

International **Comparative** Legal Guides



Public Procurement **2020**

A practical cross-border insight into public procurement

12th Edition

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The substantive procedural rules which apply to public, utilities and defence procurements in excess of EU thresholds are contained in four pieces of legislation:

- the European Union (Award of Public Authority Contracts) Regulations 2016 (SI 284/2016) (**Public Contracts Regulations**) which implement Directive 2014/24/EU into Irish law;
- the European Union (Award of Contracts by Utility Undertakings) Regulations 2016 (SI 286/2016) (**Utilities Regulations**) which implement Directive 2014/25/EU into Irish law;
- the European Union (Award of Concession Contracts) Regulations 2017 (SI 203/2017) (**Concessions Regulations**) which implement EU Directive 2014/23/EU into Irish law; and
- the European Union (Award of Contracts Relating to Defence and Security) Regulations 2012 (SI 62/2012) (**Defence Regulations**) (as amended) which implement Directive 2009/81/EC into Irish law.

The rules setting out the remedies for a breach of the substantive procurement rules are governed by several regulations (the **Remedies Regulations**) which are dealt with in further detail at question 5.1.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

For above-threshold contracts, the Irish public procurement regime is based on the EU regime, which has as its objective the free movement of goods, services and works within the EU. For contracts that fall below the EU thresholds but that have the potential for cross-border trade, contracts must be awarded in accordance with General Principles of EU law including the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Water, energy, transport and postal sectors

The Utilities Regulations govern the award of contracts in the

utilities sector above EU thresholds (i.e. water, energy, transport and postal services). The rules are slightly less rigorous than the public sector regime.

Defence

The Defence Regulations govern the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

Construction procurement

The Capital Works Management Framework (**CWMF**) comprises a suite of standard procurement documents, model forms, works contracts, as well as guidance notes, which apply to the conduct of public sector capital works projects in Ireland. The documents are available at www.constructionprocurement.gov.ie.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The Freedom of Information Act 2014 (**the FOI Act**) applies to almost all public bodies in Ireland. Any person may request “records” under the FOI regime including records relating to tendering procedures. There are exemptions under the FOI Act which apply where records are confidential or commercially sensitive. Tender-related records are not exempt as a class. Tenderers are normally requested to indicate in their tenders, with supporting reasons, any information which should be regarded as confidential.

Commercial and non-commercial State bodies in Ireland are subject to the Code of Practice on the Governance of State Bodies (2016) (**Code**). The Code provides that it is the responsibility of the relevant Board to satisfy itself that the requirements for public procurement are adhered to. Transparency is a key theme of the Code and competitive tendering is advocated as the standard procedure in the procurement process of State bodies. Non-competitive procurement must be recorded and reported to the relevant Minister.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The substantive procurement regulations require contracting authorities and contracting entities to apply no less favourable treatment to the economic operators and signatories of the GPA.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The relevant legislation applies to “contracting authorities” and “contracting entities”.

Contracting authorities include the State (i.e. Ireland), regional and local authorities, bodies governed by public law and associations formed by one or more such authorities or one or more such bodies governed by public law. A body governed by public law is defined under the regulations as a body which:

- a) is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- b) has a legal personality; and
- c) has any of the following characteristics:
 - i. is financed, for the most part, by the State, a regional or local authority, or by another body governed by public law;
 - ii. is subject to management supervision by an authority or body referred to in (i); or
 - iii. has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, a regional or a local authority, or by another body governed by public law.

Contracting entities include contracting authorities and “public undertakings” which pursue activities in the utilities sector (i.e. gas, heat, electricity, water, transport, port, airport, postal services and fuel industries). A “public undertaking” is an undertaking over which a contracting authority may directly or indirectly exercise a dominant influence by virtue of ownership, financial participation or rules governing the undertaking.

The definition of contracting entities also includes bodies which pursue a “prescribed activity” and which have been granted special or exclusive rights by a competent authority of a Member State.

2.2 Which types of contracts are covered?

The regulations apply to contracts for works and services, supply contracts and concession contracts. Additionally, the regulations apply to mixed procurement contracts with a value above certain financial thresholds.

