 2018<sup>1</sup>:

Works	Value	Who it applies to
Contract Notice	€5,548,000	Threshold applies to Government Departments and Offices, Local and Regional Authorities and public bodies
<b>Goods and Services</b>		
Contract Notice	€144,000	Threshold applies to Government Departments and Offices
Contract Notice	€221,000	Threshold applies to Local and Regional Authorities and public bodies outside of the Utilities Sector
Contract Notice	€750,000	All services concerning social and other specific services listed in Annex XIV of the EU Directive 2014/24/EU
<b>Utilities</b>		
Works Contracts / Prior Indicative Notice	€5,548,000	For entities in Utilities sector covered by GPA
Goods and Services	€443,000	For entities in Utilities sector covered by GPA

<sup>1</sup> Thresholds are revised every two years. Full and up to date thresholds can be checked on the EU public procurement website [www.simap.europa.eu](http://www.simap.europa.eu).

# **APPENDIX III: MODEL LETTERS FOR BELOW THRESHOLD - OPEN COMPETITION**

## MODEL LETTER (BELOW THRESHOLD) LETTER TO THE PREFERRED TENDERER (SUCCESSFUL TENDERER)

**Company name**

**Address**

**SUBJECT TO CONTRACT / CONTRACT DENIED**

**RE: Competition ref .....**

**Competition for .....**

Dear .....

I refer to your company's tender submitted on [date] in respect of the above mentioned competition and I am pleased to inform you that your tender has been identified by the [insert name of contracting authority] as the most economically advantageous.

Please note that no commitment of any kind, contractual or otherwise will exist unless and until a formal written contract has been executed for and on behalf of [insert name of contracting authority]. The identification of your tender as the most economically advantageous does not and will not give rise to any enforceable rights.

The [insert name of contracting authority] may cancel this public procurement competition at any time prior to a formal written contract being executed for and on [his / her / its] behalf.

I wish to take this opportunity to remind you that in line with the terms of the Request for Tenders, [insert appropriate text if additional documentary or other evidence is required in addition to the TCC] your company will be required to supply its Tax Clearance Access Number and Tax Reference Number to facilitate online verification of your tax status by [insert name of contracting authority].

Yours etc.

## MODEL LETTER (BELOW THRESHOLD)

### NOTICE TO UNSUCCESSFUL TENDERER AT EVALUATION STAGE

**Company name**

**Address**

**RE: Competition ref. ....**

**Competition for .....**

Dear [insert name],

I refer to your company's tender submitted on [date] in respect of the above mentioned competition and I regret to inform you that your tender was not successful on this occasion.

The decision reached by [insert contracting authority] is that the tender received from [company .....] is the [most economically advantageous/lowest price] tender.

Please note that the [insert contracting authority] will not conclude a contract with [insert company name of company identified as successful tenderer] until on or after [date].

The following table sets the characteristics and relative advantages of the successful tenderer as compared with your tender:

Award Criteria	Maximum marks available	Marks awarded to successful tender	Marks awarded to your tender	Characteristics and Relative advantages

Yours etc.



