

Kilkenny County Council

PROCUREMENT PROCEDURES

7th Edition

Effective from 1st January 2017

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Glossary of Acronyms

CCMA	County and City Management Association
CE	Chief Executive
DPER	Department of Public Expenditure & Reform
DoS	Director of Services
LGMA	Local Government Management Agency
LGOPC	Local Government Operational Procurement Centre (based in Kerry Co Co)
LGSPC	Local Government Strategic Procurement Centre (based in LGMA)
NOAC	National Oversight and Audit Commission
OGP	Office of Government Procurement
PU	Procurement Unit
SMEs	Small and medium-sized enterprises
VFM	Value for money



1. INTRODUCTION

Given the significance of KCC annual procurement spend, it is necessary that clear procedures exist for all purchases. It is an objective of the Council's Corporate Procurement Plan 2016 that the Council's Procurement Procedures document be updated on a regular basis.

The overriding procurement objective is that the local authority obtains optimum value for money while complying with EU Procurement Directives, Irish Regulations and Central Government Departmental Circulars/Guidelines. KCC must be cost effective and efficient in the use of resources while upholding the highest standards of probity and integrity.

A secondary objective is the devolution and streamlining of the purchasing procedures in KCC to empower staff to procure goods and services appropriate to their work areas as efficiently as possible to assist service delivery.

Document status

This document is the Kilkenny County Council Procurement Procedures October 2016 Version 7 as approved by the Chief Executive of Kilkenny County Council (KCC).

This document now includes Legislative/Legal references to they apply to relevant definitions, procedures and processes which regularly occur in Public Procurement.

References from the Directive 2014/24/EU Public Sector on public procurement adopted in 2014 and transposed by the Irish Regulations in 2016 are included in this document.

This document replaces the previous document Version 6 for Kilkenny Local Authorities (Kilkenny Co Co and former Kilkenny Borough Council) dated August 2013.

Why is there a new Public Sector Procurement Directive?

The European Commission's stated aims include to promote the Europe 2020 strategy of smart, sustainable and inclusive growth while ensuring most efficient use of public funds. This includes significant changes to promote electronic procurement and to assist SMEs (Small and Medium Enterprises).

The new Public Sector Directive is also designed to clarify basic notions and concepts to ensure legal certainty as well as incorporating certain aspects of well established case-law of the Court of Justice of the EU.

Further EU Directives regarding concessions and utilities were also adopted in 2014 and transposed in May 2016.

Irish Procurement Regulations 2016

The European Union (Award of Public Authority Contracts) Regulations 2016 allow for:

- Shorter, less burdensome, procurement processes reducing costs to business and barriers to competition;
- Scope to take account of economy-wide strategic policy goals in the areas of environmental, social and labour law compliance;
- Public bodies are required to use procurement arrangements put in place by Central Purchasing Bodies, such as the Office of Government Procurement (OGP) or the Local Government Operational Procurement Centre at Kerry County Council (LGOPC);
- Encouragement of greater access to SMEs ;
- The current grounds for excluding suppliers has been expanded to include terrorism, child labour and human trafficking; and
- The Directives make the use of e-procurement mandatory by October 2018.

What is Procurement?

"Procurement" is the process of acquiring goods, services and works, whether from third parties or in-house providers. The process spans the cycle from the original needs identification, through to the end of a services contract or the end of an asset useful life. It involves options appraisal, including the critical "make or buy" decision which may result in the provision of services in-house in appropriate circumstances.

Legislative References – EU Directive 2014/24/EU Public Sector

"Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose." Art.1.2

("The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authority.") Preamble Recital 4

"Contracting Authorities" means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law." Art 2.1(1)

"Public contracts means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services." Art 2.5

EU Directives, Irish Regulations and Departmental Guidelines govern the purchases by public bodies of works and works related activities, goods and services.

Contracts that exceed specified financial thresholds are subject to the Public Sector Procurement Directive, as implemented by Irish law.

Contracts valued below those thresholds are principally governed by current Irish Government Guidelines (the Competitive Process document) issued by the Department of Public Expenditure and Reform (DPER).

DPER Spending Code



The Public Spending Code

Local Authorities are subject to the DPER Public Spending Code under Circular 13/13 which gives details of the obligations that those responsible for spending public money are obliged to adhere to as well as guidance material on how to comply with those obligations.

The Public Spending Code, which applies to both Capital and Current expenditure, sets out what is required of public service managers at different points of the expenditure lifecycle and offers advice on how to fulfil those requirements.

All Government Departments and public bodies and all bodies in receipt of public funding must comply, as appropriate, with the relevant requirements of the Public Spending Code.

Procurement and purchasing

This document gives an overview of the procurement procedures to be applied by KCC service areas. Ancillary or associated bodies such as the Local Enterprise Office, Watershed etc that expend public funds are also subject to public procurement rules.

Certain purchasing situations may require compliance with extra procurement conditions contained in Department grant approval letters etc.

Procurement Developments - Public Sector and Local Government Sector

- ▶ It is estimated that the **Irish public service** in a typical year expends some €15 billion on goods, general services and construction works and consultancies.
- ▶ The estimated revenue procurable expenditure in 2014 for the Council was €24.3 m.

Public Sector

The Accenture study to Government on the Capacity and Capability Review of the Central Procurement Function 2012 recommended;

- ▶ Integrating procurement policy, strategy & operations into one office – now the Office Of Government Procurement (OGP) established in late 2013
- ▶ Strengthening spend analytics & data management
- ▶ Much greater aggregation of purchasing across public bodies to achieve better VFM
- ▶ Examining the specifications set out for goods & services/evaluating demand levels
- ▶ Strengthening vendor & category management

Local Government sector

The Local Government sector is made up of 31 separate Contracting Authorities.

Local Government Strategic Procurement Centre (LGSPC) based in the LGMA

This office was set up in the LGMA in 2014 to upgrade the procurement function in Local Authorities and to act as an interface with the newly established OGP.

- Overseeing reform of Procurement in the sector
- Professionalisation
- Engagement with OGP
- Supporting National Sourcing Strategy
- Policy & Communications



Local Government Operational Procurement Centre (LGOPC)

The LG Operational Procurement Centre (LGOPC) was also set up in 2014 and is run by Kerry County Council operating as a Central Purchasing Authority for the public sector.

- Sourcing Team (SupplyGov.ie) on behalf of LG sector and OGP



Local Authority Procurement Officers

Activity at local authority level is co-ordinated by the Procurement Officers in each Council.

Local authority reporting

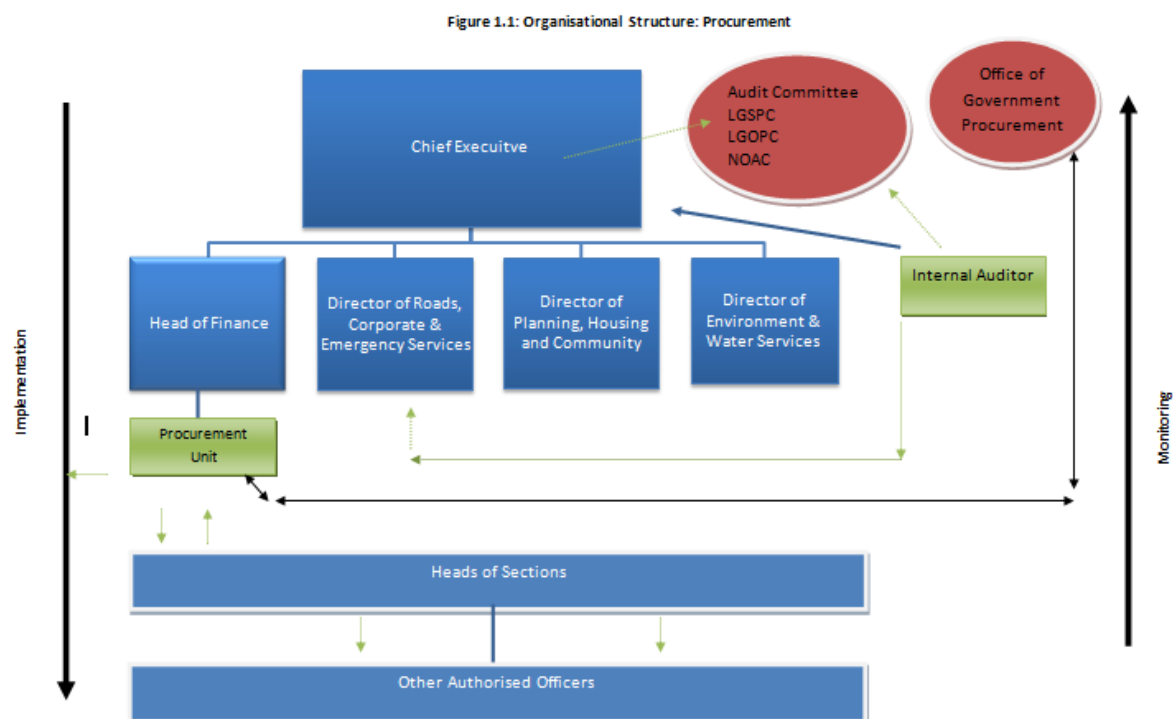
There are new requirements to track and report on procurement processes and expenditure with a view to verifying savings made; reduce duplication by using National Frameworks and centralised purchasing mechanisms and identify opportunities for collaborative spending, at local, regional and national levels and to establish a local contracts register in each public body.

The Council now regularly provides expenditure figures, data and information to the –

- Office of Government Procurement (OGP)
- LG Strategic Procurement Centre (LGSPC)
- LG Operational Procurement Centre/Kerry County Council (LGOPC)

The Department of Public Expenditure and Reform (DPER) provides oversight on Public Procurement activities across all sectors including Local Government.

2. PROCUREMENT IN KILKENNY COUNTY COUNCIL



KCC Corporate Procurement Planning

An analysis of organisational capacity and competence within Kilkenny Local Authorities was undertaken by Price Waterhouse Coopers (PWC) in 2009. This analysis showed that procurement was not perceived as a strategic corporate function. The main focus of procurement activity was based on EU compliance and daily operational purchasing, rather than strategic sourcing and planning.

The Council's Corporate Procurement Plan 2009 took on board the PWC analysis and in response an internal Procurement Unit was established within Kilkenny County Council in 2010 in order to keep KCC up to date with procurement developments such as purchasing procedures, tender tracking, management of contracts and reporting of savings and outcomes.

The Council's Corporate Procurement Plan 2016 includes the core procurement objective;

Core Objective

To further advance the purchasing and procurement of goods and services in a more cost effective manner and to pursue a policy of environmentally friendly procurement throughout the organization

Strategic objectives are as follows;

1. To ensure the local authority **complies** with procurement Directives, Legislation, Circulars and other legal requirements and that staff engaged in procurement also adhere to the organisation's procurement policies and procedures
2. To support **service delivery** by the local authority and fulfil the **strategic objectives** in the local authority's Corporate Plan.
3. To achieve greater **value for money** by:
 - ensuring that purchasing is carried out in a co-ordinated and strategic manner;
 - reviewing and, where possible, streamlining existing procurement processes;
 - identifying opportunities for savings, for example by utilising national and regional aggregated contracts or other means.
4. To facilitate **economic, social or environmental objectives** through procurement, for example by:
 - identifying opportunities for social or green procurement
 - engaging with Kilkenny Local Enterprise Office and local businesses and suppliers to promote opportunities for SMEs

KCC Procurement Unit structure

Some larger local authorities favour a centralised procurement approach; with one office carrying out both strategic and operational tasks.

Others use a decentralised model where the procurement unit focuses primarily on procurement policies, identifying opportunities for savings, planning and compliance tasks,

and the competitive process is carried out by the section that requires the goods, services or works.

The model adopted for the Procurement Unit in Kilkenny County Council is the decentralised procurement approach; with one office carrying out all of strategic tasks and some of the operational tasks in conjunction with the relevant service areas.

Procurement Unit reporting and staffing

Formal responsibility for Procurement matters is delegated to the Head of Finance. The Procurement Unit was set up in September 2010 and is staffed by Kevin Hanley, Procurement Manager (and Head of Information Systems) and by John Walsh, Administrative Officer.

- Procurement Unit provides procurement guidance to KCC staff on an on-going basis.
- The Unit's objectives are to ensure that
 - an appropriate and competitive procurement process is used for all procurement spends and
 - that KCC achieves value for money (savings/efficiencies) on its procurement activities.
- The Unit has advised Service Areas on over 80 formal tenders of various types of scale and complexity valued at over €50m. from 2011 to 2015.
- The Unit has achieved estimated operational and capital savings (both direct savings from tenders and also negotiated discounts from existing suppliers) of over €2m.

Strategic Procurement Functions

- To have in place current Corporate Procurement Plans and Procurement Procedures
- To promote sustainable and Green Procurement and the use of Social Clauses
- To have an overview of total procurement spend in the Council and encourage aggregation of like purchases across the organisation.
- To hold appropriate SME procurement seminars, Meet the Buyer events and act as a single point of contact from the Local Enterprise Office and other agencies for interested local or national suppliers.
- To provide information and reports to the OGP , LGSPC and LGOPC as required.
- To liaise with the Munster & South Leinster regional procurement network.

Operational Procurement Functions

- To establish a dedicated in-house resource for KCC so that all Service Areas are assisted when undertaking the complex task of public sector procurement.
- To ensure that all KCC tender competitions advertised on eTenders and contracts awarded comply fully with KCC Procurement Guidelines.

- To ensure that all KCC quotation processes and contracts awarded comply fully with KCC Procurement Guidelines.
- To arrange procurement & legal advices for Service Areas as required. Procurement queries from Service Areas which require legal advice are referred by the Procurement Unit to the Council's appointed Procurement Legal advisor. In this way, the Procurement Unit acts as a central repository of legal advices to the various Service Areas and procurement legal costs are contained and monitored.
- To ensure appropriate follow up with service areas on required insurances, Performance Bonds, appropriate execution/signing of contracts and contract management issues.
- To arrange Works/works related and other procurement training for Service Areas.
- To advise compliance with and monitor utilisation of relevant OGP, SupplyGov, & other centralised frameworks.