2.3 Are there financial thresholds for determining individual contract coverage?

The regulations apply to all contracts valued in excess of the EU financial thresholds (excluding VAT) which are updated every two years. The thresholds applicable from 1 January 2020 are as follows:

Public Contracts (excluding VAT)	
Works contracts	€5,350,000
Supply contracts / service contracts / design contests by central government authorities	€139,000

Public Contracts (excluding VAT)	
Supply contracts / service contracts / design contests by sub-central contracting authorities	€214,000
“Light Touch” services (see Annex XIV of Directive 2014/14/EU)	€750,000

Utilities Contracts (excluding VAT)	
Works contracts	€5,350,000
Supply contracts / service contracts / design contests	€428,000
“Light Touch” services (see Annex XVII of Directive 2014/25/EU)	€1,000,000

The Concessions Regulations apply to all concessions contracts valued in excess of €5,350,000 (excluding VAT).

For supplies and services contracts below the EU thresholds, public bodies are required to comply with the Public Procurement Guidelines for Goods and Services (2019). Under the Guidelines, contracts valued above €25,000 (excl. VAT) and up to the EU thresholds should be advertised as part of a formal tendering process on the Irish procurement website “www.etenders.gov.ie” using the open procedure. Contracts valued above €5,000 (excl. VAT) may be awarded on the basis of responses to specifications sent by email to at least three suppliers/service providers. For contracts below €5,000 (excl. VAT), contracts may be awarded on the basis of verbal quotes from one or more suppliers.

Regardless of value, all contracts below the EU thresholds which are of “cross-border interest” are subject to EU Treaty principles.

2.4 Are there aggregation and/or anti-avoidance rules?

The aggregation rules under both the Public Contracts Regulations and Utilities Regulations (the **Procurement Regulations**) provide that in certain cases, the value of contracts must be aggregated and where the value of these purchases taken together exceeds the relevant thresholds, the Procurement Regulations will apply.

The general rule under the Procurement Regulations is that a procurement must not be subdivided with the effect of preventing it from falling within the scope of the regulations.

Where a contract is to be awarded in the form of separate lots, account must be taken of the total estimated value of all such lots. The Procurement Regulations will apply where the aggregate value of the lots is equal to or greater than the relevant thresholds.

There are also “annual aggregation requirements” which require services or supply contracts of the “same type”, awarded within a one-year period to be aggregated.

The aggregation rules are relatively detailed and subject to exemptions in certain cases.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

EU Directive 2014/23/EU on Concession Contracts was implemented into Irish law by the Concessions Regulations. Under the

Concessions Regulations, a “concession contract” is defined as a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works, or the provision and the management of services, to one or more economic operators. The consideration must consist in the right to exploit the works or services or in that right together with payment. Concession contracts must also involve a transfer of risk to the concessionaire from the contracting authority.

2.6 Are there special rules for the conclusion of framework agreements?

The Procurement Regulations regulate the award of single and multi-supplier framework agreements. However, there are more detailed rules under the Public Contract Regulations (e.g. rules in relation to draw-down mechanisms). The maximum term for a framework agreement is four years under the Public Contract Regulations and eight years under the Utilities Regulations. The award of call-off contracts may be done by awarding directly from the framework or by re-opening competition. The Office of Government Procurement (the **OGP**) has established a large number of centralised framework agreements for use by public sector bodies. A list of the centralised frameworks is available on the OGP’s website at www.ogp.gov.ie.

2.7 Are there special rules on the division of contracts into lots?

It is possible under the Procurement Regulations to divide contracts into lots and to limit the number of lots that may be awarded to a single entity. The Public Contracts Regulations require contracting authorities to document the reasons for not subdividing a contract into lots in the procurement documents or in the Regulation 84 Report.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Under the Procurement Regulations, purchasers must treat all suppliers equally and cannot discriminate based on the place of establishment.

For below-threshold contracts, EU Treaty principles apply where there is a cross-border interest in the contract. The principle of transparency requires a degree of advertisement sufficient to allow suppliers in other Member States the opportunity to express an interest or to submit tenders.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There are several different award procedures under the Procurement Regulations. Under the Public Contracts Regulations, there is a free choice to use the open and restricted procedures. The competitive procedure with negotiation and the competitive dialogue procedure are available only in the circumstances prescribed in the Public Contracts Regulations. The open procedure is the most commonly used procedure in Ireland for public sector bodies. Contracting entities under the Utilities Regulations have a free choice of procedure and the negotiated procedure is the most commonly used procedure in Ireland for utilities.

The negotiated procedure without a prior call for competition may only be used in the exceptional circumstances specified under the Procurement Regulations. Some of the most commonly relied on justifications are: (i) where no tenders or no suitable tenders are received; (ii) where the works, supplies or services may only be prescribed by a particular operator; or (iii) for reasons of extreme urgency not attributable to the contracting authority.