# **APPENDIX IV: LIGHT-TOUCH REGIME**

1. While all goods and most services contracts above the relevant thresholds (and in the absence of an express exemption) require the full application of the public procurement rules in the 2016 Regulations, the 2016 Regulations introduced a simplified award regime for certain services, notably health, social, educational and cultural services, often referred to as services to the person, to take into account the specific nature of these services.
2. This simplified regime is often referred to as the “Light Touch Regime”. There are 14 broad categories of social and other services to which the light touch regime applies and these are listed in the attached Annex. For more details of the precise services falling within this regime, contracting authorities should refer to Annex XIV of the EU Directive where the relevant CPV codes for these services are set out. The 2016 Regulations only apply to these services for contracts with an estimated value at or above a higher threshold of €750,000. Contracts below this value would typically not attract cross-border interest unless there are concrete indications to the contrary (such as EU financing for cross border projects).
3. In relation to contracts equal to or greater than €750,000 contracting authorities are required to:
  - ▶ publish a Contract Notice or a Prior Information Notice (PIN) in the OJEU
  - ▶ publish an Award Notice (or quarterly batches of award notices) in the OJEU
  - ▶ comply with the basic Treaty principles of transparency, equal treatment and non-discrimination
  - ▶ conduct the procurement in conformance with the information provided in the OJEU Contract Notice/PIN regarding any conditions for participation; the time limits for contacting/responding to the authority; and the award procedure to be applied
  - ▶ apply the rules in relation to Mandatory and Discretionary Exclusion Grounds
  - ▶ use time limits for the submission of tenders which are proportionate and reasonable
  - ▶ the contracting authority may take account of relevant considerations including the need to ensure quality, continuity, accessibility, affordability and comprehensiveness of the services; and/or the specific needs of different categories of users such as disadvantaged or vulnerable users
4. The contracting authority has the flexibility to use any process or procedure they choose to run the procurement, as long as it respects the other obligations above. There is no requirement to use the standard EU procurement procedures (open, restricted etc.) although contracting authorities can use those procedures if helpful, or tailor those procedures according to their own needs.
5. Where contracts are below the €750,000 threshold, there is no requirement to advertise on the OJEU or to publish an Award Notice on the OJEU. Contracting authorities are encouraged to use a public competitive process to ensure value for money when tendering. The procedure should be fair and impartial and comply with the general principles of EU law including transparency and equal treatment.

## Annex to Appendix IV: “Light-Touch” Services

Services that fall within this category are explicitly listed (with CPV codes) in Annex XIV of Directive 2014/24/EU. The 14 categories of services are:

- ▶ Health, social and related services
- ▶ Administrative social, educational, healthcare and cultural
- ▶ Compulsory social security services
- ▶ Benefit services
- ▶ Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
- ▶ Religious services
- ▶ Hotel and restaurant services
- ▶ Legal services not excluded by Article 10(d) of Directive 2014/24/EU
- ▶ Other administrative services and Government services
- ▶ Provision of services to the community
- ▶ Prison related services, public security and rescue services not excluded by Article 10(b) of Directive 2014/24/EU
- ▶ Investigation and security services
- ▶ International services
- ▶ Postal service
- ▶ Miscellaneous services

# **APPENDIX V: OJEU TIME LIMITS IN THE 2016 REGULATIONS**

	IF ELECTRONIC TENDER PERMITTED	IF URGENT+	WHERE PIN PUBLISHED*	IF SUB CENTRAL AUTHORITY**
<b>Open Procedure</b>				
Minimum time limit for receipt of tenders 35 days	Minimum time limit for receipt of tenders 30 days	Minimum time limit for receipt of tenders 15 days	Minimum time limit for receipt of tenders 15 days	-
<b>Restricted Procedure</b>				
Minimum time limit for requests to participate 30 days	-	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Minimum time limit for tenders 30 days	Minimum time limit for receipt of tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders to be set by agreement with tenderers.  In the absence of agreement  Minimum time limit 10 days
<b>Competitive Procedure with Negotiation and Innovation Partnerships</b>				
Minimum time limit for requests to participate 30 days	-	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Minimum time limit for initial tenders 30 days	Minimum time limit for receipt of initial tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders to be set by agreement with tenderers.  In the absence of agreement  Minimum time limit 10 days

	IF ELECTRONIC TENDER PERMITTED	IF URGENT+	WHERE PIN PUBLISHED*	IF SUB CENTRAL AUTHORITY**
<b>Competitive Dialogue</b>				
Minimum time limit for requests to participate 30 days	-	-	-	-
No explicit time limits for submission of initial/subsequent tenders	-	-	-	-

### See notes below

These are minimum time limits. When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities must take account of the complexity of the contract and the time required for drawing up tenders

- + This shorter time limit is allowed where a state of urgency duly substantiated by the contracting authorities renders the minimum impracticable
- \* This shorter tendering time limit is allowed where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, provided that all of the following conditions are fulfilled:
  - a. the Prior Information Notice included all the information required in section I of the PIN notice referred to in the Public Contracts Regulations, insofar as that information was available at the time the prior information notice was published
  - b. the Prior Information Notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent
- \*\* sub-central contracting authorities means all contracting authorities which are not central Government authorities