Please refer to Appendix A for further information regarding Procurement functions.

LGSPC analysis of Local Authority advertised tenders

Local Authority contracts advertised on etenders: 17 June 2015 – 17 June 2016:

Procedure	Total	%
Competitive Dialogue / Negotiated	7	1
Open	743	91
PIN	13	2
Restricted	54	7
Total	817	100

- Services tenders = 47%; Works tenders = 36%; Goods tenders = 17%
- 83% of contract notices were for below EU threshold values
- 17% of contract notices were advertised on the OJEU

Procurement procedures applicable to Service Areas for tenders advertised on eTenders/OJEU

- The Service Area must initially check with the Procurement Unit to see if their requirement can be procured by way of mini competition from an existing OGP, LGOPC or other centralised Framework or panel.
- The Service Area must then provide a draft brief or specification for discussion which must set out as precisely as possible what is being sought to be purchased.

- As a rule, draft tender documents should be submitted to the Procurement Unit for checking **at least one week prior to the intended publication date.**
- Only the current versions of tender documents, contracts etc from the Capital Works Management Framework or OGP must be used for quotations and tenders.
- The Procurement Unit will also advise the Service Area regarding the most appropriate procurement process before the tender is advertised.
- Monthly invoicing in arrears for competitions in respect of supplies of goods and services and the use of Low Value Purchase Cards as the preferred payment method should be used where possible
- The Procurement Unit will publish the tender, arrange for the posting of tender query replies and publish the tender award notice in due course.
- The Service Area will liaise with Corporate Services for the opening of the tenders and will conduct the tender assessment. All draft notification letters are to be checked with the Procurement Unit before they are issued.
- The Procurement Unit will also follow up re contract award matters.

Procurement Portal on SharePoint

A repository for procurement documentation is available on SharePoint at <http://intranet/Procurement/>. This site contains current information regarding relevant procurement procedures, details of current and intended OGP/LGOPC Frameworks, thresholds, tender documentation, draft notification letters etc.

Please refer to Appendix B for Procurement information sources.

3. GOVERNMENT PROCUREMENT POLICY DEVELOPMENTS

The Government agreed in 2013 to establish a new Office of Government Procurement ("OGP") to directly procure or make the arrangements for others to procure all goods and services bought by the public sector on a category led basis.

The OGP has also taken over the functions of the previous Government Procurement bodies, the National Procurement Policy Unit based in the former Department of Finance and the National Procurement Service based in the Office of Public Works.

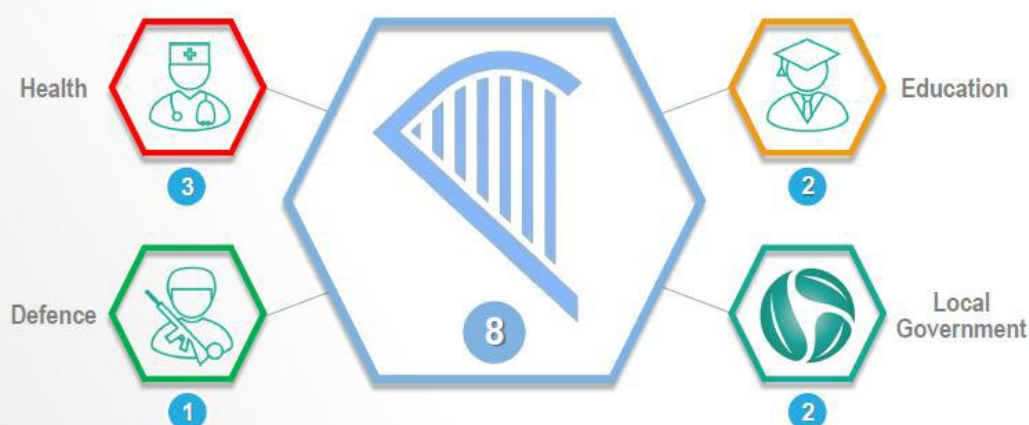
The management of capital works contracts will continue to be managed by public bodies using the Capital Works Management Framework (CWMF) suite of documents.

The OGP will put in place various framework contracts that public bodies will buy from for the majority of their goods and services.

Office of Government Procurement (OGP) – Central Purchasing Authority

The Model

16 Categories – 'One Voice' to the market



A number of OGP Category Councils and Professional Sourcing Teams have gone to market following their analysis of the needs of the public sector and how the public sector can get best value from the market.

Kerry County Council/LGOPC will take the lead on behalf of the Public Service including all Local Authorities for two of these categories Plant Hire and also Minor Building Works and Civils.

OGP also incorporates the activities of CMOD - Centre for Management and Organisation Development, a division set up within the Department of Public Expenditure & Reform with expertise across the public sector to leverage volumes and secure benefits from economies of scale and having overall responsibility for monitoring and approving

- ICT spend in civil and public service bodies
- Telecommunications policy and infrastructures,

- eGovernment policy and infrastructures,
- Technology research and policy
- Central ICT procurements and framework
- Common IT systems including payroll and HR Management

DPER Circular 02/16 - Arrangements for Digital and ICT related Expenditure in the Civil and Public Service - sets out that the threshold for publishing such tenders on eTenders is €25,000.

Role of the OGP Category Council

The role of Category Councils is to provide input into the sourcing strategies for goods and services, taking into account PSB clients' requirements, market dynamics and the savings required. Each council is made up of members nominated by the Public Sector clients who are the main users of the category.

OGP Led Categories

- Professional Services
- Facilities Management and Maintenance
- Utilities
- ICT and Office Equipment
- Marketing, Print and Station-ery
- Travel and HR Services
- Fleet and Plant
- Managed Services
- Laboratory, Diagnostics and Equipment
- Veterinary and Agriculture

LG Sector Led Categories – LGOPC/Kerry Co Co

- Minor Building Works and Civils
- Plant Hire

OGP Website

The OGP website <http://www.procurement.ie> contains relevant information such as;

- OGP Current Frameworks and Contracts
- Project Updates/Planned Frameworks and Contracts
- EU Directives, Irish Regulations and Government Circulars
- Template documents such as RFTs, Contracts and Confidentiality Agreements

The Council's Procurement Unit informs Council service areas of the availability of new OGP Frameworks and posts quarterly OGP updates etc on sharepoint.

DPER Circular 16/13 - Complying with Procurement Procedures – OGP guidance

“It is Government policy that public bodies, where possible, should make use of all such central arrangements. Where public bodies do not utilise central procurement frameworks they should be in a position to provide a value for money justification.”

Where centralised arrangements are in place

Public Sector Bodies (PSB) clients are expected to use the centralised arrangements currently in place for all purchases, including those under €25,000, unless explicitly excluded. The drawdown mechanism may involve either direct call off or mini-competition.

Where centralised arrangements are not yet in place

For purchases that fall under certain sub-categories, PSB clients should inform the OGP of their requirements, including those under €25,000. They should not go directly to the market without consulting the OGP. The OGP will assess these requirements and advise clients if a procurement process can be completed in line with their deadlines.

For other purchases below €25,000, where there is no centralised arrangement in place, PSB clients should follow current public procurement competitive process guidance. The Council's Procurement Unit will advise Service Areas regarding their requirements.

KCC uses many important OGP Frameworks such as;

- Energy Supply (Electricity/Natural Gas)
- Managed Print Services ICT/ Computer Supplies
- Fuel Purchasing Cards/Payment Cards
- Facilities Management & maintenance
- Personal Protective Equipment/Workwear
- Plant & Equipment
- Legal Services (pending)

Procurement of Legal services – DPER Circular 05-2013



DPER Circular 05/13 Procurement of Legal Services and Managing Legal Costs stressed that a competitive public tendering process should be the standard method for the procurement of legal services in order to manage legal costs.

In this regard, the Procurement Unit on behalf of the Council had established 6 no. Legal Services Frameworks in 2012 which were procurement compliant and gave certainty re legal services costs for the last number of years.

The OGP advertised several new Legal Services Frameworks for the Public Sector in 2015 and these are now coming on stream for use by PSB's including Local Authorities.

OGP Legal Services Frameworks for Local Authorities 2016 – for routine legal services

The OGP has recently pre-qualified a number of applicant solicitors onto this Framework for a number of 8 geographical areas, each corresponding to a Circuit Court jurisdiction. Councils will run mini competitions to establish providers for 4 practice areas such as Core Legal Services, Code Enforcement, Property & conveyancing and Commercial & Corporate or they can opt to tender for a full service of all these practice areas.

Long term services or discrete requirements can be tendered in the mini competitions.

The Legal Services Frameworks will provide the following benefits:

- Compliance with procurement obligations
- Access to suitable service providers
- Cost certainty as upward price pressure on legal pricing is now emerging
- Management Information to assist decision making
- Access to Value Added Services

This Framework excludes Debt Management & Debt Collection services which will be the subject of a further OGP Framework in 2017.

OGP Legal Services Frameworks for All of Government (including Local Authorities) 2016 for specialised Legal Services

This OGP Framework will complement the above Framework by providing pre-qualified legal firms available to tender under mini competitions for more specialised services.

Procurement Unit to manage and co-ordinate use of OGP Legal Services Frameworks

The Council's Procurement Unit will advise service areas of the procurement strategy to be undertaken for these legal services and will agree the operational requirements.

Centralised Purchasing of goods/services from OGP Frameworks

The drawdown of goods and services from OGP National Framework Competitions is facilitated by way of centralised ordering/purchasing by particular individuals on behalf of the Council.

The delivery of goods to particular offices or facilities can be arranged as part of the order.

This policy of centralised purchasing reflects the category management approach to procurement activities where the category managers are in a pivotal position to achieve value for money by aggregating orders.

Service Areas are advised that the following arrangements are in place;

Stationery – General Office Supplies

All orders are to be placed with Post Room, County Hall.

Facilities Management supplies – Watercoolers, Cleaning supplies etc

All requests are to be co-ordinated by Regina Moran, Housing Technical.

Personal Protective Equipment/Workwear

All orders are to be placed with Shay Burke, Stores/Machinery Yard.

Plant & Equipment Purchases/leases valued in excess of €3,000.

All requests for the purchase or lease of plant & equipment by Area Engineers etc are to be placed with Kieran Kelly, Machinery Yard Engineer.

ICT Supplies

All orders are to be placed with Anne O'Donnell, IT Section, County Hall.

Legal Advice for Procurement matters & Legal Services Frameworks

Any queries are to be submitted to Kevin Hanley/John Walsh, Procurement Unit.

Minimum Order Levels

Service Areas should also be aware of minimum order levels when purchasing from certain OGP Frameworks so as to avoid the the imposition of extra charges by suppliers. Any issues arising from OGP Frameworks should be referred to the Procurement Unit.

LGOPC - Kerry County Council– Central Purchasing Authority

SupplyGov.ie (previously LAQuotes) has been used by KCC since 2010 to facilitate the hire of plant, equipment and purchase of materials and products by Area Offices etc.

Kerry County Council is the the lead authority for SupplyGov.ie which is used by the 31 Local Authorities.

Kerry County County was designated as the Local Government Operational Procurement Centre in 2014.

Kerry are also developing Dynamic Purchasing Systems(DPS) and multi-party Frameworks for the national categories of Plant Hire and Minor Building Works and Civils Works.



- *SupplyGov.ie* will deliver DPS and multi-party framework agreements, compliance with national and EU Procurement Regulations and better value for money.
- Local Authorities will run 'mini competitions' centrally or at Municipal District level from the qualified suppliers from the DPS/framework agreement with full audit trail.

LGOPC Go Live Framework Dates 2017 – subject to change

Roads/MDs/Areas

- [DPS](#) Road Markings January 2017
- [DPS](#) Plant Hire March 2017
- Readymix – Supply Only January 2017
- Road Making Materials – Supply Only May 2017
- Road Making Materials – Supply & Place May 2017

Housing

- Energy Retrofitting Works February 2017
- Electrical Services May 2017
- Plumbing Services May 2017

Framework compliance for *SupplyGov.ie* and the conduct of Mini-Competitions

Options for Award criteria for mini-competitions

- *Price;* There are a number of options which can be structured to facilitate the user.
- A list system can be established – in the case of emergency or out of hours works where a predefined price is already to hand for such works the users can draw down straight off a list or it can be on a time basis using rates already established.
- Price can be secured up front using a Pricing Document and works priced accordingly
- An individual mini-competition can be run for specific projects.

Stage 1 – Establishing the Framework - LGOPC

- LGOPC advertise as a Central Purchasing Authority(CPA) on behalf of the interested Contracting Authorities (including KCC) and arrange for the various Frameworks to be established in compliance with relevant procurement legislation
- The Frameworks are established from 1 year term up to a maximum of 4 years or for 1 or 2 years with an option to extend on a yearly basis to the maximum of 4 years.
- The Framework Agreement is a contract between the CPA and the participant local authorities
- LGOPC holds basic qualification information only regarding the Framework supplier

Stage 2 - this refers to the call off procedures from the established frameworks.

