

## Public Procurement Guidelines - Competitive Process

### Supplies and Services

#### Foreword

1. Recent developments in public procurement, including the introduction of revised and updated EU procurement Directives\*, the promotion of new and innovative purchasing methods and strategies, increasing emphasis on the need for best practice and best value for money in an expanding public procurement market and greater accountability of public purchasers, require that existing guidelines set out in *Public Procurement – 1994 Edition* (Green Book) be updated. These revised guidelines have been drafted by the National Public Procurement Policy Unit (NPPPU) of the Department of Finance in consultation with the Government Contracts Committee and other participants in the public procurement market.

2. This document sets out steps to be followed in conducting an appropriate competitive process under EU and national rules. It is intended that further guidance will be provided on issues including disclosure of information, ethics, Remedies Directive and infringement proceedings, environmental considerations in procurement and new aspects of the revised EU procurement Directives, such as framework contracts and eprocurement. These guidelines may be revised and updated as required. They will be published on [www.etenders.gov.ie](http://www.etenders.gov.ie), which will be the principal means of guidance dissemination. Up - to - date guidelines may be viewed or downloaded at any time.

3. Additional guidelines on the engagement of management consultants in the civil service, appraisal and management of capital expenditure proposals in the public sector, environmental considerations in public procurement and on the engagement of advertising, public relations and creative design services are available on [www.etenders.gov.ie](http://www.etenders.gov.ie).

\* *EU Directive 2004/18/EC covers the procurement procedures of public sector bodies. Directive 2004/17/EC covers the procurement procedures of entities operating in the utilities sector. They are published in Official Journal L 134 of 30 April 2004 and can be accessed on the EU Publications Office portal at <http://europa.eu.int/eur-lex/en/index.html>, or on the EU public procurement website <http://simap.europa.eu> which has a link on [www.etenders.gov.ie](http://www.etenders.gov.ie).*

*This document is issued by the NPPPU to provide general guidance and information. It is not an interpretation of any legal provisions governing public procurement. Additional informal advice may be sought from the NPPPU (contact details are given in Appendix VII). Legal or other professional advice should be obtained if there is doubt about the interpretation of legal provisions or the correct application of such provisions*

<b>Public Procurement Guidelines - Competitive Process</b>	
<i>Contents</i>	<i>Page</i>
<b>1. Introduction</b>	<b>Error! Bookmark not defined.6</b>
<b>2. Key Principles</b>	<b>7</b>
<b>3. Important General Issues</b>	<b>8</b>
3.1 <i>Expertise and Probity</i>	8
3.2 <i>Casual Purchases</i>	8
3.3 <i>Subsidised Contracts</i>	8
3.4 <i>Pilot Projects</i>	8
3.5 <i>Sole Suppliers</i>	9
3.6 <i>Conflicts of Interest</i>	9
3.7 <i>Statutory Provisions</i>	9
3.8 <i>Collusive Tendering</i>	9
3.9 <i>Criminal Convictions</i>	10
<b>4. Taxation Issues</b>	<b>111</b>
4.1 <i>Value-Added Tax (VAT)</i>	11
4.2 <i>Professional Services Withholding Tax</i>	11
4.3 <i>Tax Clearance Certificates</i>	12
<b>5. Competitive Process below EU threshold values</b>	<b>13</b>
5.1 <i>Low Value Requirements</i>	13
5.2 <i>Advertising</i>	13
5.3-5.7 <i>Direct Invitation (without advertising)</i>	15
5.8 <i>Evaluation and Contract Award</i>	16
5.9 <i>Results of Tendering Process</i>	16
<b>6. EU Public Procurement Procedures</b>	<b>17</b>
6.2-6.3 <i>Revision of Directives</i>	17
6.4 <i>Criteria for awarding contracts</i>	18
6.5-6.6 <i>Advertising in the OJEU</i>	19

6.7	<i>Prior Information Notices (PINs) and Buyer Profiles</i>	19
6.8	<i>Contract Award Notice</i>	20
6.9	<i>Common Procurement Vocabulary</i>	20
6.10	<i>Thresholds</i>	20
6.11	<i>Estimation of contract values</i>	21
6.12	<i>Priority and Non – Priority Services</i>	21
6.13	<i>Tendering Procedures</i>	23
	<i>(i)Open.</i>	23
	<i>(ii)Restricted.</i>	23
	<i>(iii)Competitive Dialogue</i>	23
	<i>(iv) Negotiated</i>	24
6.14	<i>Time-limits for Replies</i>	25
6.15	<i>Issue of Documents</i>	27
6.16	<i>Receipt and Opening of Tenders</i>	27
6.17	<i>Clarification of Tenders</i>	27
6.18-6.20	<i>Evaluation of tenders and award of contract</i>	27
6.21	<i>Abnormally Low Tenders</i>	29
6.22	<i>Tax Clearance</i>	29
6.23	<i>Notifying Tenderers</i>	29
6.24	<i>Framework Agreements</i>	29
6.25	<i>Utilities Sector</i>	30
6.26	<i>Government Procurement Agreement of WTO</i>	30
<b>7.</b>	<b>Notifying Tenderers and Disclosure of Information</b>	<b>32</b>
7.1-7.2	<i>EU Remedies Directive and ECJ Case Law Obligations</i>	32
7.3	<i>Disclosure of Information – Other Directive and FOI Provisions</i>	33
7.4	<i>Report on Contracts Awarded</i>	33
7.5	<i>Freedom of Information</i>	33
<b>8.</b>	<b>Voluntary Debriefing of Unsuccessful Tenderers</b>	<b>35</b>
8.2	<i>Small Procurements</i>	35
8.3-8.6	<i>Larger Procurements</i>	36

<b>9. Glossary of Terms</b>	<b>37</b>
<b>10. Frequently Asked Questions</b>	<b>38</b>

**Appendices and Diagrams**

<b>Appendix I</b>	<i>EU Thresholds</i>	<b>44</b>
<b>Appendix IIA</b>	<i>Priority Services</i>	<b>45</b>
<b>Appendix IIB</b>	<i>Non Priority Services</i>	<b>46</b>
<b>Appendix III</b>	<i>Sample Scoresheet</i>	<b>47</b>
<b>Appendix IV</b>	<i>Notification and offer of Debriefing of Unsuccessful Tenderers</i>	<b>48</b>
<b>Appendix V</b>	<i>Provisional Notification to Successful Tenderer</i>	<b>49</b>
<b>Appendix VI</b>	<i>Summary of Information Commissioners Reviews</i>	<b>50</b>
<b>Appendix VII</b>	<i>Contact and Information Sources on Public Procurement</i>	<b>51</b>
<b>Diagram 1</b>	<i>Contracts Below EU Thresholds - Main Steps in Procurement Process</i>	<b>14</b>
<b>Diagram 2</b>	<i>Contracts Above EU Thresholds - Main Steps in Procurement Process</i>	<b>22</b>

## 1. Introduction

**1.1** Public Procurement can be defined as the acquisition, whether under formal contract or not, of works, supplies and services by public bodies. It ranges from the purchase of routine supplies or services to formal tendering and placing contracts for large infrastructural projects by a wide and diverse range of contracting authorities.

**1.2** General guidelines on the award of public sector contracts in Ireland were last published in the booklet *Public Procurement - 1994 Edition*. This document re-iterates the principle of competition set out in the 1994 booklet. It contains more detailed guidance on conducting an appropriate competitive process under national and EU rules and updates procedures to reflect developments in the meantime. The focus of this document is on the competitive process to be followed by contracting authorities, i.e. Government Departments, local and regional authorities and other State bodies in the award of contracts for supplies and services. Revised guidelines on construction procurement and construction-related services will be developed and will be available from the Department of Finance or the national public procurement website [www.etenders.gov.ie](http://www.etenders.gov.ie). In the interim, current construction procurement guidelines will continue to apply.

**1.3** The October 2001 *Code of Practice for the Governance of State Bodies*, published by the Department of Finance, identifies procurement as one of a number of activities requiring special attention in promoting good corporate governance. It may be appropriate to adapt or supplement these guidelines with more detailed internal procurement procedures relevant to the activities of an individual contracting authority<sup>1</sup>. Heads of Departments should ensure that these guidelines are brought to the attention of all contracting authorities under their aegis.

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<sup>1</sup>**Examples :**

(i) In the Central Government sector, proposals to procure supplies or services above a certain threshold (currently €25,000) without a competitive process must be subject to an independent internal review and annual reporting to the C&AG and the Government Contracts Committee.

(ii) Corporate governance guidelines recommend that Boards of State bodies establish sub - committees to deal effectively with particular areas of activity. It may be appropriate to have a sub-committee devise and monitor adherence to proper procurement procedures. Chairpersons of Boards are required to confirm compliance with procurement rules and procedures in an annual report to the relevant Minister.

## **2. Key Principles**

**2.1** It is very important that the public procurement function is discharged honestly, fairly, and in a manner that secures best value for public money. Contracting authorities must be cost effective and efficient in the use of resources while upholding the highest standards of probity and integrity. Procurement practices are subject to audit and scrutiny under the Comptroller and Auditor General (Amendment) Act 1993 and Accounting Officers are publicly accountable for expenditure incurred. Management in Government Departments and Offices should ensure that there is an appropriate focus on good practice in purchasing and, where there is a significant procurement function, that procedures are in place to ensure compliance with all relevant guidelines.