# **APPENDIX VI: MODEL LETTERS FOR ABOVE EU THRESHOLD - OPEN COMPETITION**

Scenario	Model Letter to be used
Non-compliant tenders and tenderers who do not meet the Selection Criteria	Letter 1, Letter 2 and Letter 3
Contracting authority seeking documentary evidence from tenderers ( ESPD documentation)	Letter 4
Tenderer fails to qualify on the evidence it has submitted	Letter 5
Unsuccessful tenderer	Letter 6
Successful tenderer	Letter 7



## MODEL LETTER 1:

Letter to Non-Compliant Tenderer or a Tenderer who does not meet the Selection Criteria (where notification is sent before the award decision is made)

### FOR USE IN AN OPEN PROCEDURE

**Company name**

**Address**

**RE: Competition ref. ....**

**Competition for .....**

Dear .....,

I refer to your company's tender submitted on [date] in respect of the above mentioned competition

**[THE TWO SENTENCES BELOW ARE ALTERNATIVES. CHOOSE ONE AND DELETE THE OTHER.]**

Your tender was deemed non-compliant with the terms of the Request for Tender (RFT) dated \_\_\_\_day of \_\_\_\_\_201\_\_ because

**[OR]**

Your tender did not meet the Selection Criteria as set out in the Request for Tenders (RFT) dated \_\_\_\_day of \_\_\_\_\_201\_\_ because

**Insert the following:**

- i) reason for failure to qualify**
- ii) the specific section(s) in the RFT being relied upon and**
- iii) list (if relevant) any documents not produced or information not provided in compliance with the section in the RFT.**

I would like to take this opportunity to thank you for responding to the RFT and wish you success in the future.

Yours etc.

**Note 1: After the award decision is made please send Model Letter 2**

**Note 2: Please delete as appropriate the "either/ or" text which is not relevant to your letter.**

## MODEL LETTER 2:

Standstill letter to Non-Compliant Tenderer or a Tenderer who does not meet the Selection Criteria and who has previously been notified

### FOR USE IN AN OPEN PROCEDURE

**Company name**

**Address**

**RE: Competition ref. ....**

**Competition for .....**

Dear .....,

I refer to your company's tender submitted on [date] in respect of the above mentioned competition and to my letter of the [date] informing you that your tender was not successful on this occasion and setting out the reasons why your tender was not successful. I enclose a copy of my letter for your convenience.

The decision reached by [insert contracting authority] is that the tender received from [company .....] is the most economically advantageous tender.

Please note that the [insert contracting authority] will not conclude a contract with [insert company name of company identified as successful tenderer] until on or after [date]. This standstill notice is issued as required by the Remedies Directive (2007/66/EC) and the implementing Irish Regulations (S.I. No. 130 of 2010 and S.I. No. 192 of 2015).

I would like to take this opportunity to thank you for responding to the RFT and wish you success in the future.

Yours etc.

## MODEL LETTER 3:

### Letter to Non-Compliant Tenderer and/or Tenderers who have not met the Selection Criteria who have not previously been notified

#### FOR USE IN AN OPEN PROCEDURE

**Company name**

**Address**

**RE: Competition ref. ....**

**Competition for .....**

Dear [insert name],

I refer to your company's tender submitted on [date] in respect of the above mentioned competition

**[THE TWO SENTENCES BELOW ARE ALTERNATIVE. CHOOSE ONE AND DELETE THE OTHER.]**

Your tender was deemed non-compliant with the terms of the Request for Tender (RFT) dated \_\_\_\_ day of \_\_\_\_\_ 201\_\_ because

**[OR]**

Your tender did not meet the Selection Criteria as set out in the Request for Tenders (RFT) dated \_\_\_\_ day of \_\_\_\_ 201\_\_ because

**[Insert the following:**

- i) reason for failure to qualify**
- ii) the specific section(s) in the RFT being relied upon and**
- iii) list (if relevant) any documents not produced or information not provided in compliance with the section in the RFT.]**

The decision reached by [insert name of contracting authority] is that the tender received from [company .....] is the most economically advantageous tender.

Please note that the [insert name of contracting authority] will not conclude a contract with [insert name of successful tenderer] until on or after [date]. This standstill notice is issued as required by the Remedies Directive (2007/66/EC) and the implementing Irish Regulations (S.I. No. 130 of 2010 and S.I. No. 192 of 2015).