- A purchaser requires goods or a service and there is an appropriate framework established on SupplyGov.
- At this stage the contracting authority (purchaser) will become responsible for the draw down contract – this contract is formed between the Purchaser and Framework Participant.
- Purchasers must be familiar with the Framework Agreement and its contents.
- The conditions as to how competitions are run will be set out in the FA – award is usually the lowest price.
- If there is a qualitative element in the award, then it is advisable that the element associated with this is broken down into objective elements that can be assessed on that basis and the awarded quality award mark is demonstrable.
- If particular conditions are attached to the Framework Agreement then they must be adhered to in the draw down, for example; the FA may specify the use of a particular set of documents e.g. 'Short Form' contract for works, in plant hire and bitumen there are templates for draw down contracts.
- In particular, it is the Council's responsibility to ensure that all contractors to be used are assessed as competent in accordance with the Council's Health & Safety procedures **before** they are appointed.
- If in doubt, Service Areas should contact the Council's Health & Safety Department to ensure that the correct assessment procedures have been undertaken.
- Close out – it is important that unsuccessful participants are notified of the award of the drawdown competitions – please use the facility on *SupplyGov.ie*.

Stage 3 - Performance Review during the draw down contract.

- Performance review; Within the Framework Agreement, provision is made for performance review – these can be specific measures to each framework and focus on particular aspects of the works/service that require strict adherence.

- As CPA, the contract is formed with LGOPC and the framework participants and as such removal from a framework signed by a CPA requires that LGOPC formally remove the contractor/provider.
- A strict procedure with all reasonable and proportionate steps being taken in advance of any action being taken is required – this procedure needs to be consistent.
- Issuing of warnings – “yellow” and “red” cards – for no or poor compliance with Health & Safety standards , Performance , Quality of work etc
- This process is very useful in managing and improving contractor performance.

Request for Quotations (RFQ) advertised on SupplyGov.ie

To facilitate electronic procurement, the quotation system on *SupplyGov.ie* should be used where possible to obtain quotations where the aggregated annual total for general goods and services is below €25,000 or €50,000 for works or works related services not available through the existing OGP or LGOPC frameworks.

The facility to run RFQ’s or quick quotes for a wide variety of goods or service categories provides a full audit trail for these quotations. Quotations can be invited from all or selected suppliers in a category. New Categories can be set up upon request. It is an objective of the Council’s Corporate Procurement Plan 2016, that the number of quotations sought using the Quick Quotes facility on *SupplyGov.ie* be much increased.

Invoicing Standards and Requirements

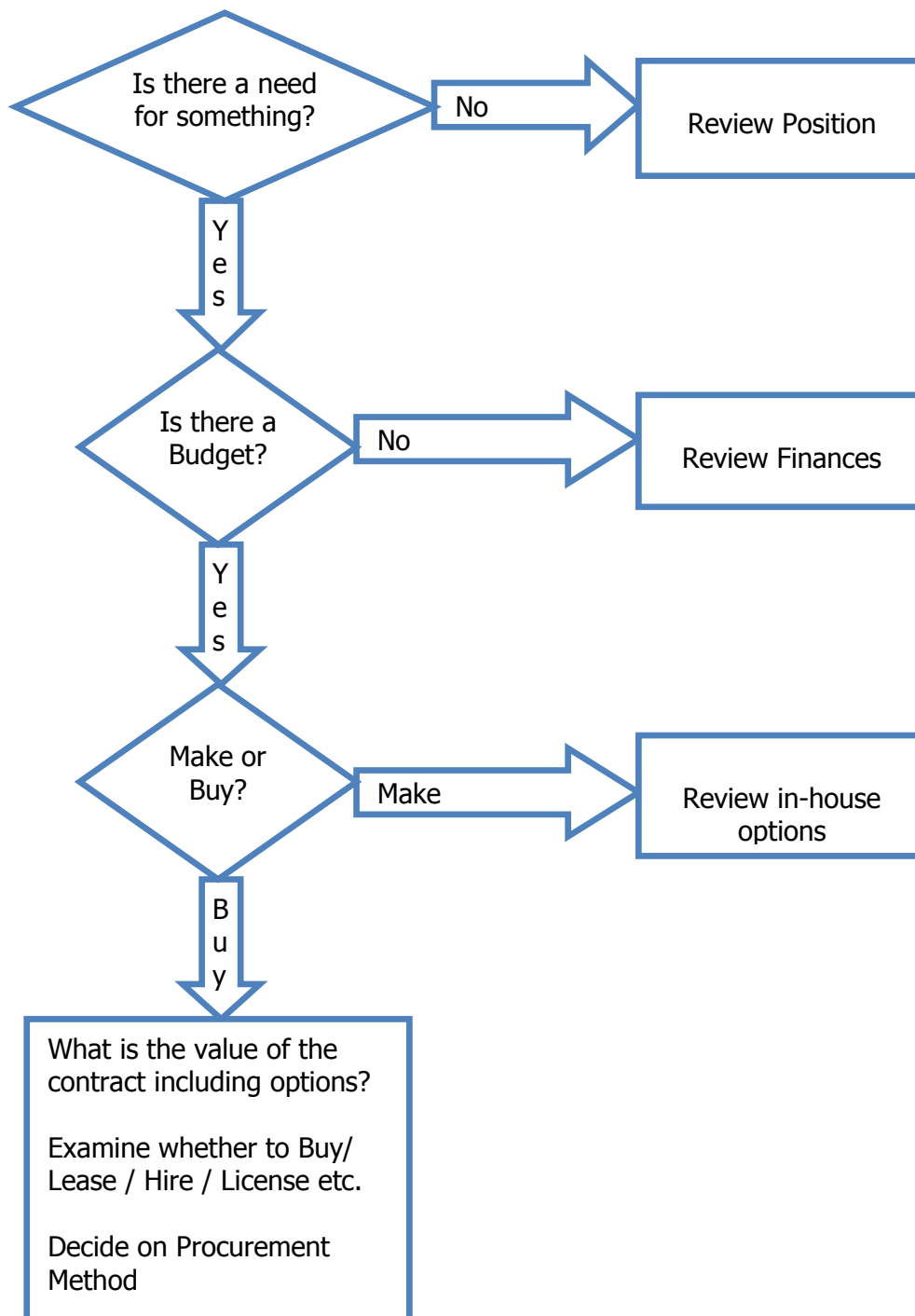
It is the Council’s policy that, unless otherwise stated and agreed between the parties, monthly invoices in arrears shall be submitted for any goods or services drawn down from RFQ’s advertised on Supplygov.ie

Operational queries from Service Areas regarding *SupplyGov.ie* should be directed to Martin Butler, Admintrative Officer, Roads Department who is the Council’s SupplyGov Administrator.



4. PROCUREMENT PRE-CONDITIONS TO BE SATISFIED

The following flow chart outlines the main conditions that must be satisfied prior to starting a procurement process:



Financial Considerations

The procurement of goods, services or works is subject, in all cases, to the availability of financial resources – either a revenue budget or capital allocation including VAT.

That is:

- (a) For Income & Expenditure jobs, an approved budget must exist
Or
- (b) For Capital jobs, a Departmental allocation has been received, which has been formally approved by the Chief Executive/Director of Service and the funding arrangements have been approved by the Head of Finance
Or
- (c) If the proposed expenditure doesn't have an approved budget, prior approval must be sought from the Chief Executive / Director of Services and the Head of Finance, having identified a funding source.

When purchasing goods, services or works, the purchase price must always be agreed in advance of placing the order that commits the organisation to the purchase.

All contract award procedures should include a verifiable audit trail, which should include all the necessary documentation that demonstrates that a proper procurement process was followed.

Invoicing Standards and requirements for supplies and services

It is the Council's policy that, unless otherwise stated and agreed between the parties, monthly invoices in arrears shall be submitted for any goods or services drawn down from RFT/Q's advertised on Supplygov.ie

It is the Council's policy that, unless otherwise stated and agreed between the parties, plant purchases for the Council's Machinery Yard, shall be by lease finance.

It is the Council's policy that, unless otherwise stated and agreed between the parties, monthly invoices in arrears shall be submitted for any goods or services drawn down from all other OGP, LGOPC or other National or Local Frameworks, panels or tenders advertised on eTenders.

Invoicing Standards and Requirements for Public works

Invoicing shall be as stated in the relevant Public Works Contract.

Recent examples of procurements undertaken by the Council....



**St Mary's Medieval Mile Museum – North Aisle Extension @ October 2016
Building Works Contract procured by Project Architect, Corporate Services –
Restricted (2 stage) Procedure**



**Gaol Road Crescent Housing Scheme – Officially opened in October 2015
Building Works Contract procured by Housing Technical - Open Procedure**



New Bridge - Central Access Scheme Phase 1, Kilkenny - 2016
Civil Works Contract procured by Roads Design - Restricted (2 stage) Procedure



Upgrade of Athletics Track at the Watershed, Scanlon Park - October 2016
Procurement & Technical assistance from KCC Procurement & Roads Design

Civil Works Contract procured by The Watershed - Restricted (2 stage) Procedure

5. EU TREATY PROCUREMENT PRINCIPLES



All public sector procurement contracts within the EU, irrespective of value, are covered by the Principles set out in the Treaty on the Functioning of the European Union (TFEU) of non-discrimination, equal treatment, proportionality and transparency.

The awarding of contracts is also subject to the principles of the Treaty of Rome and, in particular, the freedom of movement of goods, freedom of establishment and freedom to provide services. The procurement principles which derive from these basic freedoms include:

- Transparency
- Equal Treatment
- Proportionality
- Non-discrimination or Mutual Recognition of qualifications

These principles apply to all procurements irrespective of value.

Transparency in public procurement contracts applies to all aspects of contract award procedures, particularly:

- Being fully open and transparent about all aspects of the procurement process by informing the market about the agreed specifications, qualification criteria, award criteria and sub-criteria, marking systems, formulae etc
- Advertising and communicating your intentions, e.g. publishing prior and contract notices in the Official Journal of the European Union (OJEU) and publishing notices in Irish government website www.etenders.gov.ie or use national media/specialist journals as appropriate.
- Advertising of tender opportunities in the National Media is generally not necessary.
- Advertising of the availability of panel competitions may also be undertaken on the Council's website in addition to initial advertising on eTenders.
- Providing the necessary clarifications or responses to queries received during the course of competitions
- Communicating award of contract decisions to all tenderers and publishing contract award notices on eTenders or OJEU.

Breaches of Transparency would include failing to advertise contracts and/or failing to let the prospective tenderers and market know about key aspects of the advertised competition such as the award criteria, award sub-criteria, scoring methodologies and any formulae used to assess price and quality.

Equal Treatment means:

- Applying the same rules to all
- Giving everyone the same rights of access
- Making objectively fair decisions
- Treating all equally irrespective of nationality, i.e. EU, EEA, and GATT countries

Breaches of Equal treatment would include accepting offers which do not conform to the specification or changing the award criteria during tender competitions without advising “the market”.

Proportionality means:

- Ensuring that all requirements are **necessary** and **appropriate** in relation to the contract. In addition, ensuring that no excessive or disproportionate conditions, criteria or rules are applied.

Breaches of proportionality could include insisting on excessive financial or capacity requirements such as company turnover, bonds/guarantees etc or requiring unnecessary previous experience as a pre-condition to receiving tenders or quotations. This principle has particular relevance for the Small and Medium Enterprises (SME) sector in the context of DPER Circular 10/14 .

Mutual Recognition must be given to:

- Professional Qualifications, i.e. architects etc
- Standards and Specifications. However, these should be used as reference only, but where used must be accompanied by the phrase '**or equivalent**' e.g. regarding the accreditation of tenderers.

The advice of the Procurement Unit should be sought where a particular specified material or bespoke design in competitions is being considered by Service Areas.

Community Rules on mutual recognition of diplomas, certificates may apply when evidence is required for participation in a procurement process or a design contest. Ireland adopted EC Directive 2005/36/EC on the recognition of professional qualifications in SI 139 of 2008.

Breaches of mutual recognition could consist of unfairly excluding a company/person from a contract award procedure because they do not manufacture to a certain standard or by refusing their qualifications on unfair grounds.

6. PROCUREMENT THRESHOLDS AND PROCEDURES

Introduction

In procuring a good or service or a works or works services contract, the first thing to be determined is the likely purchase value ex VAT. This value will determine the procurement route taken as different procedures apply above and below EU and National Thresholds.

All EU Directives/ National Regulations governing public sector procurement in Ireland can be accessed (1) on the national public procurement website, www.etenders.gov.ie, under Guides / Policy and Legislation and (2) on the Council's Procurement page on Sharepoint, (3) the construction web site www.constructionprocurement.gov.ie and (4) the OGP web site www.procurement.ie.

eTenders website for advertising tenders

Kilkenny County Council uses the eTenders website www.etenders.gov.ie as the main method of publication for prior indicative notices (PIN), contract notices and contract award notices. This website, which is managed by the OGP, is now used instead of local or national newspapers as a means of advertisement. The availability of the tender competition or panel on eTenders may also be referenced on the the Council's website as necessary.

Local Authority users must be registered as a user and assigned publication rights on this site before they can publish a tender. This is a security measure for both the website and the Local Authority. Any KCC user wishing to be registered on the site should contact the Procurement Unit, who will arrange same. There are guidance notes for users in completing online publication on the website together with up to date notes on EU thresholds.

An upgraded version of eTenders was launched by the OGP in 2013. This website facilitates the near term Government objective that electronic submission of tenders will become the norm. The relevant Director of Service / Senior Executive Officer is to approve the placing of any advertisement and co-ordinate the placing of the relevant notices on the eTenders website.

It is Council policy that the Procurement Unit arranges to publish all contract and contract award notices for Service Areas on eTenders/OJEU.

Official Journal of the European Union (OJEU)

The Official Journal of the European Union is the equivalent of eTenders and is used for all contracts with a value above the European Thresholds – these are shown in the next table. The OJEU can be found at <http://simap.europa.eu/>. KCC is required to advertise all tenders above the EU threshold on OJEU by using the OJEU facility on eTenders.