There are no prescribed procedures under the Concessions Regulations which generally provide for a lighter touch regime.

3.2 What are the minimum timescales?

As a general rule, the Procurement Regulations require that when fixing the deadline for receipt of tenders or requests to participate, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders.

In line with the 2014 EU Directives, the Public Contract Regulations also set out the rules governing minimum timescales. For open procedures, the minimum time limit for receipt of tenders is 35 days from the day after the date of dispatch of the Contract Notice to the OJEU. This can be reduced by five days where the tenders may be submitted by electronic means.

For restricted procedures and for competitive procedures with negotiation, the minimum timescale for receipt of requests to participate is 30 days, and for receipt of tenders is 30 days. For the competitive dialogue procedure, the minimum timescale for receipt of requests to participate is 30 days, and there is no minimum deadline for receipt of tenders. Certain reductions in timescales are available if a Prior Information Notice has been published or where there is a state of urgency.

The minimum timescales under the Utilities Regulations are more flexible. For example, for the negotiated procedure, the general timescale for requests to participate is generally 30 days and not less than 15 days. The minimum timescale for receipt of tenders is 10 days.

3.3 What are the rules on excluding/short-listing tenderers?

Regulation 57(1) of the Public Contracts Regulations specifies the mandatory grounds upon which a contracting authority shall exclude an economic operator from participation in a procurement procedure. A contracting authority is obliged to exclude an economic operator from the procurement process where it becomes aware that the economic operator concerned has been convicted of one or more of the following offences within the last five years:

- participation in a criminal organisation;
- corruption;
- fraud;
- terrorist offences or offences linked to terrorist activities;
- money laundering or terrorist financing; and
- child labour and other forms of trafficking in human beings.

Regulation 57(8) of the Public Contract Regulations lists a number of discretionary grounds upon which the contracting authority may exclude an economic operator from participation in a procurement procedure. These include:

- where the contracting authority can demonstrate by any appropriate means a violation of 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 law;

- where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the courts, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under the law of the State;
- where the contracting authority can demonstrate, by appropriate means, that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- where a conflict of interest cannot be effectively remedied by other, less intrusive, measures;
- where a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure cannot be remedied by other, less intrusive, measures;
- where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;
- where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit supporting documents required; and
- where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, or obtain confidential information that may confer upon it undue advantages in the procurement procedure or where the economic operator has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Rules governing the selection criteria for shortlisting tenderers are set out under Regulation 58 of the Public Contracts Regulations. This states that the selection criteria to be imposed on an economic operator as a requirement for participation in a procurement procedure may relate to the following:

- suitability to pursue a professional activity;
- economic and financial standing; and
- technical and professional ability.

In addition, selection criteria must be “related and proportionate” to the subject matter of the contract concerned.

The Utilities Regulations provide that where a contracting entity is a contracting authority, the mandatory and discretionary grounds in Regulation 57(1) and (8) of the Public Contracts Regulations apply. In all other circumstances, the contracting authority may “establish objective rules and criteria for the exclusion and selection of tenderers or candidates” in accordance with Regulation 85(1) of the Utilities Regulations.

Notwithstanding the above, the Procurement Regulations provide for “self-cleaning” measures which facilitate bidders to demonstrate their reliability. Where bidders provide evidence that they have taken certain measures to rectify the relevant ground of exclusion, a contracting authority may decide not to exclude the bidder.

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The Procurement Regulations require contracts to be awarded

on the basis of the most economically advantageous tender. Contracts may be awarded on the basis of cost alone or on the basis of price together with quality. The evaluation of cost must be carried out using a cost-effectiveness approach including life-cycle costing. Award criteria must be transparent and related to the subject matter of the contract. Award criteria may comprise criteria relating to technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, the organisation, qualifications and experience of staff assigned to perform the contract where the quality of staff assigned can have a significant impact on the level of contract performance or after sales service and technical assistance and delivery conditions. The OGP has published an Information Note on incorporating social considerations into Public Procurement (2018) (available at www.ogp.gov.ie).

3.5 What are the rules on the evaluation of abnormally low tenders?

In line with the 2014 EU Directives, contracting authorities are required to ask tenderers to explain the price or costs proposed in a tender where such prices appear to be abnormally low. Tenderers may only be rejected where the evidence supplied by the tender does not satisfactorily account for the low level of price or costs proposed. A contracting authority is required to reject a tender where it has been established that the prices are abnormally low because of:

- a) non-compliance with applicable obligations in the fields of environmental, social and labour law; and
- b) the tenderer has obtained State aid and the tenderer is unable to provide that the aid is compatible with the internal market.