I would like to take this opportunity to thank you for responding to the RFT and wish you success in the future.

Yours etc.

**Note:** *Please delete as appropriate the "either/or" text which is not relevant to your letter.*

## MODEL LETTER 4:

### Letter to the Highest Ranking Tenderer seeking documentary evidence prior to award decision

#### FOR USE IN AN OPEN PROCEDURE

**Company name**

**Address**

**RE: Competition ref. ....**

**Competition for .....**

#### **SUBJECT TO CONTRACT / CONTRACT DENIED**

Dear ....,

I refer to your company's tender submitted on [date] in respect of the above mentioned competition.

I wish to inform you that, subject to your providing us with (i) evidence sufficient to demonstrate your fulfilment of the Selection Criteria (or any one of them) and (ii) the absence of Exclusion Grounds (Declaration in the form attached at Appendix 5 of the RFT) in accordance with the terms of the RFT, your tender has been identified by the [insert name of the contracting authority] as the most economically advantageous.

**We now invite you to provide the evidence of qualification as required in part [insert], section [insert] of the Request for Tenders (RFT) dated \_\_\_day of \_\_\_201\_. This evidence should be provided as soon as possible but in any event no later than [insert the date by which the evidence must be produced]. If we do not receive a satisfactory response to this letter on or before this date, we reserve the right to exclude your tender from further consideration.**

Please note that no commitment of any kind, contractual or otherwise will exist unless and until a formal written contract has been executed for and on behalf of [insert contracting authority]. The provisional identification of your tender as the most economically advantageous does not and will not give rise to any enforceable rights. In any event, the [insert contracting authority] will impose a standstill period and will not conclude a contract until on or after the standstill period is expired. Please note that this letter is not a standstill notice and no standstill period has yet commenced.

The [insert contracting authority] may cancel this public procurement competition at any time prior to a formal written contract being executed for and on [his / her / its] behalf.

Yours etc.

## MODEL LETTER 5:

### Letter notifying Tenderer who fails to qualify on evidence submitted

#### FOR USE IN AN OPEN PROCEDURE

**Company name**

**Address**

**RE: Competition ref. ....**

**Competition for .....**

Dear.....,

I refer to your company's tender submitted on [date] in respect of the above mentioned competition. **[THE TWO SENTENCES BELOW ARE ALTERNATIVE. CHOOSE ONE AND DELETE THE OTHER.]**

I refer to your letter dated [date] After assessment of the evidence submitted with your letter I regret to inform you that your tender failed to qualify because

**[Insert the following:**

- i) reason for failure to qualify**
- ii) the specific section(s) in the RFT being relied upon and**
- iii) list (if relevant) any documents not produced or information not provided in compliance with the section in the RFT.]**

**[Or]** It is noted that you have not furnished a reply to our letter of [insert date] within the time specified and therefore I regret to inform you that your tender has been excluded from this tender competition.

I would like to take this opportunity to thank you for responding to the RFT and wish you success in the future.

Yours etc.

**Note:** *Please delete as appropriate the "either/or" text which is not relevant to your letter.*

## MODEL LETTER 6: Standstill Notice to Unsuccessful Tenderer

### FOR USE IN AN OPEN PROCEDURE

**Company name**

**Address**

**RE: Competition ref. ....**

**Competition for .....**

Dear [insert name],

I refer to your company's tender submitted on [date] in respect of the above mentioned competition and I regret to inform you that your tender was not successful on this occasion.

The decision reached by [insert contracting authority] is that the tender received from [company .....] is the most economically advantageous tender.

Please note that the [insert contracting authority] will not conclude a contract with [insert company name of company identified as successful tenderer] until on or after [date]. This standstill notice is issued as required by the Remedies Directive (2007/66/EC) and the implementing Irish Regulations (S.I. No. 130 of 2010 and S.I. No. 192 of 2015).

The following table sets out the score obtained by your tender, the score obtained by the successful tenderer in respect of each of the award criteria and the characteristics and relative advantages of the successful tenderer as compared with your tender:

Award Criteria	Maximum marks available	Marks awarded to successful tender	Marks awarded to your tender	Characteristics and Relative advantages

Yours etc.