**2.2** In general, a competitive process carried out in an open, objective and transparent manner can achieve best value for money in public procurement. This is in line with EU Treaty principles and EU Directives on public procurement. Essential principles to be observed in conducting the procurement function include non – discrimination, equal treatment, transparency, mutual recognition, proportionality, freedom to provide service and freedom of establishment. The Directives impose legal obligations on public bodies in regard to advertising and the use of objective tendering procedures for contracts above certain value thresholds – see Appendix I for thresholds.

**2.3** Even in the case of procurement which might not be subject to the full scope of the Directives, such as the ‘non – priority’ services (see appendix IIB) or service concessions, the EU Commission and European Court of Justice (ECJ) have ruled that the Treaty principles of non - discrimination, transparency, freedom of movement, freedom to provide goods and services, must be observed. ECJ case law implies a requirement to publicise and advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

## **3. Important General Issues**

### **Expertise and Probity**

**3.1** Contracting authorities should ensure that staff involved in purchasing or placing contracts are familiar with the EU and international rules that may apply and are aware of the legal and policy framework within which procurement must be conducted. To safeguard against improper or unethical practices contracting authorities must also take measures to separate functions within the procurement cycle, by ensuring that, for example, ordering and receiving goods and services are distinct from payment for goods and services.

### **Casual Purchases**

**3.2** Purchasing profiles should be examined to minimise casual or “once off” purchases. Contracting authorities with recurring or ongoing requirements should analyse their medium to long term needs. An appropriate contracting arrangement should be put in place for efficient and cost effective delivery of recurring supplies and services.

### **Subsidised Contracts**

**3.3** Most works and related services contracts awarded by a private entity, which are subsidised 50% or more by a public body, must be awarded in accordance with the EU Directives if they exceed the EU thresholds. It is the responsibility of the subsidising body to ensure that this provision is observed.

For contracts below the EU thresholds funded or part-funded from public funds, awarded by private sector entities, the funding authority should ensure that they are awarded in accordance with the procedures set out in Section 5 of these guidelines to the extent that this is practical and proportionate. Where appropriate, this requirement should be included among the conditions attached to the grant of funds to private sector entities.

### **Pilot Projects**

**3.4** Where a procurement process involves a pilot stage, the pilot should be conducted in a manner that allows and encourages the identification of a range of acceptable solutions or options. Care must be taken to avoid the development of relationships with a particular party or parties which could hinder a fair and open process or limit competition.

### **Sole Suppliers**

**3.5** Where it is necessary to deal with a sole supplier, service provider or contractor, arrangements which provide best value for money should be negotiated. Care should be taken by contracting authorities when they face a supplier, service provider or contractor with an exclusive right to provide a particular supply or service in a designated territory. Open-ended arrangements with these exclusive distributors should be avoided where possible. Irish and EU competition law does not prevent an exclusive supplier from providing supplies to customers outside of its designated territory where the exclusive supplier has been requested to do so by that customer.

Better value for money can be achieved by seeking tenders from other suppliers, service providers or contractors, outside the region in which there is an exclusive distributor. It may be appropriate to advertise in the Official Journal of the European Union (OJEU) or otherwise seek non-national suppliers in such cases.

If a contracting authority is refused supplies on the basis that there is an exclusive supplier supplying goods in the contracting authority's area, the matter should be brought to the attention of the Competition Authority: telephone (01) 804 5400.

### **Conflicts of Interest**

**3.6** Contracting authorities should be aware of potential conflicts of interest in the tendering process and should take appropriate action to avoid them. Care should be taken to ensure that project specifications and criteria should be as open and generic as possible in order to avoid favouring any one solution or any one party.

### **Statutory Provisions**

**3.7** Before awarding a contract, contracting authorities should ensure that tenderers have regard to statutory provisions relating to minimum pay, legally binding industrial or sectoral agreements and relevant health and safety issues, when preparing tenders. An appropriate reference to the need for compliance with such provisions should be included in tender documents.

### **Collusive Tendering**

**3.8** Contracting authorities should watch for anti – competitive practices such as collusive tendering. Any evidence of suspected collusion in tendering should be brought to the attention of the Competition Authority : telephone (01) 804 5400.

### **Criminal Convictions**

**3.9** In line with the revised procurement Directives, candidates or tenderers who have been convicted of involvement in organised crime, of fraud, corruption or money laundering must be excluded from performing a public contract.

## 4. Taxation Issues

### Value-Added Tax (VAT)

**4.1** Tenderers should be invited to express tender prices exclusive of VAT. VAT law provides for equal treatment in the supply of goods and services, therefore no competitive advantage or disadvantage should arise from the correct application of VAT rules.

Contracting authorities are required to pay VAT on goods and services procured and, generally speaking, cannot recover VAT paid. In the case of goods and services invoiced from within Ireland, VAT is charged to the contracting authority and remitted to the Revenue Commissioners by the supplier of the goods or services. However, contracting authorities procuring, or likely to procure, in a twelve month period, **goods** above a certain value (€41,000 from 1 January 2002) from other EU Member States, are required to register and pay VAT to the Revenue Commissioners (Collector General) in respect of those procurements.

VAT must be paid by the contracting authority for **all scheduled services** (including the most commonly procured services) invoiced VAT free from abroad, i.e. there is no minimum threshold. If a contracting authority is required to register for VAT because it receives scheduled services from abroad, **all goods** which it receives, irrespective of the level of such acquisitions, are liable to Irish VAT. VAT, calculated at the rate applying in Ireland, must be paid to the Revenue Commissioners by the contracting authority which receives such goods or services.

The foregoing is a brief summary of the VAT rules which apply to contracting authorities when procuring supplies and services and the information is not exhaustive. Further information is available in “Value Added Tax Information Leaflet No 11/01” issued by the Revenue Commissioners, which is published on their website [www.revenue.ie](http://www.revenue.ie) or can be obtained by contacting VAT Administration, Stamping Building, Dublin Castle, Dublin 2: telephone (01) 647 5000.

### Professional Services Withholding Tax

**4.2** Professional Services Withholding Tax (PSWT) must be deducted at the standard rate from payments by contracting authorities for professional services. Comprehensive information on PSWT is available in a booklet “A Revenue Guide to Professional Services Withholding Tax (PSWT) for Accountable Persons and Specified Persons” which is published on website [www.revenue.ie](http://www.revenue.ie) or can be obtained from the Revenue Commissioners: telephone (01) 878 0100.

### **Tax Clearance Certificates**

**4.3** All contracting authorities are reminded of the need for tax clearance of Contractors as outlined in Department of Finance “*Circular 43/2006 Tax Clearance Procedures - Public Sector Contracts*” and “*Circular 44/2006 Tax Clearance Procedures, Grants, Subsidies and Similar Type Payments*” or any revised version which will be available on [www.revenue.ie](http://www.revenue.ie).

Tenderers should contact their local Revenue District or Large Cases Division as appropriate. Full contact details can be obtained, and for most cases an application for Tax Clearance Certificates can currently be made online. To reduce administrative burdens (on contracting authorities and tenderers) use of this online facility is encouraged. It can be accessed at [www.revenue.ie](http://www.revenue.ie) under “What can I do online”, “Tax Clearance”. Contracting authorities can verify online the tax-cleared status of applications for tenders, which eliminates the need for submission of the original copy of the Tax Clearance Certificates. (See 6.22 below for details).

Non-resident tenderers cannot apply online and should follow the guidelines at [www.revenue.ie](http://www.revenue.ie) “What can I do online”, “Tax Clearance”, or contact the Collector General, Sarsfield House, Limerick: telephone (061) 310 310 or 1890 203 070.

## 5. Competitive Process below EU threshold values

It is a basic principle of public procurement that a competitive process should be used unless there are justifiably exceptional circumstances. The type of competitive process can vary depending on the size and characteristics of the contract to be awarded and the nature of the contracting authority.

### Low Value Requirements

**5.1** For contracts or purchases below the EU threshold values and not part of a ‘draw down’ or framework contract, less formal procedures may be appropriate. For example:

- supplies or services **less than €5,000** in value might be purchased on the basis of verbal quotes from one or more competitive suppliers;
- supplies or services contracts between **€5,000 and €25,000** in value might be awarded on the basis of responses to specifications sent by fax or email to at least three suppliers or service providers.