Electronic Procurement – the 2014 Directive

- The 2014 PS Directive make the use of e- procurement mandatory on a phased basis
- By April 2016, electronic notification and electronic access to tender documents will become mandatory
- By April 2017, electronic submission of tenders and requests to participate will become mandatory for central purchasing bodies
- By October 2018, electronic submission of tenders and requests to participate will become mandatory for all contracting authorities
- By October 2018, ESPD must be provided exclusively in electronic form

- By October 2018, authorities must have recourse to e-Certis

Procurement Procedures – Open or Restricted

Open Procedure

Under this procedure all interested parties may submit tenders.

Information on tenderers' capacity and expertise may be sought and only those tenders deemed to meet minimum levels of financial/economic capacity and technical/professional expertise in the Selection Criteria on a Pass/Fail basis 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.

Restricted Procedure

This is a two stage process, whereby any party may request to participate.

As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU or eTenders website and expressions of interest are invited from potential tenderers, seeking information on the level of financial, economic and technical expertise and capacity. A tender list of pre-qualified applicants is then developed.

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 financial capacity and professional or technical ability.

Please refer to Appendix C for further information regarding all procurement procedures.
Please refer to Appendix D for more information in relation to drafting RFTs.

Framework Agreements – Open or Restricted Procedure

Framework agreements allow public bodies to procure goods and/or Services or works from suppliers on an ongoing basis without having to go through the full procurement process each time. Framework Agreements can be advertised using either the Open Procedure or the Restricted Procedure and are regularly used by Central Purchasing Bodies (such as the OGP and Kerry County Council/LGOPC for SupplyGov) to further the objective of gaining increased procurement efficiencies and VFM through utilising the category management approach.

Framework Agreements are also useful in the context of works or works related consultancy services, where repeated routine works or services are allocated over a period of time to those who pre-qualify onto the Framework using the Restricted Procedure. The Framework Participants can then be invited to tender by way of mini – competitions for works or services as they arise or can be allocated work in accordance with a competitive method of allocation highlighted in the original request for Expressions of Interest.

Frameworks have some drawbacks which include that they have a 4 year maximum term, that suppliers who miss the original entry or are not qualified are locked out for the remaining Framework term and that the indicative tender price at initial application can be subject to manipulation by the market. LGOPC will actively consider using an alternative

tender procedure namely the Dynamic Purchasing System (DPS) to overcome most of these difficulties.

Please refer to Appendix E for more information in relation to Framework Agreements.

Dynamic Purchasing System (DPS)

Under **Article 34 of the 2014 PS Directive**, new rules on the setting up and operation of DPS mean that they are more likely to be a procurement vehicle for procuring commonly used works, services and goods which are easily available on the market. A DPS creates a wholly electronic marketplace (such as SupplyGov.ie, a "suitable IT system") through which contracting authorities can source requirements by inviting tenders admitted to the wholly electronic system. The DPS is a two-stage process and must be set up using a restricted procedure to appoint suppliers as participants in the DPS.

One of the major advantages of a DPS over a framework agreement is that other suppliers can subsequently apply to join the DPS at any time in the life of the DPS (providing they meet the selection criteria).

Step 1 (Entry onto the DPS)

- Can be setup by Central Purchasing Bodies
- There is no limit to the duration of a DPS
- No limit to number of suppliers once they pass selection criteria
- Reduced administration / encourages SMEs
- No obligation to hold a standstill period
- Under the new rules, no requirement to submit an indicative tender price at initial application
- Can be split into categories (Lots) and by regions
- Suppliers can enter the DPS at any time during the life of the DPS (on satisfying qualification criteria)
- Suppliers can exit the DPS at any time during the life of the DPS

Step 2 (Draw Down)

- Contract Award by competition
- Contracting Authority is responsible for proper conduct of individual competitions
- Contract can be added, issued and awarded faster
- No need for OJEU advertising of "call off" contracts awarded using the system

Supplygov.ie in its current form contains many of the characteristics of a Dynamic Purchasing System.

National Thresholds

All tenders for Kilkenny County Council are processed through the Director of Services for Corporate Services, County Hall. A formal tendering system applies to all goods, services and works purchased with an estimated annual value above the current thresholds.

The following are KCC thresholds for the handling of National or non-European contracts (contracts below current EU thresholds). These thresholds are in accordance with the DPER Competitive Process procurement guidelines for below threshold spends and include the changes recommended in 2014 under DPER Circular 10/14.

THRESHOLD	PROCEDURE
Less than €1,000	Verbal quotation. Note to be made on file of verbal quotations received and all necessary paper work to be kept for audit.
Between €1,000 and €5,000	Note to be made on file of verbal quotations received from three or more suppliers or service providers. Documenting of quotations and all necessary paper work to be kept for audit.
Between €5,000 and €25,000 for SUPPLIES OF GOODS & GENERAL SERVICES	At least 3 written quotations – All necessary paper work to be kept for audit. No advertising of quotations is required.
Between €5,000 and €50,000 for WORKS or WORKS RELATED CONSULTANCY SERVICES	
Between €25,000 and EU Threshold of €207,000 for SUPPLIES OF GOODS & GENERAL SERVICES	Formal advertising inviting tenders using www.etenders.gov.ie . All necessary paper work to be kept for audit. Open Procedure mandatory for Supplies of Goods & General Services contracts (€25,000 to €125,000) and Works contracts (€50,000 to €250,000).
Between €50,000 and EU Threshold of €5,225,000 for WORKS contracts and between €50,000 and the EU Threshold of €209,000 for WORKS RELATED CONSULTANCY SERVICES	
Above EU Threshold for Supplies, Services and Works or works related services e.g. Engagement of Engineering Consultants	Formal advertising inviting tenders on OJEU via www.etenders.gov.ie . All necessary paper work to be kept for audit.

Thresholds should be assessed **exclusive of VAT**. These limits do not preclude any Service Area section from seeking tenders for purchase of goods, services and works where the annual value is less than the current threshold.

Award Criteria – including Life Cycle costing

Legislative References – EU Directive 2014/24/EU Public Sector Article 67

Under the new Directive 2014/24/EU Public Sector, more prominence is given to the concept of life-cycle costing in the award criteria for contracts.

Criterion for contract award is the most economically advantageous tender.

This must include price or cost using a cost-effectiveness approach, such as life cycle costing.

This may include best price-quality ratio assessed on the basis of criteria including qualitative, environmental and/or social aspects linked to the subject matter of the contract at any stage of their life cycle including process of production and provision of services.

Cost only or price only may still be used as the sole award criteria.

Social Clauses in Public Procurement

Social Clauses are requirements that the State can place on bidders for public contracts in order to achieve certain established standards or goals in order to be able to tender for public contracts. Social clauses can cover a broad range areas such as environmental considerations, equality, employment rights, employment (local, long-term, youth, etc.), sheltered employments for people with disabilities and training.

Examples of Social Clauses already in place across the Public Sector

- Taxation and Social Payment compliance
- Employment legislation.
- Safety, Health and Welfare at Work Act 2005; and,
- Waste Management Act 1996.
- Human rights

Experience in other jurisdictions shows that social clauses are most effective when the following conditions are fulfilled:

- they are linked to the overall focus of the contract (e.g. procurements aimed at urban renewal to include long term unemployed; procurement of supplies that are suited to sheltered workshops; apprenticeships, re-training and addressing skills shortages e.g. IT) and,
- organisations are actively engaged through the provision of supply-side actions (identifying suitable procurements) and good monitoring and evaluation processes.

The Government set up a Social Clauses Project Group to examine this complex area and to identify suitable pilot projects such as urban renewal where their inclusion in public contracts can be monitored and assessed.

Acquired Rights Directive and Service Contracts – Transfer of Undertakings TUPE

This refers to the EC (Protection of Employees on Transfer of Undertakings) Regulations 2003. Directive 2001/23/EC and SI 131 of 2003. When awarding certain service contracts, there may be implications for Acquired Rights, if there are staff members carrying out the contract who may be affected by a change of service provider. Legal advice should be obtained by Service Areas prior to tendering or re-tendering such service contracts.

Using environmental and social labels

[Legislative References – EU Directive 2014/24/EU Public Sector Article 43](#)

- Social/environmental labels are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are *linked to the subject matter of the contract* (e.g. working conditions of the employees producing coffee to be supplied to the authority)
- However, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits
- Labels must also, as now, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label

Procurement in Irish Water

Irish Water is Ireland's national water utility established with the aim of reducing costs, generating economies of scale and increasing efficiencies which took over various responsibilities in regard to water and wastewater from the then existing 34 Water Authorities from January, 2014.

Irish Water have advertised through Kerry County Council on *SupplyGov.ie* for a number of goods, works and services. This is part of Irish Water's on-going procurement strategy. Please see www.water.ie for further information.

DPER Circular 10/14 (Assistance to SMEs), the seeking of quotations and variant tenders

DPER Circular 10/14 has regard to the Government's Action Plan for Jobs 2014, specifically those actions aimed at maximising procurement opportunities for SMEs in the public sector, such as;

- reducing company capacity and financial turnover requirements
- undertaking prior buyer market analysis
- encouraging innovation
- sub-dividing contracts and frameworks into suitable geographical or lot sizes where possible.
- publishing award notices on eTenders for all contracts valued over €25,000

The Council's Local Enterprise Office (LEO) fosters the capacity of local SMEs through their various programmes, training and mentoring. The Council's Procurement Unit works with LEO to facilitate SME company introductions and to hold introduction to tendering and meet the buyer events.

Invitation of quotations procedures – importance for SMEs

Service Areas are advised of the importance of seeking quotes from SMEs and smaller companies that are capable of delivering on the requirements of the procurement process.

It may be appropriate to seek more than the minimum three quotations required to facilitate and encourage SME involvement in the Procurement process. Similarly, SMEs may be able to propose innovative solutions to the Council by way of small scale pilot projects to demonstrate their capabilities.

Inviting variant tenders to cater for innovative solutions

Finally, buyers should encourage new and innovative solutions by indicating in tender documents where they are prepared to accept reasonable variants to the specifications.

The correct procedure where a variant solution is sought, is that the non – variant tenders should be assessed and then the variant tenders should be assessed to determine the most advantageous tender or variant tender.

Information on DPER Circular 10/14 can be found in Appendix F.

Prohibition on Restrictive Specifications – The UNIX case

One of the main elements of the RFT is the description of what is being procured. Purchasers are reminded of the basic Procurement Principles outlined earlier when describing requirement standards/specifications and drafting the tender documentation.

- Standards and Specifications. These should be used as reference only but where used must be accompanied by the phrase '**or equivalent**' e.g. regarding the accreditation of tenderers.

Suggested clause for Tender Documents:

Please note in relation to this RFT; where reference is made to a particular make, source, process, trademark, type or patent, that this is not to be regarded as a de facto requirement. In all such cases it should be understood that the reference in question is accompanied by the words "or equivalent."

European Single Procurement Document (ESPD)

These measures, which improve suppliers' access to contracts, have been formalised in **Articles 58 and 59 of the new PS Directive 2014**. In particular, suppliers may submit and authorities must accept new "self-declarations" in relation to capacity/exclusion requirements namely the European Single Procurement Document (ESPD) – with proof to be submitted by the winning tenderer only.

Calculating Contract Values

The following guidelines should be used by Service Areas in calculating the value of any contract:

- The estimated value is based upon the total amount payable excluding VAT and inclusive of any form of **options** and **renewals**.
- The estimate must be valid either at the time when the contract notice is sent or when the **award procedure commences**.
- Prizes, if any, shall be included when calculating the estimated value
- No **subdivision** of requirements may be used to prevent it coming under the scope of the Directives or to keep it below EU or National Thresholds.
- For a series of contracts, it is the total value of **all** contracts that should be aggregated together
- e.g. if various Service Areas within the organisation award individual contracts for the same requirement during the same period.
- Regarding **lots**, it is the *total value of all lots* which should be aggregated together.

- e.g. a design team may be awarded in four lots such as; Lot 1 – Architectural services; Lot 2 – Mechanical & Electrical services; Lot 3 – Quantity Surveying services; Lot 4 Civil & Structural Engineering services.
- while the values of the individual lots may be below the relevant Threshold, it is the total value of all services which must be taken into account.
- Regarding public **works**, the cost of works plus the total estimated cost of any supplies given to the contractor necessary for executing the works, should be included.