3.6 What are the rules on awarding the contract?

The contracting authority must award the contract to the tenderer identified as submitting the most economically advantageous tender having regard to the published award criteria. A contract award notice must be published in the Official Journal of the European Union within 30 days following conclusion of the contract.

3.7 What are the rules on debriefing unsuccessful bidders?

Unsuccessful bidders must be informed of the reasons for the contract award decision at the time of notification of the contract award decision. Under the Remedies Regulations, the notification letter must state the exact standstill period applicable to the contract. Tenderers that have submitted an admissible tender must be informed of the name of the successful tenderer (or in the case of a framework agreement, the names of the parties to the agreement) and a summary of the reasons including the characteristics and relative advantages of the tender selected. If a tender is being rejected, the unsuccessful bidder must be provided with the reasons for the decision of non-equivalence or for the works, supplies or services not meeting the performance or functional requirements.

In *RPS v Kildare County Council* [2016] IEHC 113, the Irish High Court held that in order to set out the characteristics and relative advantages of the successful tender, the contracting authority must at least mention the matters which should have been included in the unsuccessful tenderer's tender or the matters

contained in the successful tender. The statement of reasons must therefore be sufficiently detailed to explain how the successful tender was advantageous by reference to particular matters, respects, examples or facts supporting a general assertion of relative advantage.

3.8 What methods are available for joint procurements?

Contracting authorities routinely procure their requirements jointly by using multi-supplier framework agreements or dynamic purchasing systems usually established by a central purchasing body. The OGP has established a large number of centralised framework agreements for use by public bodies. The Local Government Operational Procurement Centre has also formed a procurement platform called SupplyGov.ie, which facilitates local authorities and other State agencies in the procurement of certain goods, works and services under various frameworks and dynamic purchasing systems.

3.9 What are the rules on alternative/variant bids?

In line with the 2014 EU Directives, Regulation 45 of the Public Contracts Regulations and Regulation 71 of the Utilities Regulations permit a contracting authority to authorise or require tenderers to submit variant bids. The contracting authority must indicate in the contract notice or procurement documents whether or not variants are permitted and must state the minimum requirements to be met by the variant bid. Where variants are permitted, the contracting authority must ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

3.10 What are the rules on conflicts of interest?

The Regulations require contracting authorities to take appropriate measures to effectively “prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators”. “Conflicts of interest” include any situation where a relevant staff member has, directly or indirectly, a financial economic or other personal interest that might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure. If a conflict of interest cannot be resolved by other less intrusive measures, it may constitute a discretionary ground for exclusion of an economic operator from the procurement process.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

A contracting authority may conduct market consultations with a view to preparing the procurement and informing economic operators of the authority’s procurement plans and requirements. A contracting authority may seek or accept advice from independent experts or authorities or from market participants. This advice can be used in the planning of the procurement procedure; however, contracting authorities must ensure that the use of such advice does not have the effect of distorting competition or violating the principles of non-discrimination and transparency.

Where a tenderer (or an undertaking related to a tenderer) has previously advised a contracting authority or has otherwise

been involved in the preparation of the procurement procedure, the contracting authority shall take “appropriate measures” to ensure that competition is not distorted by the participation of that candidate or tenderer. Such mitigating measures must include communication to tenderers of relevant information exchanged in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders.

A tenderer should only be excluded from a procurement procedure because of prior involvement where there are “no other means to ensure compliance with the duty to treat economic operators equally”.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

For contracts above the current EU thresholds, the principle exclusions/exemptions in the Procurement Regulations mirror the 2014 EU Directives. Exemptions from the public procurement regime include contracts for the acquisition or rental of land or buildings, employment contracts, certain legal services contracts, and certain financial services contracts. As with all derogations from the public procurement rules, any exclusions or exemptions are narrowly interpreted. As mentioned in question 4.2 below, the Procurement Regulations exclude certain “in-house” and shared services arrangements from their scope where certain conditions are met.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

For above-threshold contracts, the Irish rules in relation to in-house arrangements and contracts between public bodies mirror the 2014 EU Directives.

Both the Public Contracts Regulations and the Utilities Regulations exclude from their scope contracts awarded by a contracting authority to a legal person where:

- a) the contracting authority exercises control over the legal person similar to that which it exercises over its own departments;
- b) provided that 80% or more of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the contracting authority; and
- c) there is no private capital participation in the controlled legal entity.