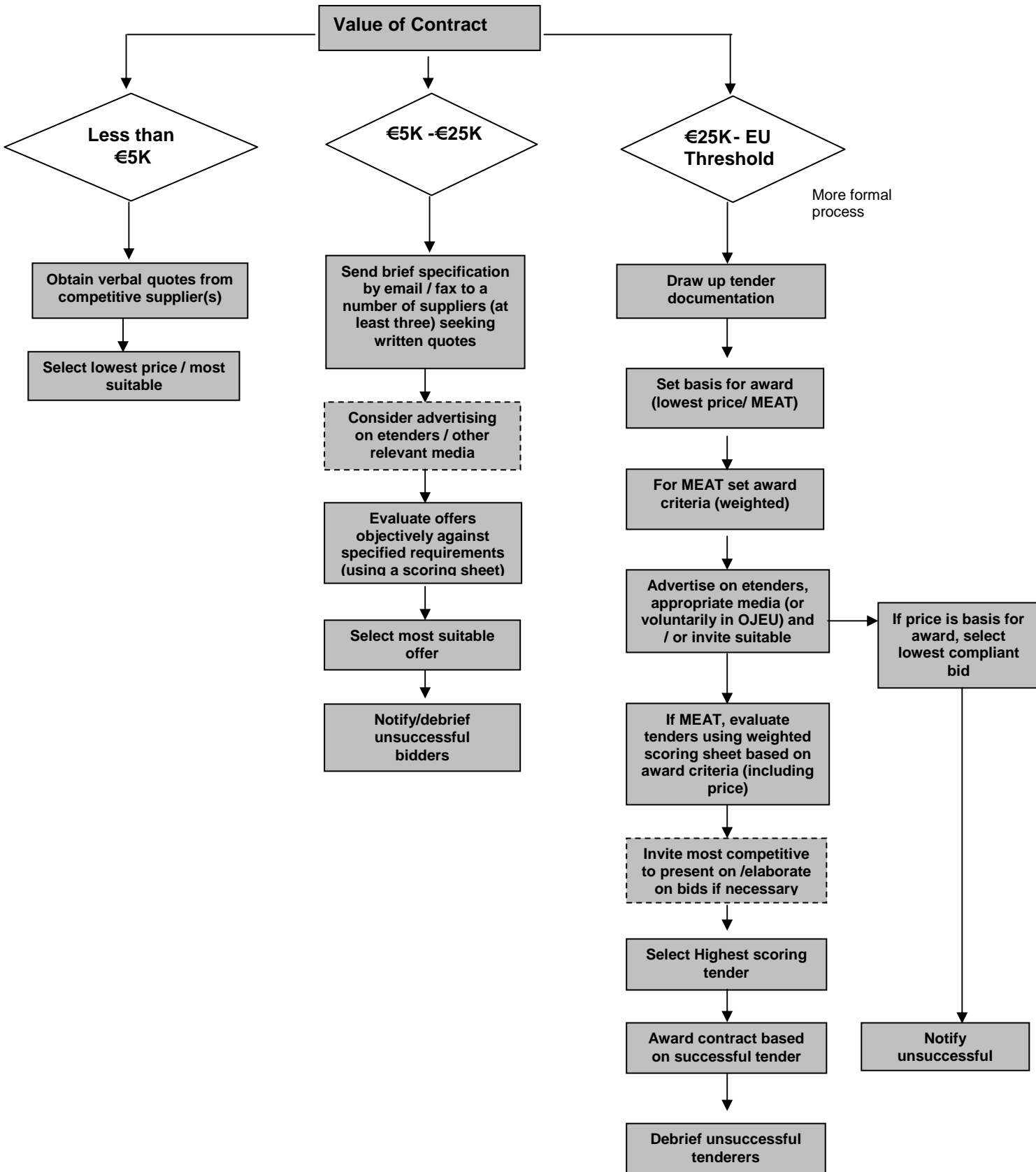
Values and procedures outlined above are indicative only and should be adapted as appropriate to suit the type of contracting authority and the nature and scale of the project. Reasons for procedures adopted, including procedures where a competitive process was not deemed appropriate, should be clearly recorded. All contract award procedures should include a verifiable audit trail.

While contracting authorities are not required to advertise on the national public procurement website *etenders.gov.ie* for requirements below €25,000 they are encouraged to do so if the anticipated response would not be disproportionate, having regard to the value of the requirement.

### Advertising

**5.2** Contracts **above €25,000** <sup>\*[see note at end of this paragraph]</sup> and up to the value of EU thresholds for advertising in OJEU (see Appendix I), not part of a ‘draw down’ or framework contract, should normally be advertised as part of a formal tendering process. Publication on the *etenders.gov.ie* website generally meets national advertising and publicity requirements and significantly reduces the need for expenditure on advertising. Notices can be placed by registering online. The site is a key reference point for potential suppliers and service providers and the service is currently provided at no cost to contracting authorities.

Diagram 1. Steps in conducting a Competitive Process for contracts below EU Thresholds



Depending on the nature of the requirement, it may be appropriate to supplement national website advertising with advertising in other media, in trade publications and / on other websites. An abbreviated notice indicating the publication of tender details on the *etenders* website should be considered in such cases. Details of an advertised tendering procedure may be sent directly to candidates who may be deemed suitably competent to participate.

[\*Circular 10/10 of 13 August 2010 reduced the threshold for advertising on eTenders from €25,000 and introduced some other new measures. Please consult this Circular for detail of the new measures]

### **Direct Invitation (without advertising)**

**5.3** Alternatively, a process of direct invitation to tender<sup>2</sup> may be used. This may involve

- invitation to firms deemed appropriately qualified for a particular project (this may be appropriate for specialised requirements in markets where there is a limited number of suppliers or service providers)

**or**

- invitation to tender to firms on a list established on an open and objective basis (normally used by contracting authorities which have a frequent or recurring requirement for supplies or services or those wishing to maintain a well organised ongoing procurement system).

**5.4** Where direct invitations are issued, firms from which tenders are sought should be a good representative sample of all potential bidders in the market concerned. The number invited to tender should be determined by the size and particular characteristics of the project to be undertaken. The number must be sufficient to ensure adequate competition, and should not be restricted for reasons of administrative convenience. At least five firms should normally be invited to submit tenders.

**5.5** Authorities keeping a list of firms from which they invite tenders should advertise at appropriate intervals (normally on an annual basis) for the admission of interested parties and should ensure that the lists are open to suitably qualified entrants at all times. Care should be taken to ensure that such lists are used in an open and non - discriminatory manner. Under direct tendering procedures, contracting authorities should ensure that recently established firms, or firms with no previous experience of public contracts, are not excluded from invitations to tender. Contracting authorities should encourage these firms by allowing them to tender for smaller contracts initially

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<sup>2</sup> Often referred to as selective or restricted tendering

and then, subject to satisfactory performance, progressing to larger or more complex contracts. It is in the interest of contracting authorities that the pool of potential suppliers is actively maintained and updated.

**5.6** If the number of firms on a list is too large to invite all suitable firms to tender, a number of those firms, sufficient to ensure adequate competition, may be selected for inclusion in the competition. Selection from the list can be made in accordance with specified criteria, randomly, or by rotation, or by a combination of all three. Selection may be based on factors such as overall suitability to the particular project by reference to experience, technical competence and capability and financial standing. The selection process should have particular regard to the need for equal treatment and reasonable distribution of opportunities.

**5.7** The methods and criteria for selecting firms and for awarding contracts should be documented and should be objective, transparent and proportionate. It should be clearly understood that whether responses are to an advertisement or to a direct invitation, all parties in the process must be treated on the same fair and objective basis. Decisions on selections for smaller projects or purchases should be recorded with a minimum of formality.

### **Evaluation and Contract Award**

**5.8** For larger projects (€25,000 and above) being awarded on the basis of the most economically advantageous tender (MEAT), it should be the normal practice to have the evaluation of tenders carried out by a team with the requisite competency. This may include independent representation, i.e. a competent person from outside the area directly involved with placing the contract. Transparency and objectivity are best demonstrated by the use of a scoring system or marking sheet based on the relevant weighted criteria, including price, indicating a comparative assessment of tenders under each criterion. (See Appendix III for sample scoring system).

As an aid to understanding and clarity, it may be appropriate to invite the most competitive tenderers to present or elaborate on proposals for technical or consultancy projects. However, any dialogue with tenderers that could be construed as "post tender negotiation" on price or result in significant changes to the published tender specifications must be avoided.

### **Results of Tendering Process**

**5.9** All tenderers should be informed of the result of a tendering process without delay. (See Section 8 on debriefing unsuccessful tenderers).

## 6. EU Public Procurement Procedures

**6.1** The EU Treaties provide for free movement and non - discrimination on the grounds of nationality in the provision of goods and services. The Treaties express these provisions as broad principles. Procurement Directives adopted by the EU set out in law what Member States must do in exercising the public procurement function to give effect to the principles of the Treaty and to realise the benefits of the Internal Market.

### Revision of Directives

**6.2** A revision of the EU public procurement Directives was completed recently. Three former public sector Directives for works, supplies and services have been consolidated into one text. The revised Directives are 2004/17/EC, covering procurement procedures of entities operating in the utilities sector and 2004/18/EC, covering procurement procedures of public sector bodies. The Directives have been adapted to modern market conditions by providing for measures such as the use of electronic means of procurement and tendering (eprocurement), providing for framework arrangements (see 6.24) and for more flexible procedures for awarding complex contracts, such as public private partnership projects (PPPs), in the public sector.

*This section summarises the principal features and provisions of the revised EU public sector procurement Directives. It does not attempt to provide an exhaustive or detailed outline of their requirements nor is it a legal interpretation of the obligations they impose. It is essential that officials directly concerned with placing contracts are familiar with the provisions of the Directives. Informal advice may be sought from the Public Procurement Policy Unit, Department of Finance (contact details are given in Appendix VII). For large or complex projects, or in the case of contracts with non - standard features, legal or other professional advice should be obtained if there is any doubt about the correct procedures to be followed.*

**6.3** The Directives impose obligations on contracting authorities to:

- advertise their requirements in the Official Journal of the European Union (OJEU);
- use procurement procedures that provide open and transparent competition;

- apply clear and objective criteria, notified to all interested parties, in selecting tenderers and awarding contracts;
- use broadly based non - discriminatory technical specifications;
- allow sufficient time for submission of expressions of interest and tenders.

It is a legal requirement that contracts with estimated values above the thresholds<sup>3</sup> set out in the Directives (apart from some defined exceptions) be advertised in the OJEU and that these contracts are awarded in accordance with the provisions of the Directives. Contracting authorities covered by the public sector Directive must also ensure that most works contracts and related services contracts, which they subsidise by 50% or more, are awarded in accordance with the provisions of that Directive. Any infringement of the terms of the Directives can give rise to serious legal or financial sanctions.

The EU Directives cover contracts for

**Works** - buildings and civil engineering contracts

**Supplies** - purchasing of goods and supplies

**Services** - all of the most commonly procured services, including advertising, property management, cleaning, management consultancy, financial and ICT related services, (See Annex IIA and Annex IIB of the revised public sector Directives).