Lots & Waivers

The following guidelines should be used by Service Areas regarding Lots & Waivers:

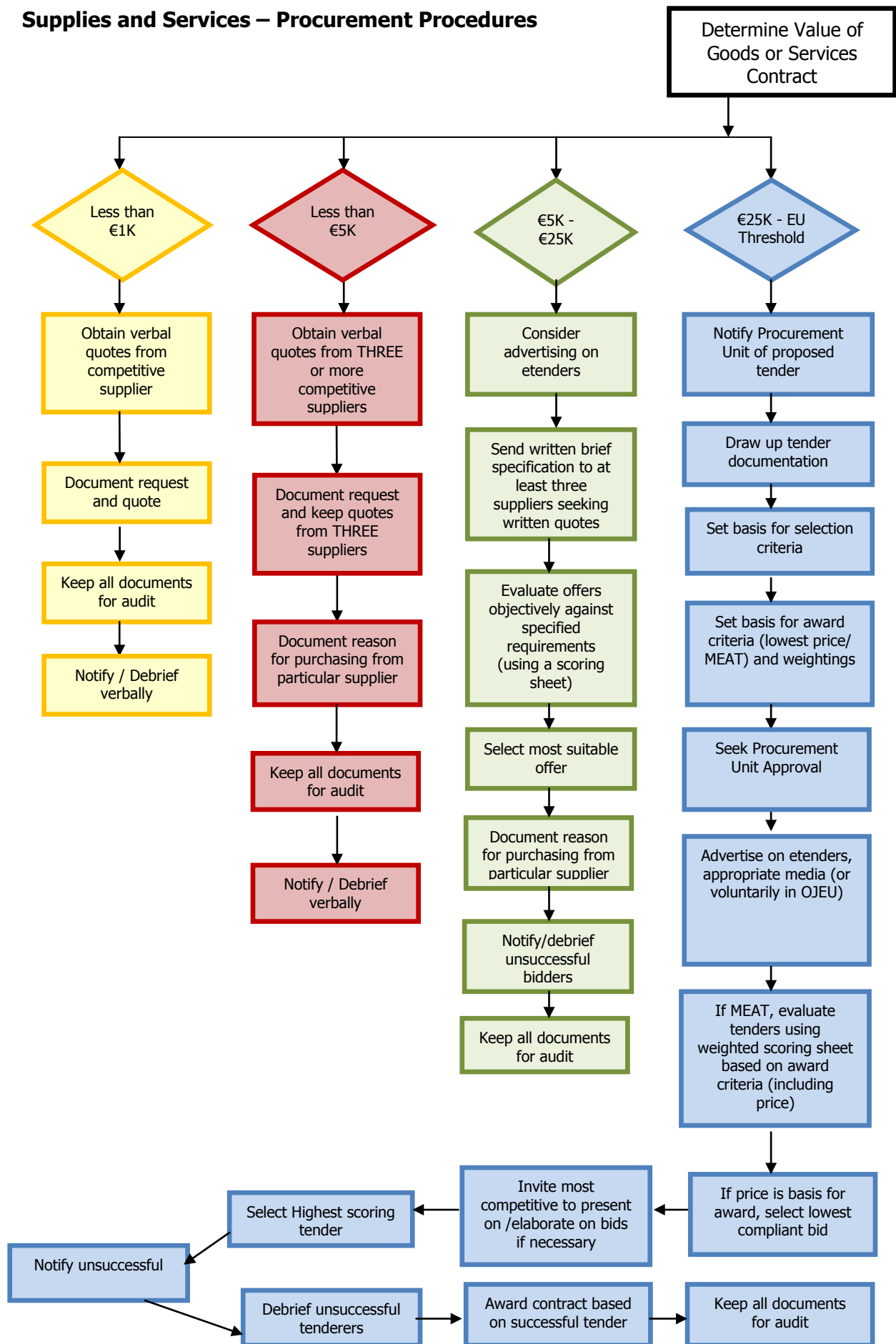
- Where a proposed work or purchases of services may result in separate lots awarded at the same time, the total must be taken into account
- Where the aggregate value exceeds the EU Threshold, the EU Directives shall apply to each lot.
- However, authorities may waive application in respect of lots the estimated value of which net of VAT is less than €80,000 for supplies and services or €1 million for works, providing that the aggregate value of those lots does not exceed 20% of the aggregate value of the lots as a whole.
- Contracts waived in accordance with the above rules, can be awarded in accordance with national/local rules.
- The 2016 Irish Regulations will not require authorities to divide contracts into lots.

Preliminary market consultations and prior involvement

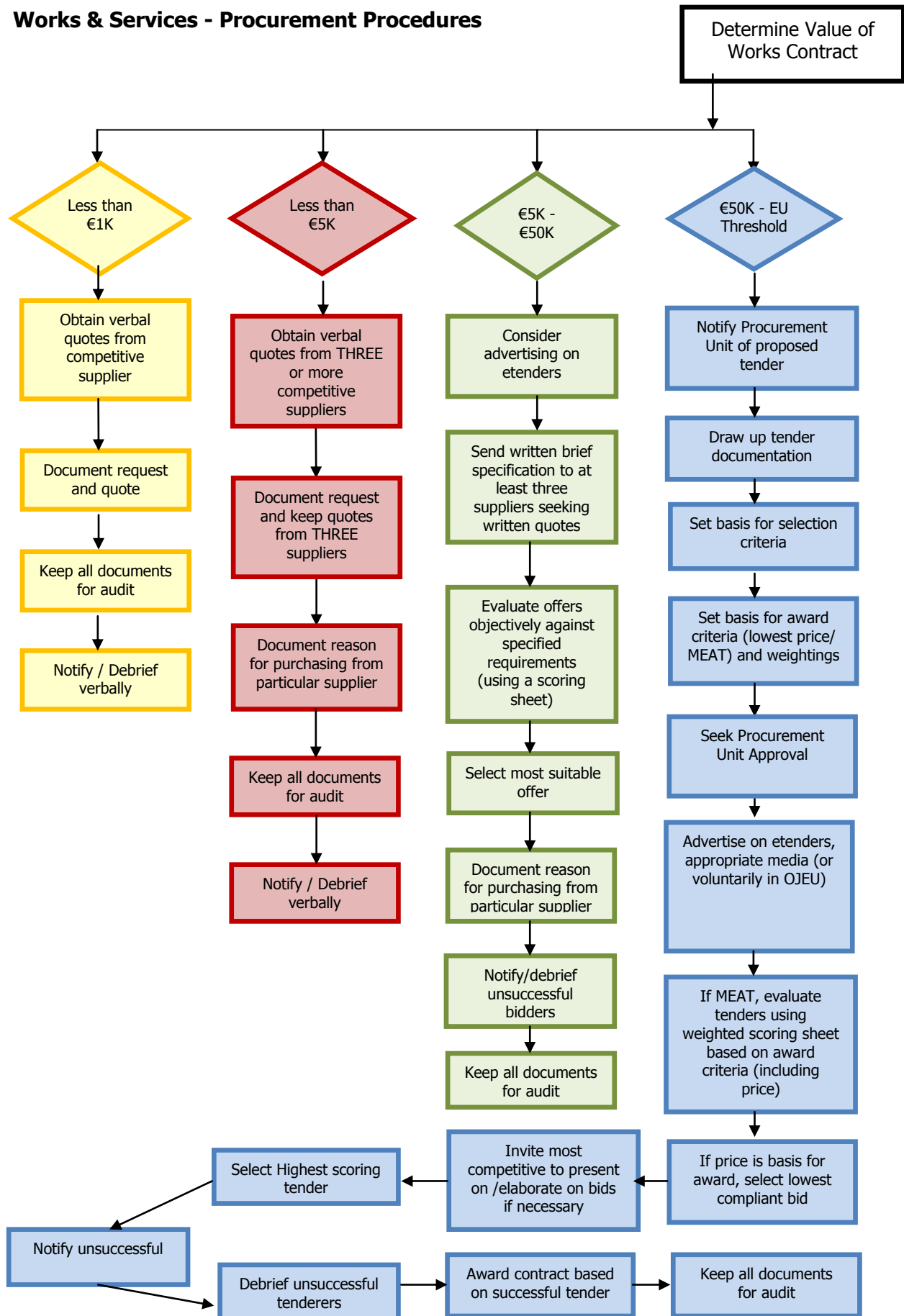
Articles 40 & 41 of the 2014 PS Directive

- Pre-market engagement can assist authorities in developing their tender specifications for open and restricted procurement procedures
- The new rules explicitly allow for prior discussions with suppliers and independent experts or bodies prior to starting a procurement procedure
- Development of the specifications should be documented in the procurement report on the procurement procedure – **see also Article 84 of the 2014 PS Directive**
- Care must be taken to ensure that such contact does not distort competition or violate the transparency and non-discrimination principles
- Where a supplier is involved at an earlier stage, appropriate measures must be taken to ensure no distortion of competition – communication to tenderers of relevant information exchanged and allowing adequate time limits
- Exclusion of bidder is a last resort and should be discussed and agreed with relevant party prior to the commencement of the consultation

Supplies and Services – Procurement Procedures



Works & Services - Procurement Procedures



Procurement Procedures for National value purchases

The following procedures should only be used by KCC Service Areas for transactions where the contract values are below the current EU thresholds.

Purchasers are reminded of the procedures for estimating contract values and that the splitting of purchases to keep under either the EU or National thresholds is not allowed.

Purchasers must demonstrate the proper segregation of duties in all cases i.e. the person sending out the request for tender and evaluating the tender must not be the person that approves the purchase.

Value less than €1,000 (excl. VAT) - Goods/services and works.

Purchasers must keep:

1. A documented log of what was requested in the request for quote.
2. A log or note of the quotation received.
3. All delivery dockets/receipts should be recorded and filed.

Value from €1,000 to €5,000 (excl. VAT) - Goods/services and works.

Purchasers must keep:

1. A note of what was requested from the suppliers
2. A documented log / note of quotations from at least THREE suppliers. It would be preferred but it is not essential to have written quotations if it can be obtained.
3. A note of the reason for purchasing from the particular supplier selected.
4. All delivery dockets/receipts and these should be recorded and filed.

Value from €5,000 to €25,000 (excl. VAT) - Goods/services

Purchasers must keep:

1. The request for tender or request for quotation
2. Minimum of three written quotations received
3. The recommendation for purchasing from the particular supplier selected.
4. Copy of the Chief Executive/Delegated order approving purchase.
5. All delivery dockets/receipts and these should be recorded and filed.

Value from €5,000 to €50,000 (excl. VAT) - Works or works related services

Purchasers must keep:

1. The request for tender or request for quotation
2. Minimum of three written quotations received
3. The recommendation for purchasing from the particular supplier selected.
4. Copy of the Chief Executive/Delegated order approving purchase.
5. All delivery dockets/receipts and these should be recorded and filed.

EU Procurement Thresholds January 2016 – December 2017

The current EU thresholds are shown below reflecting values (excluding VAT) which will apply for the next 2 year period from 1st January 2016. These values are subject to change every 2 years. It is always advisable to have a working threshold 15-20% lower than the stated EU threshold.

	SUPPLIES	SERVICES	WORKS
Public Sector	Public Sector Directive 2014 refers		
Local Authorities	€209,000	€209,000	€5,225,000
Utilities	Utilities Directive 2014 refers		
Water, Energy, Transport & Postal	€ 418,000	€ 418,000	€5,225,000

NOTE – Advertising of tenders in the Official Journal of the EU is obligatory once these EU Thresholds are exceeded. See also the EU public procurement website <http://simap.europa.eu>.

Publication of Prior Indicative Notices

A Prior Indicative Notice (PIN) is a useful method of informing the market that an organisation intends to procure sizeable or innovative contracts to be awarded over the next 12 months.

Publication of a PIN as a contract notice by CPA's such as the OGP or LGOPC will constitute a commitment to proceed with a tender.

A PIN without contract notice may reduce the minimum tender return period if required.

PINs – Recent examples

The Council has recently published PINs for the N76 Callan Road Re-alignment scheme Main Works Contract and for the procurement of a Public Lighting Maintenance contractor for Carlow and Kilkenny for an intended 2 year period.

7. GREEN PUBLIC PROCUREMENT (GPP)



- DECLG 'Green Tenders' 2011/ EPA 'Green Procurement guidance' 2014
- Public Sector sector 'exemplar' for renewable energy - S.I. 147 of 2011
- Energy Efficiency Design Standard for Public Sector - Directive, S.I. 426 of 2014
- New Irish Standard in Energy Efficient Design Management - S.I. 399 of 2014

Green Tenders Government Action Plan 2011

The Plan nominated seven product groups as priority groups for development of GPP. This included construction and non-construction activities such as plant and equipment.

Energy Efficient Public Procurement Regulations

The European Union (Energy Efficient Public Procurement) Regulations 2011, SI 151 of 2011 state that a public body shall only procure equipment or vehicles which

- a) are listed on the Register*, or
- b) satisfy the published SEAI energy efficiency criteria for the equipment or vehicle concerned,

and the public body shall specify this requirement in any documentation describing its procurement requirements.

** 'Triple E Product Register' (Register) means the public database maintained by the SEAI containing a list of products which comply with the SEAI energy efficiency criteria*

Green Procurement – Guidance for the Public Sector – EPA 2014

This document, published by the Environmental Protection Agency, provides best practice examples and detailed selection and award criteria suitable for insertion in tenders.

The extent to which environmental and social criteria may be included in tenders and contracts for public sector procurement is clarified by the new Procurement Directive 2014/24/EU Public Sector which allows for such criteria, provided that they “are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles [of the Treaties]”.

Management Action Plan (MAP) 2013 – SEAI, CKEA and KCC Energy Committee

KCC signed an Energy Map partnership with The Sustainable Energy Authority of Ireland (SEAI) in February 2013 which committed the Council to reducing their energy consumption in delivering low energy public services. By achieving 33% verifiable savings by 2020, KCC will implement the ISO 50001 approved Energy Map programme.



Carlow Kilkenny Energy Agency (CKEA) support KCC in achieving this target in partnership with SEAI by mentoring best practice in the field of energy demand reduction. The KCC Energy Committee undertook appropriate energy MAP training.

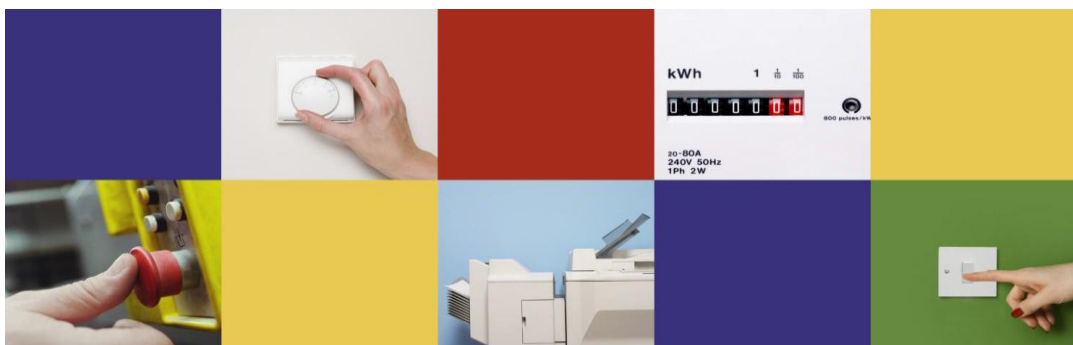
SEAI Grant funding under the Better Energy Community programme has been used to complement similar community and SME projects.