Additionally, contracts concluded exclusively between two or more contracting authorities are excluded from the scope of the Procurement Regulations where:

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

The Utilities Regulations and the Concessions Regulations include an exclusion for contracts awarded to an “affiliated undertaking”. An affiliated undertaking is an entity which either consolidates its accounts with the contracting entity under Directive 2013/34/EU or which is subject to the dominant influence of the contracting entity.

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

For above-threshold contracts, there are three principal sets of remedies regulations applicable to the public sector, the utilities sector and to the award of concessions contracts respectively:

- i. the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (SI 130/2010) as amended (the **Public Contracts Remedies Regulations**);
- ii. the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (SI 131/2010) as amended (the **Utilities Remedies Regulations**); and
- iii. the European Union (Award of Concession Contracts) (Review Procedures) Regulations (SI 326 of 2017) (the **Concessions Remedies Regulations**).

The Defence Regulations set out the review procedures and remedies for a breach of the substantive rules in the Defence Regulations.

One of the key requirements of the Remedies Regulations is that contracting authorities are obliged to observe a standstill period between notice of the contract award decision and the reasons for the decision to the unsuccessful bidders and conclusion of the contract. The standstill period must be at least 14 days which commences on the day after the notice is sent if the notice is sent electronically (or 16 days if sent by any other means).

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

For contracts below EU thresholds, aggrieved parties may bring an application for judicial review in the Irish High Court. Leave must be obtained from the Court prior to bringing such an application.

5.3 Before which body or bodies can remedies be sought?

The High Court is the body which reviews procurement decisions in Ireland.

An application can be made to transfer the case to the Commercial Court (a division of the High Court), where the value of the case exceeds €1 million. In practice, most procurement cases are transferred to the Commercial Court.

5.4 What are the limitation periods for applying for remedies?

There are very strict time limits under the Remedies Regulations. The time limit is 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the alleged infringement. An application for a declaration that the contract is ineffective must be made within six months after the conclusion of the relevant contract.

While the High Court has the power to extend the limitation period, the High Court takes a restrictive approach and tends not to grant applications for extensions of time. However, in the case of *Newbridge Tyre and Battery Co. Ltd v Commissioner of An Garda Síochána* [2018] IEHC 365, it was held by the court that the

limitation period began to run after a new disclosure of facts by the contracting authority in correspondence with the unsuccessful bidder post-notification of the award. As the unsuccessful bidder may not have been aware of the infringement until it received this information, the limitation period had not expired at the time of issuance of the proceedings.

For ordinary judicial review proceedings, applications to set aside the decision must be made within three months from the date when grounds for the application first arose. The High Court can extend the time period where there is a good reason; however, the courts take a restrictive approach to granting extensions of time.

5.5 What measures can be taken to shorten limitation periods?

The limitation period under the Remedies Regulations for an application for a declaration of ineffectiveness is six months from conclusion of the contract. This timeframe can be shortened to 30 calendar days where:

- i. the contracting authority has published an award notice in the OJEU and where, in the case of a contract awarded without prior publication of a contract notice in the OJEU, the award notice sets out the justification for not publishing a contract notice;
- ii. the contracting authority has notified each tenderer or candidate concerned of the outcome of the tender process and that notice contained a summary of the reasons for the rejection of their tender in accordance with the requirements of the Remedies Regulations; or
- iii. for a contract based on a framework agreement or a dynamic purchasing system, the contracting authority notified each tenderer or candidate concerned of the outcome of the tender process in accordance with the requirements of the Remedies Regulations.

5.6 What remedies are available after contract signature?

Post-contract signature under the Remedies Regulations, the High Court may set aside a decision or declare a reviewable public contract ineffective, impose alternative penalties on a contracting authority or may make any necessary consequential order. The Court may also make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage. The Court may also suspend the operation of a decision or a contract and may award damages as compensation for loss resulting from an infringement.

5.7 What is the likely timescale if an application for remedies is made?

While it is possible for a review application to be heard within six months, the length of time varies considerably depending on the complexity of the case, the level of discovery and whether an application to lift any automatic suspension is made. In practice, the timescale is likely to exceed 12 months.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

In *Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform* [2019] IESC 38, the Supreme Court

upheld a decision by the Court of Appeal to set aside a contract award decision on the basis that there was a ‘manifest error’ in the contracting authority’s evaluation and scoring of the successful tender.