### **Criteria for awarding contracts**

**6.4** Contracting authorities may choose to award contracts on the basis of

- the lowest priced tender **or**
- the most economically advantageous tender (specifying, in addition to price, various other criteria including running costs, servicing costs, level of after sales service, technical assistance, technical merit, environmental characteristics).

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<sup>3</sup> The current value thresholds above which contracts are subject to the Directives are set out in Appendix I

When a contract is being awarded on the most economically advantageous basis, the notice or the tender documents must state all of the criteria being applied in the award process, giving the relative weightings for each criterion. If it is not technically possible to indicate criteria weightings in advance, they must be listed in descending order of importance. New or amended criteria must not be introduced in the course of the contract award procedure. If significant additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

### **Advertising in the OJEU**

**6.5** OJEU Notices must be drawn up in accordance with the standard forms set out in EU Directive 2001/78/EC of 13 September 2001 or any revised version which will be published on <http://simap.europa.eu>, the EU public procurement website. For economy and efficiency, contracting authorities are strongly advised to publish their notices online via [www.etenders.gov.ie](http://www.etenders.gov.ie) or <http://simap.europa.eu>. There is guidance for users in completing online publication on both websites.

If forwarding notices manually the standard forms must be used. The forms can be downloaded, completed electronically (in Word format) and emailed to the Publications Office. The *simap* website has a FAQs section which provides comprehensive information on the procedures involved in publishing notices.

**6.6** Advertisements in the OJEU should also be published on the *etenders* website. This will be done automatically if *etenders* is used for online OJEU publication. They may be supplemented by advertisements in the national media to ensure the widest possible competition for the contract. However, national advertisements must not appear before the date of dispatch to the OJEU and must not contain any information additional to that in the OJEU advertisement. Where supplementary national media advertising is considered necessary, contracting authorities are advised, in the interests of economy, to place abbreviated notices in the media referring interested parties to the OJEU notice and / or to the *etenders* website for full details.

### **Prior Information Notices (PINs) and Buyer Profiles**

**6.7** Contracting authorities with an aggregated procurement requirement in excess of €750,000 for any product area of supplies or category of services are encouraged to publish an annual notice called a Prior Information Notice / Prior Indicative Notice (PIN) in the OJEU. The PIN is normally submitted by the contracting authority at the start of the budgetary year and sets out the categories of products and services likely to be procured during the year.

Contracting authorities are also encouraged to publish ‘buyer profiles’ on their websites with general information on their procurement requirements and to publicise the existence of these profiles in a PIN.

Insertion of a PIN does not commit contracting authorities to purchasing or proceeding with a project if circumstances change. It is intended as an aid to transparency and is for the benefit of suppliers. Publication of a PIN permits a contracting authority to reduce the minimum time for tendering if the PIN, with the necessary amount of information specified, has been dispatched to the OJEU at least 52 days before, and within twelve months of, dispatching the contract notice (see 6.14 on ‘Time limits for Replies’).

### **Contract Award Notice**

**6.8** It is a requirement that contracting authorities publish certain information on contracts awarded (or framework agreements concluded) within 48 days of the award in the OJEU. Particulars, including the type of contract, the procedure and award criteria used, the number of tenders received, the name of the successful tenderer, the value of the contract or the range of tender prices, justification for the negotiated procedure, if used, are published. The necessary information can be submitted online to the OJEU or electronically on the standard ‘Contract Award Notice’.

### **Common Procurement Vocabulary**

**6.9** The Common Procurement Vocabulary (CPV) is a classification code developed by the EU Commission to describe thousands of types of works, supplies and services. It is being adopted as the official code for classifying public contracts and is maintained and revised by the Commission as markets evolve and develop. The CPV can be accessed on the <http://simap.europa.eu> website and the appropriate code should be used for describing the subject of the contract on the standard forms when advertising in the OJEU.

### **Thresholds**

*Any contract placed by a public body over the financial threshold set out in the Directive must be processed and awarded in accordance with the procedures of the Directive, unless it is covered by a clearly defined exception.*

**6.10** The thresholds applying from 1 January 2010 to 31 December 2011 are set out in Appendix I. The thresholds in the Directives are revised by the Commission, under the terms of the Directives, at two-yearly intervals. The revised thresholds are published on the EU procurement website <http://simap.europa.eu> and the national

procurement website [www.etenders.gov.ie](http://www.etenders.gov.ie). The Department of Finance will notify Departments of these changes as they occur.

### **Estimation of contract values**

**6.11** Estimation of contract values for OJEU publication purposes must be realistic. If a contract, not advertised in the OJEU, attracts tenders in excess of the EU thresholds, there is a risk that the award could be subject to infringement proceedings. In such an event, a contracting authority would be required to justify the original estimation.

No project or purchase may be sub-divided to prevent it coming within the scope of the Directives. Where a project or purchase involves separate lots the value of all lots must be included in estimating the value of the contract.

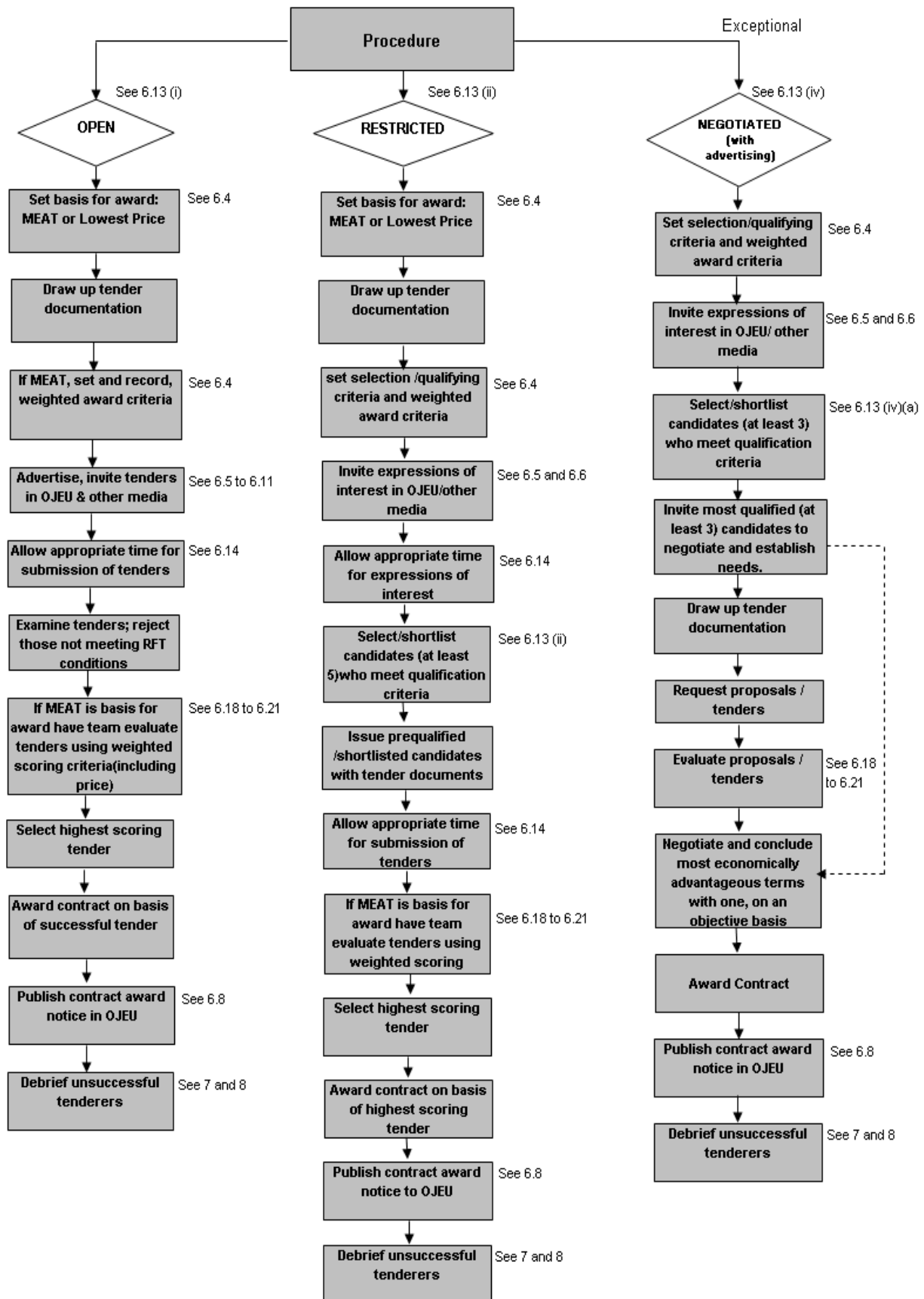
### **Priority and Non – Priority Services**

**6.12** Under the procurement Directives, services are divided into two categories described as 'priority' and 'non-priority' services (set out in Annex IIA and Annex IIB of the revised public sector Directive). The two categories of services are listed in Appendix IIA and Appendix IIB of these guidelines.

The 'priority' services are subject to the full provisions of the Directive. In the case of 'non-priority' services, the requirement is that they should be awarded without using restrictive technical specifications. For example the use of specifically branded products should be avoided. In addition, information on 'non-priority' contracts awarded should be notified to the Commission in the form of an Award Notice, indicating whether the notice should be published in the OJEU. The purpose of this provision is to help determine whether some or all of those services might be made subject to the full provisions of the Directive at a future date.