## MODEL LETTER 7: Letter to the Preferred Tenderer (Successful Tenderer)

### FOR USE IN AN OPEN PROCEDURE

**Company name**

**Address**

#### SUBJECT TO CONTRACT

**RE: Competition ref .....**

**Competition for .....**

Dear .....

I refer to your company's tender submitted on [date] in respect of the above mentioned competition and I am pleased to inform you that your tender has been identified by the [insert contracting authority] as the most economically advantageous.

The [insert name of contracting authority] will not conclude a contract with your company until on or after [date]. This standstill notice is issued as required by the Remedies Directive (2007/66/EC) and the implementing Irish Regulations (S.I. No. 130 of 2010 and S.I. No. 192 of 2015).

Please note that no commitment of any kind, contractual or otherwise will exist unless and until a formal written contract has been executed for and on behalf of [insert name of contracting authority]. The identification of your tender as the most economically advantageous does not and will not give rise to any enforceable rights.

The [insert name of contracting authority] may cancel this public procurement competition at any time prior to a formal written contract being executed for and on [his / her / its] behalf.

I wish to take this opportunity to remind you that in line with the terms of the Request for Tenders, [insert appropriate text if additional documentary or other evidence is required in addition to the TCC] your company will be required to supply its Tax Clearance Access Number and Tax Reference Number to facilitate online verification of your tax status by [insert name of contracting authority].

Yours etc.

# **APPENDIX VII: CHECKLIST FOR PROCUREMENT AND CONTRACT FILE**



## Checklist for Procurement and Contract File

Regulation 84 report (if applicable)

A request to engage external support or buy goods with reasons justifying decision

A business case or cost benefit analysis

All documentation that issues to the market including PIN, contract notice and RFT

All clarifications sent to tenderers/candidates

The report of the opening of the tenders

A qualification report and list of candidates meeting the Selection Criteria

The evaluation report

The acceptance by senior management of the evaluation team's report

The winning tender (or quotation)

Unsuccessful tenders should be archived together with a copy of the RFT, the contract notice and the evaluation report

The Contract Award notice

The award letter and standstill/regret letters to unsuccessful tenderers

The signed contract

For Framework Agreements, all correspondence, including orders, relating to individual contracts/drawdowns - one file should be opened for the Framework Agreement and individual project files set up for each call-off contract established under the Framework

The project management plan (including risk assessment)

The minutes of all project management meetings

All orders to the contract holder for work packages/services

All requests for payment by the contract holder

All requests for expenses, supporting documentation and vouched expense claims from the contract holder

All acceptance notes for deliverables and services

All correspondence with the contract holder

The post-implementation review or reviews/reports by third parties

# **APPENDIX VIII: DISCLOSURE OF RECORDS - INFORMATION COMMISSIONER**

## Summary of the Information Commissioner views regarding disclosure of records relating to a tender competition given at conclusion of a ruling under Section 34(2)m of the Freedom of Information Act 1997 in Case 98188.

First, public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.

Second, tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances, would historic prices remain trade secrets. As a general proposition, however, I accept that tender documents which “would reveal detailed information about a company’s current pricing strategy” or about otherwise unavailable product information could fall within the scope of Section 27(l)(a) of the FOI Act even following the conclusion of a tender competition.

Third, tender prices generally qualify as commercially sensitive information for the purposes of Sections 27(l)(b) and (c) of the FOI Act, Depending on the circumstances, product information can also be considered commercially sensitive under Section 27(l)(b).

Fourth, when a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. The public interest also favours the release of such information, but exceptions may arise (see Telecom Eireann and Mr Mark Henry, Case Number 98114).

Fifth, other successful tender information which is commercially sensitive (for example, details of the internal organisation of a tenderer’s business, analysis of the requirements of the public body, or detailed explanations as to how the tenderer proposed to meet these requirements) may remain confidential. Disclosure in the public interest ordinarily would not be required, unless it were necessary to explain the nature of goods or services purchased by the public body.

Sixth, unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract, and the public interest lies in protecting that information from disclosure.

I must stress, however, that no tender-related records are subject to either release or exemption as a class. Therefore, each record must be examined on its own merits in light of the relevant circumstances.