KCC Social Housing units have also benefitted from energy retrofit measures such as external/internal and attic insulation works under both the SEAI and Department programmes.

The provision of higher performing doors/windows in Council stock are envisaged in Phase 2 of the Department programme.

Kilkenny Better Energy Community comprising public sector , community (schools, Churches and GAA Clubhouses) and SME (hotels etc) projects won the SEAI Community Award for community energy efficiency works carried out in 2013.

Further improvement works in KCC offices including County Hall and other facilities such as Fire Stations, libraries and area depots are ongoing.



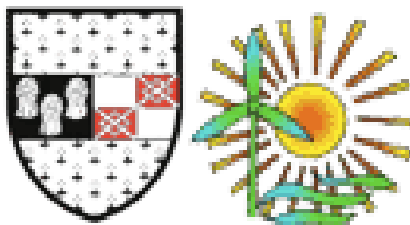
Reduction of Carbon output - Design and construction of new buildings – energy efficient design of social housing, fire stations etc

The Council is committed to reducing its carbon output in accordance with the recent Government White Paper – *Ireland's Transition to a Low Carbon Energy Future 2015-2030*

The Council appoints competent Design Teams experienced in energy efficient design to undertake the design and supervision of all new build projects to the highest possible standards in conformity with its exemplar role.

The Council utilizes existing resources such as CKEA Energy Engineers and the Council's Engineers/Architect to peer review preliminary proposals produced by the design teams.

Street Light LED Conversion Works project for Public Lighting 2014



Kilkenny County Council are City Partners in the Intelligent Energy Europe Streetlight EPC project with Carlow Kilkenny Energy Agency as the Regional Partners.

The project aims to create the demand and supply for Energy Performance Contracting (EPC) projects in Ireland and also to perform real life procurement of 36 EPC street lighting projects across 9 regions in Europe.

An EPC involves the incorporation of energy performance guarantees into contracts with service providers, contractors or product suppliers.

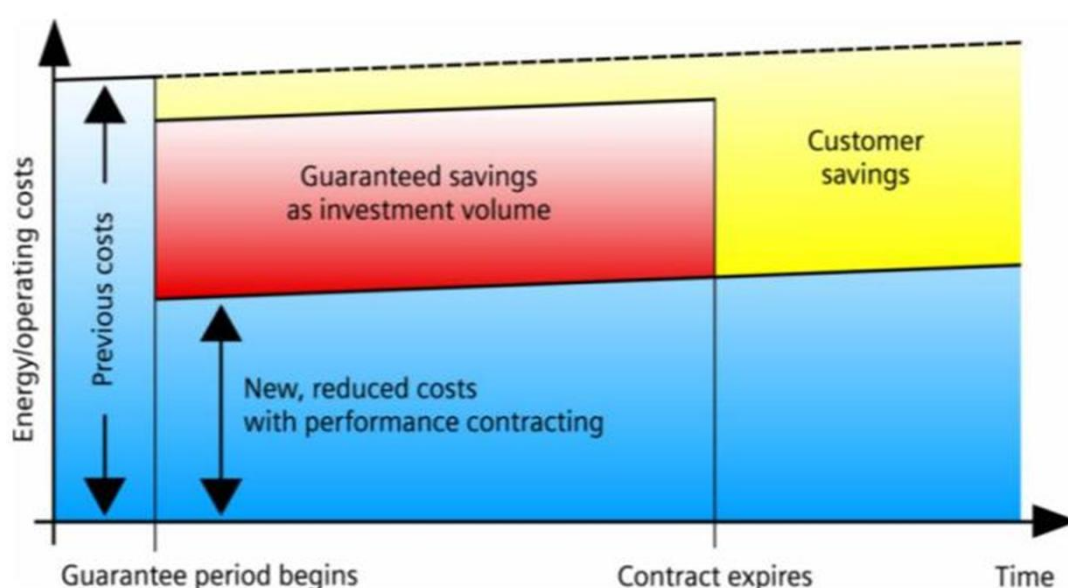
An ESCO or Energy Service Company is a company that provides the investment for an energy saving project with the investment being repaid out of the reduced energy costs as a result of the energy savings made.

Kilkenny County Council intends to complete the conversion of the road lighting on regional roads and selected housing estates from high intensity discharge lighting to LED lighting.

The scope may include National Roads infrastructure operated by the TII (Transport Infrastructure Ireland) in conjunction with the Local Authority.

This work is a direct outcome of the European Street Lighting project encompassing Energy Performance Contracting.

The appointment of a suitable design consultant has been undertaken for this pilot project during 2016. It is expected that the conversion works will be undertaken in 2017.



Energy Performance Contracting model illustrated

8. REQUEST FOR TENDERS & SELECTION/AWARD CRITERIA

OGP/DPER Template RFT

It is KCC policy to use the OGP/DPER Request for Tender (RFT) templates, developed for use by local and public authorities.

The use of these legally robust templates by Service Areas offers protection to users. The templates have been updated to take account of the provisions of the 2014 Procurement Directive and 2016 Irish Regulations.

OGP Supplies and Services Templates

Purchasers should use these templates for all supplies of goods and services purchases above the National threshold of €25,000. The templates are called Goods – Template RFT/Contract/Guidance Note and Services - Template RFT/ Contract/Guidance Note and can be found on the Procurement Site of the intranet at <http://intranet/Procurement/>.

Construction Procurement Works and Consultancy Templates

The management of capital works contracts is undertaken by public bodies using the Capital Works Management Framework (CWMF) suite of documents as updated by DPER.

This framework has been developed to deliver the Government's objectives in relation to public sector construction procurement reform. It covers all aspects of the delivery of a public works project from planning to final delivery and review – including the engagement of related consultancy services.

Template documentation is available at <http://www.constructionprocurement.gov.ie/>.

Service Areas must use the current versions of CWMF tender documents, contracts and related Guidance Notes for all works/construction projects and works related consultancies valued above the National threshold of €50,000. There are currently 11 types of Public Works contracts available for use by contracting authorities ranging from Civil Engineering and Building Works Contracts for new builds and refushments to Term Maintenance Contracts for ongoing maintenance of existing buildings and facilities.

Works Contractors – Guidance Notes

Service Areas are reminded to consult the DPER Guidance Notes as required.

- GN 1.5 has provisions relating to bonds, retention limits and appropriate insurances
- GN 2.3.13 has guidance re previous turnover guidance and recommendations.

Construction Industry Register Ireland (CIRI)

The Construction Industry Register Ireland has been set up by the Construction Industry Federation (CIF) in consultation with the Department of the Environment, Community and Local Government – see www.ciri.ie

Amendments to the Public Works Contracts - DPER 2016

The Minister for Public Expenditure and Reform through the Government Contracts Committee for Construction (GCCC) has undertaken a review of the Public Works Contracts.

Amendments arising from this review are:

- reducing the level of risk currently being transferred by making the bill of quantities the primary reference document for tender purposes on employer-designed contracts;
- direct tendering of specialist works packages where specialist works make up a significant proportion of the overall project value or where they have a significant impact on the long-term performance of the project;
- in awarding works projects, a greater concentration on quality criteria that are directly linked to the project in order to deter unsustainable pricing,

and;

- the inclusion of informal dispute resolution methods to reduce the volume of disputes that are currently being referred to the formal procedures prescribed in the contract.

Please refer to DPER Circular 01/16 - Revised arrangements re Public Works contracts on the Construction procurement website and implementation updates.

Engagement of Consultants - construction related service providers

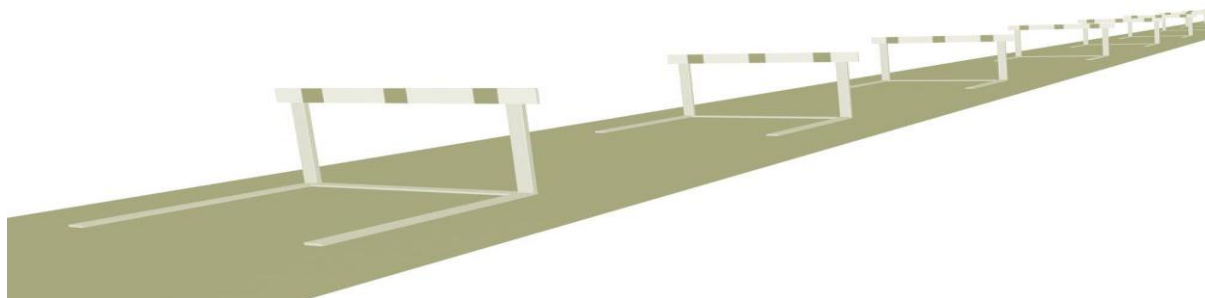
Significant changes were made by DPER in July 2013 in relation to the pre-qualification and tender documentation for construction-related service providers.

- The assessment methodology for awarding contracts set out in the tender documents (Section 9.5 in the Instructions to Tenderers) has been amended to ensure that quality is the deciding factor in the award of contracts for service providers.
- Two standard pre-qualification questionnaire templates have been developed; one for a restricted procedure and the other for an open procedure. They are based upon the QC 1 and QC 2 forms but have been modified to integrate the Safety and Health assessment and a facility to declare certain criteria into a single form.
- Safety and Health declarations are to be provided prior to appointment as against at the pre-qualification stage. The requirement to submit these declarations has been included in the Instructions to Tenderers and in the Letter to Successful Tenderer.
- Guidance Note GN 1.6.3 – Prequalification of Consultants using Minimum Standards for Suitability Criteria sets out suggested minimum standards to be used in the suitability assessment questionnaires for service providers.

Tender Evaluation - Compliance and Selection/Award Criteria

Tender Evaluation

There are three stages or hurdles in the tender evaluation process regardless of which procedure is used - Compliance/Selection/Award



Only those tenders which comply with the competition Instructions to Tenderers are allowed to proceed to the tender evaluation stage proper. Selection and Award criteria are required to be clearly indicated in the contract notice published on eTenders and/or in the tender documentation. Tenders should always be evaluated according to the principle of obtaining best value for money.

The use of legally sound selection and award criteria in competitions has been the subject of considerable focus under EU procurement law.

Directive 2014/24/EU Public Sector contains some new provisions regarding exclusions from participation, selection and award criteria which are highlighted below.

Exclusion from participation in a Public Contract

Legislative References – EU Directive 2014/24/EU Public Sector Article 57

Any candidate or tenderer convicted by final judgement shall be excluded (where the contracting authority is aware of the fact) in the following situations:

Mandatory

- Participation in a criminal offence
- Corruption
- Fraud
- Money Laundering
- New obligations introduced in 2014 Directive to exclude suppliers for convictions for terrorist, child labour and human trafficking related offences

Optional

- Bankrupt or subject of bankruptcy proceedings
- Guilty of grave professional misconduct, which can be shown to affect the supplier's integrity
- Failure to fulfill tax obligations

- Significant or persistent deficiencies in the performance of a prior contract

Legislative References – EU Directive 2014/24/EU Public Sector Article 57 (40) (g)

“where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions”.

Application of mandatory and discretionary exclusions – self cleaning provision

Legislative References – EU Directive 2014/24/EU Public Sector Article 57 (6)

- Suppliers must not be excluded if they have provided sufficient evidence of reform
 - Maximum period of exclusion is 5 years in the case of mandatory exclusions or 3 years if exclusion is discretionary

For EU value goods/services procurements and for all works competitions, the relevant declaration regarding the personal circumstances of the tenderer is signed and submitted by tenderers with their tender confirming that they should not be excluded from the competition.

For National value goods/services procurements, the relevant declaration should be sought only from the successful tenderer at Letter of Intent stage and prior to the formal award of the contract.

Selection or Qualification Criteria

Legislative References – EU Directive 2014/24/EU Public Sector Article 58

Selection criteria may relate to:

- (a) suitability to pursue the professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

Proof of Professional Registration, etc.

Tenderers may be requested to prove their enrollment on the professional or trade register (a declaration on oath or certificate may be required) or to provide their company registration number or equivalent. For example, a practicing certificate for solicitors issued by the Law Society of Ireland could be requested in a legal services tender competition.

Selection Criteria are needed in all procurements to determine whether candidates or tenderers are competent (or “suitable” in works contracts). Transparent and non discriminatory selection criteria should be used to test competency or suitability e.g. Skills, efficiency, experience or reliability.

Selection criteria on economic/financial capacity and technical/professional ability need to be proportionate and related to the subject matter of the Contract as per Article 58 (1) of the Directive 2014/24/EU Public Sector. A selection criterion that previous experience acquired in dealing with the public sector only is deemed to limit competition (European Code of Best Practice).

Selection criteria used should be included for reference in the technical specification or "Information for Tenderers" document. Advice should be sought from the Procurement Unit in all cases. Selection Criteria are generally pass/fail in open procedures to decide which tenderers should be considered. Such Selection Criteria are weighted and scored in restricted procedures to decide which companies should proceed to the tender invitation stage.

DPER Department Circular 10/14 strongly suggests a "self-declaration" approach to providing the necessary evidence regarding Selection Criteria such as Financial Capacity, Company turnover and Insurances, with the required evidence being submitted later to the contracting authority when the letter of intent is issued to the successful tenderer.

Economic and Financial Standing of Tenderers

The following are examples of criteria that might be considered to explore if a potential tenderer has the proportionate financial capacity relative to the contract value to undertake a particular contract – initially by self - declaration:

- Statement of annual company turnover for previous 3 financial years
- Extracts from audited accounts
- Insurances
- Tax Clearance Certificate online registration number etc.

DPER Circular 10/14 reminds Contracting Authorities generally that any capacity levels set must be proportionate and relevant to the particular circumstances of the contract. Specifically in relation to company turnover, the Circular identifies broadly acceptable practice as requiring a maximum of two times the value of a contract.