While the full procedures of the Directives do not apply to the award of contracts for 'non – priority' services, the European Court has ruled that Treaty principles such as non - discrimination, transparency, freedom of movement and freedom to provide goods and services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

Diagram 2. Steps in conducting a Competitive Process for contracts above EU Thresholds



## Tendering Procedures

**6.13** The revised EU public sector Directives permit four tendering procedures:-

(i) **Open.** Under this procedure all interested parties may submit tenders. Information on tenderers' capacity and expertise may be sought and only the tenders of those deemed to meet minimum levels of technical and financial capacity and expertise are evaluated. If there are minimum requirements it is important that they be made clear in the notice or the request for tenders (RFT) to avoid unqualified bidders incurring the expense of preparing and submitting tenders.

(ii) **Restricted.** This is a two-stage process where only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

- As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed questionnaire to interested parties.
- The second step involves issuing the complete specifications and tender documents (RFT) with an invitation to submit tenders only to those who possess the requisite level of professional, technical and financial expertise and capacity. It is important to note that, as a basis for pre - qualifying candidates, only the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of candidates set out in the revised Directive (Articles 45 to 48 of 2004/18/EC) are permissible. The European Court of Justice and the EU Commission have ruled clearly on this.

Contracting authorities may opt to shortlist qualified candidates if this intention is indicated in the contract notice and the number or range of candidates indicated. Shortlisting of candidates who meet the minimum qualification criteria must be carried out by non - discriminatory and transparent rules and criteria made known to candidates. The Directives require that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five (provided there is at least this number who meet the qualification criteria) and up to a total of 20.

(iii) **Competitive Dialogue.** This is a procedure, introduced under Article 29 of the revised public sector Directive 2004/18/EC, designed to provide more flexibility in the

tendering process for more complex contracts, for example public private partnerships (PPPs). Contracting authorities must advertise their requirements and enter dialogue with interested parties, (pre – qualified on the same basis as for restricted procedure described at 6.13 (ii) above). Through the process of dialogue with a range of candidates, a contracting authority may identify arrangements or solutions which meet its requirements. Provided its intention is indicated in the contract notice or in descriptive documents supplied to candidates, a contracting authority may provide for the procedure to take place in successive stages in order to reduce the number of solutions or proposals being discussed. The reduction must be achieved by reference to the award criteria for the contract.

In conducting the dialogue, contracting authorities must ensure equality of treatment and respect for the intellectual property rights of all candidates. When satisfied about the best means of meeting its requirements, the contracting authority must specify them and invite at least three candidates to submit tenders. The most economically advantageous tender will then be selected. Aspects of tenders may be clarified or fine tuned provided that there is no distortion of competition or discrimination against any tenderer.

(iv) **Negotiated.** This is an exceptional procedure, which may be used only in the limited circumstances set out in Articles 30 and 31 of the revised public sector Directive. There are two types of negotiated procedure:

(a) *Contracting authorities advertise and negotiate the terms of the contract.* This process should normally involve the submission of formal tenders by at least three candidates (pre-qualified on the same basis as for the restricted procedure described at 6.13 (ii) above, provided there are at least this number who meet the minimum qualification criteria) with negotiation on final terms in a competitive process. This procedure may be used mainly:

- where the nature of the requirement does not permit overall pricing;
- where it is not possible to specify requirements for a service with sufficient precision to enable tenderers to respond with priced tenders;
- where an open, restricted or competitive dialogue procedure has not attracted acceptable tenders.

(b) *Contracting authorities negotiate, without advertising, the terms of the contract directly with one or more parties.* This is a departure from the core principles of

openness, transparency and competition and is a very exceptional procedure. The main instances where this procedure may be used are:

- in cases of extreme urgency;
- when, for technical or artistic reasons or due to the existence of special or exclusive rights, there is only one possible supplier or service provider;
- when an open or restricted procedure has not attracted appropriate tenders (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially);
- extension of existing contracts and repeat contracts subject to certain conditions;
- 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.

Contracting authorities should ensure that the precise circumstances justifying negotiation, as set out in the public sector Directive, exist before deciding on the use of this procedure. It should be noted that definitions of ‘exceptions’ and ‘urgency’ are strictly interpreted by the Commission and the Courts. Factors giving rise to urgency must be unforeseeable and outside the control of the contracting authority. Where one of these exemptions is invoked, the contracting authority must be able to justify the use of the exemption. Candidates must always be treated fairly and objectively in negotiations.

### **Time-limits for Replies**

**6.14** Minimum time-limits are set down for the different stages of the particular contract award procedure chosen. In all cases, the times specified in days relate to calendar days. When fixing the timescale for submitting expressions of interest / requests to participate or tenders, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders.

The main **minimum** time-limits, which are reckoned from the date of dispatching the notice to the OJEU, are as follows.

### *Open Procedure*

- for receipt of tenders: **52 days**
- if a PIN has been published (see 6.7 above): as a general rule the minimum time may be reduced to **36 days** but in no circumstances less than **22 days**.

### *Restricted, Negotiated and Competitive Dialogue Procedures*

- for receipt of expressions of interest / requests to participate: **37 days**;
- for receipt of tenders under restricted procedures: **40 days** from date of issue of invitation to tender;
- if a PIN has been published: as a general rule the minimum time for receipt of tenders under the restricted procedure may be reduced to **36 days** but in no circumstances less than **22 days** (*no reduction in times for receipt of expressions of interest*).
- Under a negotiated procedure or in competitive dialogue the time allowed for receipt of tenders may be agreed between the parties involved.

Where **genuine** urgency<sup>4</sup> renders these time limits impracticable, shorter time-limits may be applied as follows

- for receipt of expressions of interest, not less than **15 days** from the date of dispatching the notice and
- for receipt of tenders, not less than **10 days** from the date of issue of invitation to tender.

**Electronic / online transmission:** minimum times for responses may be reduced where contract notices are transmitted electronically to the OJEU and all tender documentation is made available electronically in accordance with the provisions of the revised Directives. The reduction can be up to a cumulative 12 days, reflecting the potential for time saving if up - to - date technological methods of communication and transmission are used at the various stages of the process. Conditions for availing of these potential time reductions are set out in Article 38 (5) and (6) of the revised public sector Directive.

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<sup>4</sup> The use of the urgent procedures, or accelerated procedures, as referred to in the Directives, must be justified and have been caused by unforeseeable events outside the control of the contracting authority. The EU Commission and ECJ interpret 'urgency' very strictly. Delay or inaction on the part of the contracting authority is not sufficient reason for applying exceptional procedures.

## Issue of Documents

**6.15** Responses to requests for information, requests for tender documents and other supporting documentation (if not made available electronically) must be issued without delay and in any event within a maximum of six days of the request. Additional information, requested in good time, must be issued at least six days before the latest date for receipt of tenders. In order to avoid giving unfair advantage, additional information supplied to one party in response to a request should be supplied to all interested parties if it could be significant in the context of preparing a tender.

## Receipt and Opening of Tenders

**6.16** Contracting authorities should ensure that proper procedures are in place for opening tenders to prevent abuse or impropriety at this stage. All tenders should be opened together as soon as possible after the designated latest time and date set for receipt of tenders. Internal procedures should require that opening of tenders takes place in the presence of at least two officials of the contracting authority. The procedure adopted should ensure that, in the case of any dispute, there is a clear and formal independently vouched report of the tenders received. Tenders received after the closing time for receipt of tenders should not be accepted.

## Clarification of Tenders

**6.17** Contracting authorities may seek additional information in clarifying submitted tenders. However, substantive alterations to bids after the deadline for submission has passed are not permissible under the open or restricted procedures. In particular, any adjustment to price which could improve the competitive position of a bid is not permitted<sup>5</sup>.

## Evaluation of tenders and award of contract

*Evaluation of tenders should be carried out by a suitably competent team. The evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. This is best achieved by the use of a scoring system based on all the relevant weighted criteria, indicating a comparative assessment of tenders under each criterion.*

**6.18** The evaluation process for tenders above EU thresholds will be similar in many respects to that for larger projects below thresholds described at 5.8. Examination of

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<sup>5</sup> In regard to the open and restricted procedures, the EU Council and Commission has stated that “all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, in particular on prices, shall be ruled out”.

tenders should be carried out by a team with the necessary competence. The team may include independent representation. Tenders which do not comply with the requirements specified in the RFT should be rejected.

The evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. Price should be evaluated exclusive of VAT.

(i) Where price is the sole criterion, the contract will be awarded to the lowest priced bid complying with the specified requirements.

(ii) Where ‘most economically advantageous tender’ is the basis, the contract must be awarded to the tender which best meets the relevant criteria. In addition to price they will include other criteria relevant to the subject of the contract. For example, they may include running costs, servicing costs, level of after sales service, technical assistance, technical merit, environmental characteristics. The criteria, with the relevant weighting, will have been pre – established and made known to the tenderers, either in the contract notice or the tender documentation (RFT) as set out at 6.4.

Tenders must be evaluated objectively and transparently against the published weighted criteria. 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. The scoring system must include price and not ‘value for money’ or ‘cost effectiveness’ as a specific criterion. Value for money / cost effectiveness / economic advantage is largely the outcome of the completed evaluation. (See Appendix III for sample of a basic scoring system). The criteria may be subdivided for the purpose of scoring if it assists in the evaluation but this must not involve a departure from the pre - established criteria and weighting.

**6.19** Under the restricted procedure, care should be taken to ensure that the pre-qualification criteria are not used inappropriately in the tender evaluation process. Tenderers will be deemed to have met the minimum requirements in regard to their capacity to perform the contract. Therefore, criteria relating to past experience and track record of the company will not feature at the evaluation stage. Tenders should be assessed solely on the basis of how they meet the award criteria related to the actual project (See also 6.13 (ii) above).