In *Sanofi Pasteur v Health Service Executive* [2018] IEHC 566, while the main grounds of challenge were dismissed by the High Court, in relation to a claim that the contracting authority had failed to provide reasons in relation to certain sub-criteria, the Court directed the contracting authority to provide full reasons including the characteristics and relative advantages of the successful tender within a period to be fixed by the Court.

In *Gaswise Limited v Dublin City Council* [2014] IEHC 56, the High Court granted an order quashing the entire procurement process for the award of a multi-supplier framework agreement for the maintenance and repair of boilers in public housing owned by the contracting authority.

In *RPS Consulting Engineers Limited v Kildare County Council* [2016] IEHC 113, the High Court ordered the contracting authority to provide to the unsuccessful bidder a statement of the reasons including the characteristics and relative advantages and, in particular, the principal specific facts and matters by reference to which each characteristic or advantage could be judged within 15 days of the date of judgment.

In *Advanced Totes Ltd. v Bord na gCon* [2006] IESC 17, the Supreme Court granted an order of *certiorari* quashing the decision of the Irish Greyhound Board for the award of a contract for the provision of totalisator services. The Irish High Court subsequently granted an injunction prohibiting the use of the original successful tenderer’s equipment which had already been installed under an interim arrangement.

In *Clare Civil Engineering v Mayo County Council* [2004] IEHC 135, the High Court held that the contracting authority had erred in its assessment of tenders and that it was liable in damages to the unsuccessful bidder “for whatever recoverable losses” were suffered by the unsuccessful bidder.

5.9 What mitigation measures, if any, are available to contracting authorities?

There are limited mitigation measures after a procurement challenge has been brought. Contracting authorities may include exclusion or limitation of liability clauses in their tender documents which seek to limit or exclude their liability to a successful tenderer in the event of the awarded contract being set aside at a later date by the courts. The best mitigation strategy is to ensure tender documents are clearly drafted and ensure evaluators follow the criteria as set out in the tender documents.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The Procurement Regulations permit the amendment of a concluded contract without a new procurement procedure in the prescribed circumstances set out in the 2014 EU Directives. In broad terms, these circumstances include where:

- a) the procurement documents include a “clear, precise and unequivocal” review clause that covers the proposed modification;

- b) the modification involves the provision of additional goods, works or services by the original contractor where a change of contractor cannot be made for ‘economic or technical reasons’ and would cause significant inconvenience or substantial duplication of costs for the authority;
- c) the need for modification is a result of unforeseeable circumstances (which a diligent authority could not foresee) and the modification does not alter the overall nature of the contract;
- d) there is a change to the contractor or concessionaire as a result of an unequivocal review clause or a corporate restructuring; and
- e) the value of the modification is minimal, provided that the modification does not alter the overall nature of the contract.

The Public Contracts Regulations limit price increases to 50% of the value of the original contract in respect of scenarios b) and c) above. In order to avail of the safe harbour, a contracting authority which has modified a contract under the circumstances listed in b) or c) above must publish a notice to that effect in the OJEU.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

The scope to negotiate with a preferred bidder under the Public Contract Regulations following the submission of final tenders is limited. Generally, negotiation of final bids is only permitted under the competitive dialogue procedure while all bids other than final bids can be negotiated in the competitive procedure with negotiation. Contracting authorities must comply with the General Principles of EU Law in the conduct of their negotiations.

6.3 To what extent are changes permitted post-contract signature?

The Regulations permit certain changes post-contract signature in limited circumstances as set out above at question 6.1.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The Regulations contain a safe harbour for the replacement of a contractor where there has been a corporate restructuring and where the new contractor fulfils the criteria for qualitative selection.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The Procurement Regulations do not contain special rules in respect of privatisations but State aid rules may apply to these types of scenarios. The Code of Practice for the Governance of State Bodies requires that the disposal of assets of State bodies, or the granting of access to public property or infrastructure, should be by way of auction or competitive tendering process where the value of the assets/property is at or above €150,000.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The Regulations do not contain special rules in relation to PPPs.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

There are no proposals to change the procurement laws in Ireland at present.

8.2 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

The European Directive on eInvoicing (2014/55/EU) was transposed into Irish law by S.I. No. 258/2019 – European Union (Electronic Invoicing in Public Procurement) Regulations 2019 on 12 June 2019. These regulations require that Irish public bodies must be able to receive and process electronic invoices. However, sub-central Government has the option to postpone this until 18 April 2020.

Currently, the most significant development which is expected to impact public procurement law in Ireland is Brexit. Post-Brexit there is likely to be a lower number of behold-threshold contracts in Ireland which have cross-border interest.



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