Service Areas are advised to discuss proposed company turnover levels with the Procurement Unit when drafting their tender documents. Specific advice in relation to previous turnover for works consultancies has been added by DPER to the Construction Procurement Reform web site.

Furthermore, it should be noted that candidates are allowed to rely on the standing of other entities in relation to Economic and Financial Standing provided they submit an undertaking to this effect when requested and contracting authorities may accept alternative evidence to that required (e.g. to facilitate SMEs etc.)

Service Areas should contact Irish Public Bodies or the Procurement Unit in order to verify the necessary Insurance requirements for each tender competition prior to advertising.

Technical and Professional Ability of Tenderers

Contracting Authorities are also required to assess the technical and professional ability of tenderers. The selection criteria for Works Contracts are set out in the construction procurement website.

In contrast to the position regarding Economic and Financial Standing where tenderers are allowed to self-declare evidence, the Technical and Professional Ability of tenderers is required to be submitted with the tender.

For Works and works services contracts, the suitability of tenderers (including from a Health & Safety viewpoint) is usually assessed in the Suitability Assessment Questionnaires which are adapted for use in each procurement.

Health & Safety

KCC Service Areas may also require tenderers to complete and submit the Council's own Health & Safety Questionnaire short form (up to €50,000 contract value) and long form as appropriate.

The selection criteria for supplies of goods and services are set out in the OGP Template RFT for goods and services on the Council's procurement site on the intranet at <http://intranet/procurement>.

Previous Experience may now be used as an award criterion where such experience has a significant impact on the performance of the contract

Arising from EU legal case law and resulting practice, it had emerged that previous experience of staff could only be used as a selection criterion on a pass/fail basis.

This was clearly unsatisfactory for certain procurements where the previous experience of staff is integral to the performance of the contract.

In a welcome move, the new Directive has addressed this matter – see Article 67(b) below.

Legislative References – EU Directive 2014/24/EU Public Sector Articles 67 and 68

"The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) *organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or*

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts."

Accreditation or other statutory permits

Tenderers should also be asked to provide evidence of accreditation or any other necessary licenses or permits (e.g. Waste Collection Permits) with their tender. These requirements should be included, where appropriate, as part of the assessment of the tenderers Technical/Professional ability as a selection criterion.

In Open Procedures, this criterion is evaluated on a pass/fail basis. Service Areas are advised that the correct wording of such clauses in their "Information for Tenderers" is important. Advice on the drafting of any such requirement should be sought from the Procurement Unit.

Examples of Selection Criteria – Supply/Service Contracts

Examples of Economic / Financial Standing Criteria – initial self-declaration		
Criteria	Rule or Minimum Level	Pass / Fail
Evidence of Overall company Turnover	Must demonstrate appropriate turnover of €xxx,xxx for the previous three financial years.	Pass/Fail
Evidence of Insurances	Must provide evidence of appropriate PL and EL cover.	Pass/Fail
Tax Clearance Certificate	Online Number must be provided	Pass/Fail
Examples of Technical / Professional Ability Criteria – submission required		
Criteria	Rule or Minimum Level	Pass / Fail
Organisation Details: Skills, Manpower numbers	Must provide Details of organization etc.	Pass/Fail
Technical/Professional ability of Tenderer - Previous Experience (Public or Private) in the last 3 years	Must provide satisfactory previous experience – submit relevant no. of contracts performed and supporting references in the last 3 years	Pass/Fail
Company Quality Control systems – ISO standard or equivalent	Must provide satisfactory evidence of Company Quality Control systems.	Pass/Fail
Company Health & Safety Statement	Must provide evidence that company has a current Health & Safety Statement.	Pass/Fail
RESULT - Qualified or Eliminated from Detailed Tender Evaluation		Qualified / Eliminated

Award Criteria

Legislative References – EU Directive 2014/24/EU Public Sector Articles 67 and 68

- Criterion for contract award is the most economically advantageous tender.
- Must include price or cost using a cost-effectiveness approach
- May include best price – quality ratio
- Cost or price only award may still be used as sole award criteria
- Must be linked to the subject matter of the contract
- Can include the organization, qualification and experience of staff to perform the contract (where this significantly impacts the supplier's level of performance).

A contracting authority must now award a contract on the basis of Most Economically Advantageous Tender (MEAT), and it must specify the relative weighting (or descending order of importance if weighting is not possible) given to each of the criteria and each sub-criteria used in either the contract notice or tender documentation. It is still possible to award contracts using price or cost as the only award criterion.

The weightings should be set relative to the risk and nature of the contract being awarded.

Examples of award criteria which can be used, provided these are relevant and linked to the subject matter of the contract, include;

- Price or (Ultimate) Cost using a cost –effectiveness approach such as life –cycle costing to include easily verifiable costs relating to acquisition, use costs such as energy consumption, maintenance costs and end of life (disposal) costs.
- The cost element may also take the form of a fixed price or cost so that tenderers compete on quality criteria only (This is useful for services quotations or tenders where a service area has a fixed budget but quality criteria including the experience of staff is important)
- Quality including Technical merit submissions; accessibility; social, environmental and innovative characteristics
- Organization, qualification and experience of staff where the quality of staff assigned can have a significant impact on the delivery of the contract
- Aesthetic and Functional Characteristics
- Delivery conditions including delivery date, process and period for completion
- After Sales Service and Technical Assistance

Tender Checklists – applicant required to make adequate submissions

It is important that tenderers are reminded in the tender documents or tender checklist that they need to demonstrate their capabilities in their tender submission response when qualitative award criteria are included for assessment. Service Areas should also give in the tender documents an indication of the extent of any material required to be submitted.

Examples

Technical Merit criterion submission

Tenderers are required to submit a quality submission in respect of Technical Merit – the maximum number of pages required is 4 A4 Pages.

Experience and quality of Staff proposed to perform the contract/CV's

Tenderers are required to demonstrate the quality of staff proposed to perform this project and to submit detailed CV's.

Procurement principles re award Criteria, sub-criteria and marking schemes

Award criteria must be certain and capable of being interpreted by all tenderers.

Award sub-criteria must be disclosed.

Underlying marking schemes must be detailed in the tender documents.

Requirement to disclose award sub- criteria, weightings, formulae and adopted marking schemes in tender documents

Recent case law has reminded contracting authorities that it is a breach of the principle of transparency and equal treatment of tenderers, not to reveal sub-criteria, weightings, formulae or marking schemes in the published tender documents.

If the value of a contract is sub-threshold, it means that the Remedies Directive and Regulations may not apply to the tender process.

However, even in below EU Threshold situations, certain tenders may be demonstrated to be of interest to cross border companies and thus the tender procedure is deemed to be subject to the general EU Treaty principles of transparency, proportionality, non-discrimination and equal treatment.

One of the requirements of the principle of transparency is that the rules of the tender competition have to be disclosed in advance and that new rules cannot be introduced which may have an effect or a significant effect on the outcome of the competition – see *Commission v Ireland (2010) EUECJ*.

There is no scope for deference where there is a breach of equal treatment or transparency and any non-compliance with these principles will likely result in a finding of illegality by the Courts and allow an applicant to proceed to make its claim for damages and/or to set aside the concluded contract.

Examples of contract award criteria and relative weightings

Assume that the CA states that tenderers must submit details of their methodology which is weighted at 30% in the award criteria in the following terms;

“Award Criterion A – Methodology – Tenderers to submit their methodology, creativity and demonstrated capacity to meet the contract requirements – Weighting 30%”.

The “reasonably well informed and diligent tenderer”, will assume that each of the separate elements – Methodology, creativity and demonstrated capacity – will be scored equally at 10% by the Contracting Authority.

If , however, the Contracting Authority intended to give more weight to say “creativity” as opposed to the other 2 elements, then this weighting should have been disclosed to the market prior to advertising.

It is of critical importance that Service Areas consider the intended award criteria very carefully and that any sub-criteria and underlying marking systems are identified and disclosed to the market prior to advertising of the tender.

It is also the Council's policy that the "stepped" scoring band approach be used only in limited circumstances such as for minor quotations and certain below EU Threshold competitions not attracting cross border interest with the approval of the Procurement Unit.

Service Areas may use minimum score requirements to protect the Council from poor quality tenders or cancelling competitions

In addition, Service Areas may, where appropriate, include minimum score requirements (generally in the range of 40% to 60%) for qualitative award criteria only – this approach will help protect the Council from having to accept poor quality tenders.

If the basis of the award criteria, including minimum score requirements, are not set out in the contract notice or in the tender documents, it cannot be used in the subsequent competition scoring.

Example of Award Criteria – Supplies/Services Contracts

Criteria	Weighting	Total Score Available	Minimum Score Required
Ultimate Cost	50%	5,000	n/a
Quality of product offered	20%	2,000	1,200
Delivery Schedule Proposed	15%	1,500	900
Contract Management	10%	1,000	600
Reliability & Continuity of Supply	5%	500	300

Cost Criterion and formulae to be used

It is recommended that Ultimate Cost be used where possible rather than Lowest Tender Price.

Ultimate cost may constitute an amalgam of associated costs leading to the full life cycle costs for certain tenders i.e. capital cost, maintenance, spare parts, training etc. In any event, only one cost criterion should be used in each competition.

For certain tenders or quotations where the budget is both limited and fixed, service areas may adopt a marking scheme which only scores quality criteria. Alternatively, a small number of marks can be allocated to the cost criterion and tenderers should be advised that marks will be deducted from proposals which exceed the stated budget.

Any formulae used to score cost and quality must be published in the tender documents.

Scoring the Award Criteria – formula for general Supplies/services contracts only

Tenders received should be evaluated against the technical specification and in accordance with the pre-stated criteria and weightings.

If a Service Area has used minimum requirements on qualitative criteria as recommended above, these should be assessed first before scoring the cost criterion.

In relation to the Cost Criterion where lowest price applies, tenders should be scored in inverse proportion to the maximum score which will be allocated to the lowest cost tender not previously eliminated on qualitative grounds.

The formula to be used by Service Areas to award marks for cost/price in Supplies of goods and Services tenders is as follows:

Lowest Tender Price divided by Tendered Price multiplied by Total marks available.

Example of Cost Formula – General supplies and services tenders only

In this example, the maximum number of marks for the tender price is 2,000. The example calculation is shown below:

Price	Formula	Marks to be Awarded
50,000	$\frac{50,000 \times 2,000}{50,000}$	2,000
54,500	$\frac{50,000 \times 2,000}{54,500}$	1,835
66,000	$\frac{50,000 \times 2,000}{66,000}$	1,515
105,000	$\frac{50,000 \times 2,000}{105,000}$	952

Scoring the Award Criteria – formulae for scoring price and quality in works related services and works contracts

Note - formulae used to score cost and quality must be published in the tender documents.

For works related services tenders, Service Areas must use formulae in the standard Instructions to Tenderers for scoring Price, Quality and overall score available on the DPER Construction Reform website.

For Works contracts and for scoring any mini competitions with MEAT under SupplyGov.ie (previously LAQuotes), Service Areas must use the following formulae (agreed with DPER) to score price and quality and advertise their use in the tender documents;

Recommended Formula to score price	$(P_0/P)*marks$ Where P is the Contractor's Price and P_0 is the lowest price	DPER Comment - This is the conventional formula used to score price and results in a parabolic curve which never quite reaches zero.
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Recommended Formula to score quality	(T/T₀) *marks Where T is the Technical Score of the Contractor <i>And</i> T ₀ is the Technical Score of the highest rated Contractor	DPER Comment – DPER have adopted this formula on the quality score to give the highest scoring tenderer in quality, the highest possible marks for quality and it applies the same proportion across the board to all tenderers.
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Designated return/closing day for Tenders

The designated tender return/closing day and time for all Kilkenny County Council tenders is Wednesday at 12 noon or as otherwise agreed with the Director of Services/ Senior Executive Officer, Corporate Services.

Minimum recommended periods for submission of tenders

National tenders advertised on eTenders website

KCC policy for National tenders is to allow for a minimum of 21 days in order to afford tenderers adequate time to submit tenders and to encourage sufficient competition from the market.

For more complex works or services/supplies tenders, a minimum period of 28 days should be considered.

Shorter timescales may be considered in cases of extreme emergency but only with the prior approval of the Procurement Unit. Such situations will arise infrequently as Service Areas are expected to allow sufficient time for the submission of tenders when preparing tenders.

EU Tenders advertised on OJEC – prescribed time limits in EU Directives

The appropriate time periods for EU value tenders are prescribed in the new EU Directive and Irish Regulations. [For further information, please refer to Appendix C.](#)

Full Electronic Quotations systems – Quick Quotes on eTenders

To facilitate full electronic tendering required by October 2018, the use of the Quick Quotes facility on eTenders is recommended. Please refer to the User Guide on the OGP website.