**6.20** In open or restricted procedures, the most competitive or advantageous tenderers are frequently asked to make a presentation on their proposals for technical or consultancy projects. These presentations are used as an aid to understanding and for

purposes of elaboration and clarification. Any dialogue with tenderers that could be construed as "post tender negotiation" on price, or result in significant changes to criteria or tender specifications, is to be avoided. Such negotiations, outside the exceptional and clearly defined circumstances where EU rules permit, could contravene the EU procurement Directives.

### **Abnormally Low Tenders**

**6.21** A tender which might be regarded as abnormally low may not be rejected without investigation and consideration of the relevant elements that gave rise to a particularly low bid. Such elements might include an innovative technical solution or exceptionally favourable conditions available to the tenderer. The tenderer should be given the opportunity to explain the basis of the tender.

### **Tax Clearance**

**6.22** Before a contract is awarded, the successful tenderer must hold a valid Tax Clearance Certificate from the Revenue Commissioners. Revenue provides an online verification facility to allow third party access to the applicant's tax cleared status. This secure facility can only be accessed with the permission of the applicant, who will quote the customer number and tax clearance number, which appear on the certificate. Access to the online verification can be located at [www.revenue.ie](http://www.revenue.ie) "What can I do online", "Tax Clearance". There is no need for the applicant to produce the original certificate to confirm his/her tax-cleared status. (Refer to Section 4.3 for further details).

### **Notifying Tenderers**

**6.23** All tenderers must be informed of the result of a tendering process without delay. (See section 7 on obligations in notifying tenderers and section 8 on voluntary debriefing of unsuccessful tenderers)

### **Framework Agreements**

**6.24** The revised public sector Directive provides for "framework agreements" under which contracting authorities enter into arrangements with suppliers or service providers to supply goods or services under agreed conditions for a period of time, normally not more than four years. Under these agreements, some elements of the requirement, for example quantity, price, precise product specification, will generally not be fully established at the start of the agreement. Advertising for framework agreements should set out the precise nature of the proposed procurements to the highest degree possible.

Framework agreements can be with one supplier or service provider, selected following a competitive process, to fulfill orders or supply services over the period of the agreement. Alternatively, they may be with a number of (at least three) pre - qualified suppliers or service providers. In the latter case, a contract may be awarded to one party to the agreement if the terms of the agreement so permit, or a contract may be the subject of a sub - competition between parties to the framework agreement.

The fundamental requirement is that non – discriminatory and transparent competition prevails in establishing framework agreements and in awarding contracts on the basis of such arrangements. The provisions of the revised Directive (Article 32) are designed to ensure this. Framework agreements may be used for requirements under the EU thresholds.

### **Utilities Sector**

**6.25** Separate procurement Directives cover the public sector and the utilities sector. The revised utilities Directive 2004/17/EC covers entities operating in the water, energy, transport and postal services sectors. Private sector entities which operate under special or exclusive rights in the utilities sector are also covered by the utilities Directive. Most features of the Directives are common to both sectors. However, the utilities Directive provides more flexibility in tendering procedures, reflecting the more commercial remit of the entities it covers. For example, higher thresholds apply to supplies and service contracts under the utilities Directive (see Appendix I) and there is wider scope to negotiate contracts. Therefore a “competitive dialogue” procedure is not considered necessary.

Under the utilities Directive there is a facility to establish lists of qualified candidates under specific conditions relating to openness and regular advertising for admission to the lists. Entities in the utilities covered are not required to advertise individual contracts where a qualification system has been established and is used in accordance with the terms of the utilities Directive.

The utilities Directive provides for the removal of sectors as and when markets become sufficiently liberalised.

### **Government Procurement Agreement of WTO**

**6.26** 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. Candidates and tenderers from other signatory States have the same rights as those from EU Member States. The provisions of the EU Directives and of the GPA are closely harmonised, therefore compliance with the Directives ensures compliance with the GPA.

However, there are some very slight differences in coverage. The GPA does not apply to some contracts. The principal exceptions are service contracts of public bodies for research and development and contracts placed by entities in certain utility sectors (i.e. gas, heat, oil and railways), which are covered by the EU Directives only.

## 7. Notifying Tenderers and Disclosure of Information

This section provides information on the obligations of contracting authorities in notifying unsuccessful tenderers and providing information on public contracts covered by the EU procurement Directives. Section 8 offers general guidance on voluntary debriefing of unsuccessful tenderers.

### EU Remedies Directive and ECJ Case Law Obligations

**7.1** Unsuccessful candidates and tenderers for any public contract should be informed of the results of their candidature or a tendering process without delay. Recent case law of the European Court of Justice (ECJ) has interpreted the EU Remedies Directives as requiring that unsuccessful tenderers for contracts covered by the EU procurement Directives must have the opportunity to have a contract award decision rescinded if their rights have been infringed or an award decision is deemed unlawful (Alcatel – Case C-81/98).

**7.2** This requires that unsuccessful tenderers for contracts covered by the EU Directives be notified promptly of the outcome of a tendering procedure and that a contract is not formally awarded before an interval, during which an unsuccessful tenderer can seek a review of the decision if s/he feels that the process has been unfair or unlawful, has elapsed. (*See sample notification at Appendix IV which suggests a 14 calendar day interval, or seven calendar days in the case of a contract advertised under an accelerated procedure due to urgency*). This implies that any notification to the tenderer deemed successful during this interval must be provisional and not constitute a contractual arrangement (*See sample notification at Appendix V*)<sup>6</sup>. Tender documentation should include a statement indicating the need for an appropriate interval after the award decision is notified and before a formal contract is put in place.

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<sup>6</sup> Ireland’s transposition of the Remedies Directives currently provides that a contract award decision may be rescinded by the Courts at any time. However, on the basis that a Court will be inhibited from rescinding a decision of a contracting authority if a formal contract is in place, the EU Commission interprets the ECJ “Alcatel” judgment as requiring a “standstill period” between the award decision and the signing of a contract.

An appropriate legal provision to this effect is currently being considered in consultation with the Office of the Attorney General. Observing the notification procedure set out here should fulfil the terms of the ECJ judgment and any legal provisions that might be introduced. Any substantive change will be notified in future guidance on Remedies and Infringement procedures or an updated version of these guidelines which can be accessed on [www.etenders.gov.ie](http://www.etenders.gov.ie).

## **Disclosure of Information – Other Directive and FOI Provisions**

**7.3** Proposals in a tendering process are normally submitted on a confidential basis. In order to preserve the integrity of the process and to respect the commercial and competitive positions of tenderers, details of tenders must be kept confidential at least until the evaluation process is concluded. After the award of a contract certain information must be disclosed. Under the public procurement Directives, contracting authorities are required to provide certain information on contracts above the EU thresholds. Two particular provisions on disclosure of information in the procurement Directives require that:

- any eliminated candidate or tenderer who requests it must be informed promptly (within 15 days) of the reasons for rejection and of the characteristics and relative advantages of the successful tenderer as well as the name of the successful tenderer
- certain information on the contract awarded (or framework agreement concluded), including the name of the successful contractor(s) and the price, or range of prices, paid, must be submitted for publication in the EU Journal not more than 48 calendar days after the award. The information must be set out in accordance with the relevant model notice annexed to the Directives.

However, information may be withheld from publication if release

- would impede law enforcement or would otherwise be contrary to the public interest,
- would prejudice the legitimate commercial interests of particular undertakings or
- might prejudice fair competition.

## **Report on Contracts Awarded**

**7.4** For contracts above EU thresholds a contracting authority is required to prepare a written report containing fundamental information, as outlined in Article 43 of the public sector procurement Directive 2004/18/EC, on the award procedure adopted. This report, or the main features of it, may be requested by the EU Commission at any time.

## **Freedom of Information**

**7.5** Freedom of Information (FOI) 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 grounds of confidentiality or commercial sensitivity. Tenderers are normally requested to indicate, with supporting reasons, any information included with their tenders which they wish to be regarded as confidential. A contracting authority's deciding officer 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. A general summary of the Information Commissioner's views on the treatment of tender related records is given at Appendix VI for information.

## **8. Voluntary Debriefing of Unsuccessful Tenderers**

**8.1** Apart from observing the legal obligations where the provisions of the procurement Directives apply, where contracts are awarded on the basis of the most economically advantageous tender, it is good practice to adopt a voluntary constructive policy on de-briefing unsuccessful candidates. It is recommended that unsuccessful tenderers be given an objective assessment of the comparative strengths and weaknesses of their tenders having due regard to commercial sensitivity and the need to avoid compromising the rights or competitive situation of other tenderers. There are important benefits from giving constructive feedback to unsuccessful bidders.

For contracting authorities it can

- identify ways of improving the process for the future
- encourage better bids in the future
- help establish the public sector as a fair, open and ethical buyer and
- encourage continued participation by suppliers which promotes competition.

For tenderers it can

- generate confidence and reassurance about the integrity of the process
- help improve future performance
- help them understand and operate the different procedures and practices that might apply in the public sector.

It should also be borne in mind that voluntary disclosure of information can avoid the need for recourse to formal measures such as the Freedom of Information Act or EU Remedies Directives.

### **Small Procurements**

**8.2** At a minimum, unsuccessful candidates and tenderers should be informed of the outcome of their application or tender. It is good practice to give tenderers the reason for the unsuccessful bid by reference to their relative performance under the relevant evaluation criteria used in the competition, for example, uncompetitive on price. Subject to being satisfied as to the identity of the tenderer, feedback by telephone should normally be sufficient for smaller procurements.

## **Larger Procurements**

**8.3** For larger contracts, for example contracts above €25,000 for services or supplies (the value above which a more formal process is recommended), contracting authorities should offer unsuccessful tenderers an opportunity of a debriefing meeting. The time and resources to be devoted to debriefing is likely to be reduced if contracting authorities provide as much information as possible in the notification of the award decision. The sample notice at Appendix IV, or a version adapted as appropriate for sub EU threshold contracts, may be suitable. The notification should include the name and details of the person to be contacted about debriefing. In practice, subject to being satisfied as to the identity of the tenderer, many requests may be satisfied by telephone feedback.

**8.4** Where a more formal or personal debriefing is required, a structured approach for the debriefing should be adopted. It would be prudent to have at least two officers from the contracting authority in attendance and a note of the proceedings kept for the records. The process should address the supplier's offer against the evaluation criteria. It should focus on the relevant strengths and weaknesses of the tender without being an explicit comparison between the supplier's offer and the successful offer, or any other offer.

**8.5** Care should be taken to ensure that information such as the identity of other tenderers, the 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. However, in this regard it should be borne in mind that certain information about the successful tender, the price for example, may be in the public domain. The Freedom of Information principles on the disclosure of records relating to a tender competition summarised by the Information Commissioner, reproduced at Appendix VI, may also be relevant.

**8.6** The debriefing should not be a forum to debate the process of how tenders were evaluated or discuss the merits of the award decision. Constructive and effective debriefing will be very much assisted if clear, objective criteria for qualification and award of the contract have been pre – established and applied objectively. In general if there has been an objective and properly conducted tendering process, an open constructive debriefing should provide reassurance to unsuccessful tenderers.

## 9. Glossary of Terms

*Contracting Authority:* a Government Department or Office; local or regional authority; any public body, commercial or non commercial; a subsidiary or body established by a public body; any institution or entity funded largely from public funds.

*Public Contract:* a contract for the provision of works, supplies or services to a contracting authority. It includes all procurements, not just those which are undertaken on the basis of a full tendering process and formal signing of a contract

*RFT (Request for Tenders :* 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.

*Direct Tendering:* (sometimes referred to as restricted or selective tendering) a tendering process where a number of suitable contractors, suppliers or service providers are invited to submit tenders for contracts below EU thresholds without public advertising.

*Restricted Procedure:* a procedure under EU procurement Directives whereby expressions of interest are invited through a notice in the OJEU (and other appropriate media) and only those who meet certain qualification criteria are issued with the full tender documentation and invited to submit tenders.

*Qualification Criteria:* exhaustive criteria (set out in Articles 45 to 48 of Directive 2004/18/EC) to be used in pre-qualifying / pre-selecting candidates who are invited to submit tenders. The criteria relate 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. Proposals in relation to a particular project are not sought and are not a consideration at this stage.

*Award Criteria :* criteria, set out in tender documentation, on which tenders will be evaluated and the award of the contract will be based, i.e. relating to how a tenderer addresses and proposes to perform or deliver the object of the contract and at what cost.

## 10. Frequently Asked Questions

### ***To whom do the public procurement guidelines and rules apply?***

They apply to procurement by all public sector bodies, such as Government Departments / Offices, local and regional authorities, health authorities, commercial and non-commercial State bodies. Also, most works and related services contracts awarded by a private entity, which are subsidised 50% or more by a public body, are covered by the EU Directives if they exceed the EU thresholds. Contracts below the EU thresholds which are funded or part-funded from public funds, awarded by private sector entities, should, as far as possible, be awarded in accordance with the national guidelines.

### ***When do I have to tender for the purchase of supplies and services?***

The basic principle of public procurement is that there should be a competitive process. The type of process will depend on the value and nature of the requirement. Section 5 of the guidelines indicates procedures that might be used for lower value requirements, i.e. below EU thresholds.

There is a legal obligation to tender for contracts above EU thresholds (for thresholds see Appendix I of these guidelines) and award them in accordance with procedures set out in EU public procurement Directives.

### ***Can I invite parties to tender directly?***

Yes. Particularly suitable suppliers or service providers may be invited to compete for contracts below EU thresholds. A number sufficient to ensure adequate competition, selected on an objective and non-discriminatory basis, should be invited to tender (see Section 5 of these Guidelines). It is also acceptable to supplement advertising by issuing details of a competition directly to particular suppliers or service providers after publication of notices.

### ***Must requests for tenders be advertised in national newspapers?***

It is not obligatory to advertise in national newspapers. There is a legal obligation to advertise contracts above the EU thresholds in the OJEU. All public contracts above €25,000, and some below this value, should be published on *etenders.gov.ie*. This website is the main point of reference for entities interested in public sector contracts. If newspaper or other media advertising is considered necessary it is recommended that an abbreviated notice be published referring to full details on the *etenders* site.

***Why the €25,000 threshold for advertising on etenders?***

This is not intended to be prescriptive; it is merely a guide for contracting authorities. In recent experience, contracting authorities found that notices for many relatively small requirements published on the website were receiving very large responses. This resulted in disproportionate administrative costs for contracting authorities in processing a large number of bids and for large numbers of tenderers preparing bids.

If the number of suppliers in the market is unknown, or known to be relatively small, it is recommended that requirements below €25,000 be published on the website to ensure adequate competition, and opportunity for suppliers and service providers.

***Is there a list of contractors/ suppliers/ service providers used by public bodies?***

There is not one central list. Many public bodies have lists from which they invite submission of tenders for requirements below EU thresholds. Contracting authorities who maintain lists generally advertise and invite applications annually but application may be made directly at any time to the relevant Department/Office, Government Supplies Agency, local authority, health authority etc.

***Is there a minimum time to be allowed for the submission of tenders?***

For contracts below the EU thresholds there are no prescribed time limits but sufficient time must be allowed for preparation and submission of tenders. The complexity of a project and other relevant factors relating to the preparation of tenders should be taken into account.

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

A sample RFT can be viewed on *etenders.gov.ie*. Contract notices on the website will also have tender documentation attached which can be viewed for guidance.

***What is the GCC?***

The GCC (Government Contracts Committee) is a committee of Procurement Officers from central Government Departments and agencies which have a significant procurement function or have responsibility for key procurement sectors. It examines and considers procurement issues and assists the Department of Finance in formulating procurement policy, drafting guidelines and promoting best procurement practice.

***Do I need GCC approval to award a contract?***

No. The procedure whereby certain contracts of Central Government Departments and Offices had to be submitted for GCC approval is replaced by a new procedure outlined

in Department of Finance Circular 40/02. Contracting authorities outside the Central Government sector may have their own internal approval procedures.

### **EU Directives:**

#### ***What are procurement Directives / thresholds***

Public procurement Directives are EU rules which impose legal obligations on public bodies (contracting authorities) in Member States to advertise contracts for works, supplies and services, above certain **thresholds**, in the Official Journal of the EU. The Directives set out procedures for awarding contracts designed to ensure open, transparent and fair competition. The relevant thresholds are set out in Appendix I.

#### ***Are there any exemptions from the Directives?***

The vast majority of public contracts above the relevant thresholds are subject to the provisions of the EU public procurement Directives. There are very limited exceptions, for example in the area of Defence and State security. Some services, annexed to the Directives and listed in Appendix IIB, are not subject to the full provisions of the Directive and advertising in the OJEU is not obligatory. However, it is national policy to advertise such contracts of significant value as part of a competitive process. They must also be awarded in accordance with EU Treaty principles of transparency (this implies appropriate advertising), non – discrimination on the grounds of nationality, freedom to provide services, freedom of establishment.

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

Contracting authorities are strongly advised to publish their notices online via *etenders.gov.ie* or the EU public procurement website <http://SIMAP.europa.eu>. There is guidance for users in completing online publication on both websites. If forwarding notices manually there are standard forms which must be used. The forms can be downloaded, completed electronically (in Word format) and emailed to the Publications Office. (*SIMAP* has a FAQs section which provides comprehensive information on the procedures involved in publishing notices).

#### ***The OJEU form requires that the language or languages in which tenders can be drawn up be indicated. What should I indicate here?***

Responses must be accepted in one of the official language of the EU, for example English. However, under national policy, responses in the Irish language must also be accepted; therefore the indication must normally be Irish or English.

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

Under the revised Directives publication of a PIN is not mandatory. However, where estimated annual requirements are in excess of €750000 for similar categories of supplies or services, 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. A “purchaser profile” with the necessary amount of information published on a website and notified via a brief notice in the OJEU fulfils the same function as a PIN published in the OJEU.

***My contract is urgent – do I have to advertise in the OJEU and adhere to the minimum times for responses set out in the Directives?***

The Directives make provisions for negotiating a contract (without advertising) and for accelerating an advertised procedure in urgent and exceptional circumstances. However, ‘urgency’ and ‘exceptional circumstances’ are very narrowly interpreted by the European Court and the EU Commission. The instances where resort to these provisions is justified will be very rare and maximum care must be taken before availing of them. The exceptional circumstances / urgency must have been unforeseeable and must not have arisen due to any action or inaction on the part of the contracting authority.

***Can I try to negotiate a better deal on a tender price to get better value for money?***

Post - tender negotiation is prohibited under EU rules as it diminishes transparency and can give rise to abuses in the tendering process. The system is designed to operate on the basis that tenderers submit their most competitive bid in response to the specifications set out in an RFT.

Where contracting authorities cannot specify requirements precisely enough allow the submission of priced tenders, the rules permit the use of a negotiated procedure. Negotiation must be carried out on a fair basis with the highest possible degree of transparency.

***Is it possible to extend contracts?***

It is possible to extend contracts in certain circumstances. The circumstances in which extensions to contracts may be negotiated are set out in the EU Directives. As a general rule the provisions confine extensions to 50% of the original value of contracts. Therefore contracting authorities should be prudent and anticipate, as far as possible, all potential requirements before advertising.

***What is the CPV?***

The ‘Common Procurement Vocabulary’ (CPV) is a code for describing works, supplies and services to be advertised in the OJEU. It is available on <http://simap.europa.eu>. It can be best viewed or downloaded in ‘Excel’. (There is a link to the *simap* site on the *etenders.gov.ie* website).

***What is the GPA?***

The GPA (Government Procurement Agreement) is a formal agreement concluded by a number of member States of the World Trade Organisation, including the EU, to observe an open and non - discriminatory public procurement policy and practice among its signatories. The provisions of the EU Directives and the GPA are closely harmonized. Almost all public contracts are covered by the GPA. The principal exceptions are service contracts of public bodies for research and development and contracts placed by entities in certain utility sectors (i.e. gas, heat, oil and railways), which are covered by the EU Directives only. The slight variation in coverage gives rise to the application of different thresholds, as indicated in Appendix I of these guidelines.

# Appendices

## Appendix I

### Thresholds (exclusive of VAT) above which advertising of contracts in the Official Journal of the EU is obligatory, applicable from 1 January 2010 to 31 December 2011<sup>7</sup>:

Revised public procurement Directives simplify the threshold provisions by abolishing the two tier system that existed under the former Directives and the Government Procurement Agreement (GPA) of the World Trade Organisation and by rounding the threshold values.

The main advertising thresholds with effect from 1 January 2010 to 31 December 2011 are as follows:

<b>Works</b>		
Contract Notice	€4,845,000	Threshold applies to Government Departments and Offices, Local and Regional Authorities and other public bodies.
<b>Supplies and Services</b>		
Contract Notice	€125,000	Threshold applies to Government Departments and Offices
Contract Notice	€193,000	Threshold applies to Local and Regional Authorities and public bodies outside the Utilities sector.
<b>Utilities</b>		
Works Contracts	€4,845,000	For entities in Utilities sectors covered by GPA
Supplies and Services	€387,000	For entities in Utilities sectors covered by GPA

<sup>7</sup> Thresholds are revised every two years. Complete and up to date thresholds can be checked on the EU public procurement website <http://simap.europa.eu> which can be accessed via a link on [etenders.gov.ie](http://etenders.gov.ie)

## **Appendix II A**

**Priority Services** (i.e. Services subject to the full scope of EU procurement Directives).

1. Maintenance and repair services
2. Land transport services, including armoured car services and courier services, except transport of mail and transport by rail
3. Air transport services of passengers and freight, except transport of mail
4. Transport of mail by land (except by rail) and by air
5. Telecommunications services
6. Financial services (a) Insurance services (b) Banking and investment services
7. Computer and related services
8. Certain Research and Development services
9. Accounting, auditing and book-keeping services
10. Market research and public opinion polling services
11. Management consultant services and related services
12. Architectural services: engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services
13. Advertising services
14. Building-cleaning services and property management services
15. Publishing and printing services on a fee or contract basis
16. Sewage and refuse disposal services sanitation and similar services

## **Appendix IIB**

**Non-Priority Services** (i.e. Services not subject to the full scope of the EU procurement Directives : contracts must be awarded using non - restrictive technical specifications and EU Commission informed of award of contract).

17. Hotel and restaurant services
18. Rail transport services
19. Water transport services
20. Supporting and auxiliary transport services
21. Legal services
22. Personnel placement and supply services (but not employment contracts)
23. Investigation and security services (except armoured car services)
24. Education and vocational education services
25. Health and social services
26. Recreational, cultural and sporting services
27. Other services

### Appendix III

#### Sample Score Sheet for evaluation of tenders in an open procedure – for the delivery and management of a service.

Award Criteria	Quality of proposal for providing service detailed at ? [Section 2 (?) (?)] of RFT.	Management & service structure proposed	Particular resources and skills being applied to the project	Timeframe for delivery	Proposed Cost of providing service	Total marks awarded
<b>Total Marks Available</b>	<b>70</b>	<b>30</b>	<b>30</b>	<b>20</b>	<b>50</b>	<b>200</b>
<b>Company A</b>	60	24	22	12	30	<b>148</b>
<b>Company B</b>	60	30	27	15	45	<b>177</b>
<b>Company C</b>	45	15	12	15	50	<b>137</b>
<b>Company D</b>	55	22	25	14	40	<b>156</b>
<b>Company E</b>	50	25	16	15	35	<b>141</b>

Sample

## Appendix IV

[Contracts covered by EU Directives - Sample notification and offer of debriefing to unsuccessful tenderers].

Date : .....

**Tender for .....**

Dear ...(Company A, - similar letters to Companies C, D and E)

I refer to your tender in respect of the above and (if applicable) your presentation of (date). I regret to inform you that your tender is not the most economically advantageous tender.

The formal award of the contract to the successful tenderer will not take place before ..... (14 calendar days from date of notification – or seven days in the case of an urgent or accelerated procedure) at the earliest.

\* Relevant marks awarded against each of the award criteria are as follows:

Award Criteria	Maximum marks available	Marks awarded to your tender	Marks awarded to successful tenderer
Quality of proposal for providing service detailed at ? [Section 2 (?) (?)] of RFT	70	60	60
The management and service structure proposed	30	24	30
Expertise and skills of personnel proposed for providing the service required	30	22	27
Timeframe for delivery	20	12	15
Proposed cost of providing service	50	30	45
<b>Totals</b>	<b>200</b>	<b>148</b>	<b>177</b>

\* [As an alternative to providing marks awarded, a contracting authority may consider it more appropriate to give reason(s) why a tender was unsuccessful].

If you are interested in further feedback as to why your tender was unsuccessful, you may contact the undersigned. I would like to take this opportunity to thank you for responding to the request for tenders and wish you success in the future.

Yours sincerely

\_\_\_\_\_

**Name**

**Title**

Telephone:

e-mail:

**Appendix V**

[Contracts covered by EU Directives - Provisional notification to successful tenderer].

Date : .....

**Tender for .....**

Dear ...(Company B).

I refer to your tender in respect of the above. We have now conducted our evaluation of tenders and, at this stage, I am pleased to inform you that your company appears to have presented the most economically advantageous bid for this project.

**Please note that this letter is issued without prejudice and does not purport to create binding contractual arrangements. A formal contract will not be put in place before ... (14 days / seven days, as appropriate, from date of notification).**

At this stage I would appreciate if you forward .... (documentary or other evidence, where applicable), and your firm's Tax Clearance Certificate from the Irish Revenue Commissioners. Details on the procedure for obtaining Tax Clearance Certificates are available at <http://www.revenue.ie> .

(I enclose a draft contract document and) I would be obliged if we could arrange a meeting at your earliest convenience to advance the process of discussing formal contractual matters.

Yours sincerely,

\_\_\_\_\_  
**Name**

**Title**

Telephone:

e-mail:

## Appendix VI

*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(I)(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(I)(b) and (c) of the FOI Act, Depending on the circumstances, product information can also be considered commercially sensitive under Section 27(I)(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*, to be published (13 Jan 2000)).
- 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.

## **Appendix VII**

### **Contacts and Information Sources on Public Procurement**

Contacts in the National Public Procurement Policy Unit, Department of Finance:

Billy Noone Phone 6318 034 email: [billy.noone@finance.gov.ie](mailto:billy.noone@finance.gov.ie) and  
Geraldine Barry Phone 6318 101 email: [geraldine.barry@finance.gov.ie](mailto:geraldine.barry@finance.gov.ie)  
Fax 6613684

#### **Guidelines and Directives**

The Public Procurement guidelines are available on the National Public Procurement portal [www.etenders.gov.ie](http://www.etenders.gov.ie) (under Procurement Guidelines) and on the Department of Finance website [www.gov.ie/finance](http://www.gov.ie/finance) under Publications.

EU Directive 2004/18/EC covers the procurement of public sector bodies. Directive 2004/17/EC covers the procurement of entities operating in the utilities sector. These Directives were published in OJ No L 134 of 30 April 2004 and are available on <http://europa.eu.int/eur-lex/en/index.html>, or the EU public procurement website <http://simap.europa.eu> under 'Rules and Guidelines'. General information on EU public procurement issues is also available on this website.

Hard copies of EU Directives may be purchased at Alan Hanna Bookshop, Rathmines Road Lower. (Phone 496 7399).

#### **Official Journal of the EU**

Online publication of notices is available on [www.etenders.gov.ie](http://www.etenders.gov.ie) or <http://simap.europa.eu>

The email address of the OJEU for publication of notices is [mp-ojs@opoce.cec.eu.int](mailto:mp-ojs@opoce.cec.eu.int)

Fax numbers for the EU Official Journal: +352 29 29 44 619 **or** +352 29 29 44 623 **or** +352 29 29 42 670

#### **Some relevant websites**

National Public Procurement website [www.etenders.gov.ie](http://www.etenders.gov.ie)

EU Public Procurement website <http://simap.europa.eu>

Irish Government website [www.gov.ie](http://www.gov.ie)

General EU website <http://europa.eu.int>

Forum on Public Procurement in Ireland [www.fpp.ie](http://www.fpp.ie)

WTO site on the 1994 Government Procurement Agreement (GPA)  
<http://www.wto.org/govt/agrmnt.html>

Irish Statute Book [www.irishstatutebook.ie/front.html](http://www.irishstatutebook.ie/front.html) - for Freedom of Information, Prompt Payment etc. legislation.