Designated Corporate Address for submission of Tenders

All tenders for Kilkenny County Council should be sent only to:

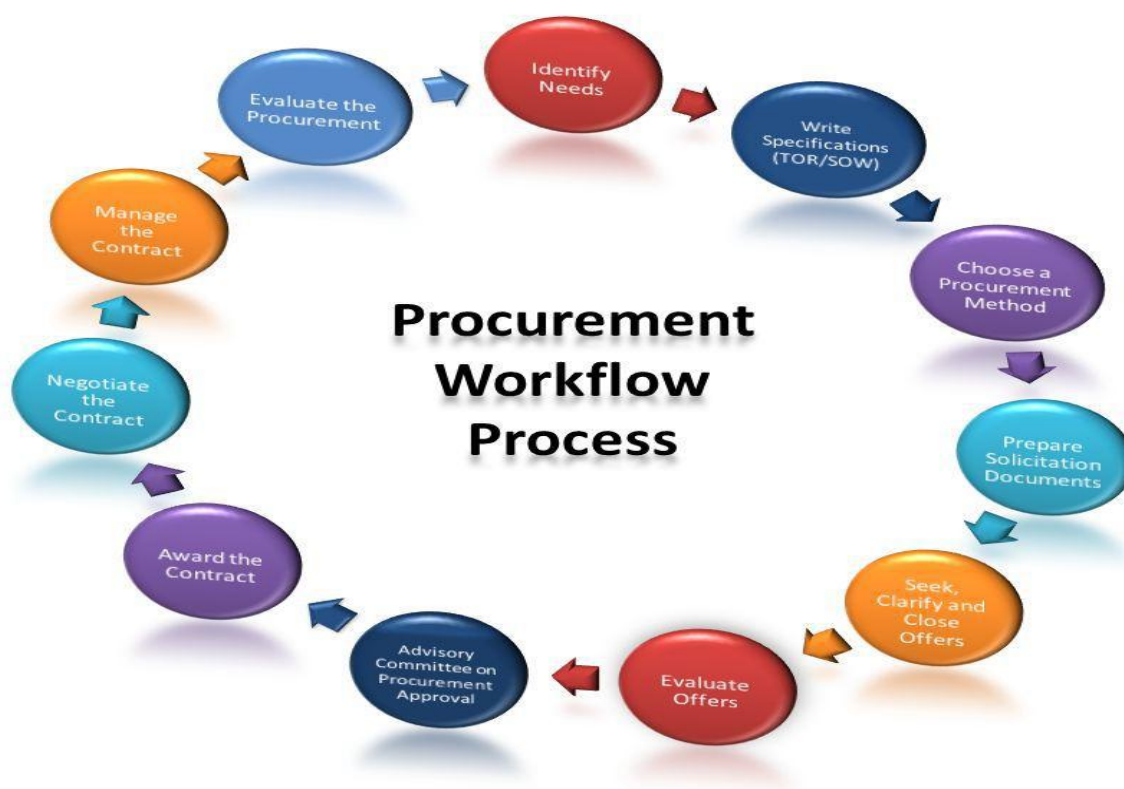
Director of Services
Kilkenny County Council
Corporate Services, 2nd Floor
County Hall
John Street
Kilkenny R95 A39T

Service Areas must inform Corporate Services of the closing date of tenders.

eTenders Q & A Facility - Questions and Clarifications

The Questions and Answers facility on eTenders should be used for all tender queries and for uploading responses including tender clarifications and/or revised tender documents.

Other than routine queries, no other consultation/communication shall be held with tenderers once the tender process is underway (i.e. once the contract notice has been published on eTenders/OJEU).



9. RECEPTION OF TENDERS – PROCEDURES

Delivery of tenders

All tenders, in the appropriately endorsed envelope, should be delivered by post or by hand delivery to the Director of Services, Corporate Services, County Hall.

1. No other office is permitted to receive tenders.

2. A Staff member at Corporate Services, County Hall's office date stamps the tender envelopes with the date, time and signature of staff member.
3. Tenders are then placed by the staff member who has signed the envelope, in the Tender Box kept at the Corporate Services office.
4. Receipts showing date and time received will be issued by Corporate when tender is received, if tender is delivered by hand.
5. If a tender arrives late, it is accepted but marked "LATE" and the envelope signed in the normal way and placed in the Tender Box. Tenders received after the closing time for receipt of tenders should NOT be opened except to establish the identity of the tenderer for the sole purpose of returning the late tender.

Opening of tenders

Tenders are removed from the Tender Box by the Director of Services, Corporate Services or his authorized Deputy. The opening of tenders, should be attended by the Tender Committee comprising An Cathaoirleach or nominated member of the Council, the Director of Services, Corporate Services or his Deputy and a representative of the Service Area seeking the tenders - the department head where possible.

Each tender is to be opened, signed and dated by the Director of Services or his authorized Deputy and one other person.

The covering letter, plus each page of quotation, should be initialled by each member of the Tender Committee. It is not necessary to sign pages of preamble.

Tenders with special conditions for opening and recording

Service Area staff should make the Director of Services, Corporate Services aware where there are special conditions relating to the opening of the tenders and a copy of opening conditions provided. For example, in certain works tenders which are assessed on both price and quality (MEAT or most economically advantageous tender), it may be preferable to initially open the quality submission only to facilitate the quality assessment with the envelopes containing the tender to be opened at a later date.

Where the advertisement for the tender specifies that the tender should be enclosed in one envelope provided, and the suitability questionnaire of the tenderer should be enclosed in a different envelope which is clearly marked 'Suitability of Tenderer', the envelope with 'Suitability of Tenderer' should be opened first.

Tenders are listed in order of opening in a Tender Book. The Tender Book is then signed and witnessed by those present at the opening of the tenders.

A valid tender shall comprise the following:

- Completed form of tender, signed and including total tender price, in an envelope clearly endorsed.
- A completed Bill of Quantities, if supplied, in a separate envelope clearly endorsed.
- A completed form of undertaking to provide a performance bond, if requested.
- Suitability and other documentation, if requested, in a separate envelope clearly endorsed.

Reports from opening of tenders

Late Tenders

Electronic Procurement Guidelines

- By October 2018, electronic submission of tenders and requests to participate will become mandatory for all contracting authorities



10. TENDER ASSESSMENT/EVALUATION – PROCEDURES

The list of tenders and the tenders are then delivered to the appropriate Director of Service / Senior Executive Officer / Senior Engineer/ Senior Executive Engineer, who signs for them. The Director of Services / Senior Executive Officer is responsible for obtaining the necessary reports on the tenders and recommendation of the successful tender.

Composition of Tender assessment panels

Examination of tenders should be carried out by a team with the necessary competence. The team may include independent representation. Tenders above EU threshold must be evaluated by a team which includes independent representation. The assessment process must be demonstrably objective and transparent and be in accordance with Instructions to Tenderers. Price should be evaluated exclusive of VAT. For TII projects regard should be given to the current Project Management Guidelines.

Tenders must be evaluated objectively and transparently against the published weighted award criteria. Objectivity and transparency is best achieved by the use of a published scoring system or marking sheet based on the weighted criteria, indicating a comparative assessment of tenders under each criterion.

Abnormally Low Tenders – Duties of Contracting Authority

Legislative References – EU Directive 2014/24/EU Public Sector Article 69 & Regulation 69

Authorities are required to seek explanations from suppliers that submit a tender which 'appears' to be abnormally low

Examples of 'explanations' that could be accepted include the economics of the method of construction to be used and the technical solutions chosen. The authority may reject the tender where the evidence supplied is not satisfactory

If the authority has established that the low price is the result of a breach of social and environmental law listed in the relevant Annex, the authority shall reject the tender

If it is discovered that the low price is the result of State Aid the authority may reject the tender if the supplier is unable to prove that the aid is compatible with Treaty rules

Tender Recommendation/Tender Report

The recommendation of successful tender should take the form of a report which will set out:

1. Method of Tendering
2. The names and addresses of those who tendered and the amounts involved.
3. Statement that all the items of evidence etc have been supplied and are in order.
4. That amounts submitted on tender form are arithmetically correct.
5. A recommendation as to which tender should be accepted and the reason for acceptance.
6. Any other comments necessary.

A Chief Executive / Delegated Officers Order must be prepared for both Letter of Intent and Letter of Acceptance/tender award by the contracting authority.

All Letters of Intent to be issued to apparently successful tenderers must be endorsed with the phrase "Subject to Contract/Contract Denied" to protect the Council in situations where the intended tenderer is unable to supply the required evidences or where the contract is not subsequently awarded at all due to legal challenge.

If a tender process has to be terminated or cancelled, then all tenderers should be informed of the position as soon as possible. If the tender is to be re-advertised, this information should also be given in the notification.

The award criteria should be documented in the Order. Tenders with a value over €1m shall be approved by the Chief Executive or in her absence the Acting Chief Executive.

Tender Information Report

Legislative References – EU Directive 2014/24/EU Public Sector - Article 83(6) and Article 84

- Authorities are obliged to grant access to very large contracts information (€1m + for supplies and services and €10m + for works contracts) subject to certain exceptions
- Authorities must document procedure and justification for decisions taken for all above EU Threshold procurement competitions and keep such documentation for at least 3 years from date of award of contract

EU Remedies Directive and Irish Remedies Regulations

Review procedures for the award of public contracts are laid down in the Remedies Directives, as implemented by Irish law.

The Remedies Directive 2007/66/EC has been implemented into Irish Law by the European Communities (Public Authorities' Contracts) Review Procedures) Regulations 2010 (SI 130 of 2010). The new Court Rules "Order 84A" contained in SI 420 of 2010 is also of relevance.

In July 2014, in response to an appeal of a High Court decision not to lift the suspension of the award of a public contract, the Supreme Court held that the Remedies Regulations 2010 did not give the court jurisdiction to lift the suspension of a contract award in the circumstances where an unsuccessful tenderer or candidate initiates proceedings to review the decision of a contracting authority to award a public contract. An 'automatic suspension' effectively applies until the High Court reaches a decision on the substantive issue.

The Remedies Regulations allow tenderers or candidates who feel that a procurement process was not carried out in an open, fair and transparent manner the option of seeking recourse from the courts.

SI 130 and 131 were amended in May 2015 to give leave to contracting authorities to apply to the courts to lift the 'automatic suspension' and to give the High Court jurisdiction to lift an 'automatic suspension' should it see fit to do so.

The amending Regulations are SI 192/2015 – European Communities (Public Authorities Contracts) (Review Procedures) (Amendment) Regulations 2015.

Awarding of Contracts – standstill provisions

Above EU threshold Contracts

The Remedies Directive 2007 and relevant Irish Regulations, provide that the contracting authority may not conclude an EU value contract within the statutory standstill period; the Regulations provide that the standstill period is 14 days if notified electronically or 16 days if notified by Registered Post with time running from the day after the issuing of the notices which must communicate the standstill period and the reasons for the award of the contract.

It is KCC policy that as much information as possible is given to unsuccessful tenderers and candidates in the statutory standstill letter in order to avoid requests for clarification etc.

Legislative References – EU Directive 2014/24/EU Public Sector - Article 55

- Authorities must as soon as possible inform each candidate and tenderer of decisions reached
- On request from the candidate or tenderer, authority must as soon as possible and in any event within 15 days from receipt of a written request inform:
- Any unsuccessful candidate of the reasons for the rejection of its request to participate
- Any unsuccessful tenderer of the reasons for rejection of its tender including reasons for non-equivalence or failure to meet performance or functional requirements
- Any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement
- Any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers

National Contracts

For National value contracts, it is recommended that a minimum period of 10 days be observed prior to the formal award of the contract. However, there is no legal requirement to do this and in cases of urgency, a lesser voluntary period can be used.

It is KCC policy that as much information as possible is given to unsuccessful tenderers and candidates in the non- statutory standstill letter.

While formal or informal debriefing of unsuccessful tenders or candidates is not recommended in DPER Circular 10/14, it may be necessary to provide a verbal debriefing in certain limited cases.

Letter of Intent – initial provisional notification (Subject to Contract/contract denied)

Accordingly, the successful tenderer should be provisionally notified by way of Letter of Intent which states that the proposed award is "subject to contract/contract denied" to

protect the Council in cases where the contract is not awarded and, observing the voluntary minimum standstill period, is asked to submit the following – if required:

- Original C2 Tax Clearance Certificate/Completion of Declaration Form RCT1
- Evidence of Insurances – PL/EL etc
- Contractor's All Risks Insurance Policy
- Compliance with Local Authority/Trade Union Procedural Agreement
- Evidence of membership of C.I.F. Sick Pay and Pension Scheme or equivalent
- Site Specific Safety Statement and Statement of Safety Policy
- PSCS Appointment
- Insurances to include all liability arising from Contractor's role as Project Supervisor, Construction Stage
- Authorised Performance Bond
- Any other relevant requirement e.g. Programme etc.

In the case of consultant/services appointments, the following requirements may apply:

- Tax Clearance Certificate online registration number
- Professional Indemnity Insurance
- Health & Safety declarations
- PSDP Appointment
- Collateral Warranty forms
- Any other relevant requirement e.g. Implementation Schedule

Standstill Period – EU value Contracts

The Remedies Directive 2007 requires the following procedures in respect of contracts which exceed the current EU Thresholds:

1. Unsuccessful tenderers, disqualified tenderers and successful tenderers are to be informed of the outcome of the competition at the same time. The applicable standstill period is 14 days if notification is sent electronically or 16 days if sent by post.
2. The standstill period commences on the day after notification is sent to the tenderers.
3. A regret letter to be sent to the unsuccessful tenderers informing them of; Reasons for rejection of their tender and features and characteristics of the successful tender over theirs and the scores of both the successful tender and their tender.
4. A letter of acceptance to award a contract after the appropriate standstill period has expired, subject to agreed terms and submission of required items e.g. Insurances, Tax Certificate.

Duty of Contracting Authority to give adequate reasons in the standstill letter

The contracting authority must give reasons as to the relative advantages of the preferred tenderer. This requires a comparison of the parties' tenders and bespoke reasons to be given. Generic statements are insufficient.

The contracting authority's explanation must be sufficiently precise to enable a tenderer to ascertain the matter of fact and law on the basis of which the authority rejected one offer and accepted another.

When setting out the characteristics and relative advantages of the successful tenderer, the contracting authority must at least mention the matters which should have been included in the unsuccessful tender or the matters contained in the successful tender.

A unsuccessful tenderer may request additional information about the reasons for their rejection in writing. That request must be responded to positively unless specific listed exceptions apply.

For further information re disclosure of reasons etc, please refer to [Appendix G](#).

Template Standstill Notification Letters

Model Form notification letters have been published by DPER on the Construction Reform website for both EU and National tenders in respect of construction (works) or works related services tenders.

Advice should be sought from the Procurement Unit before any template standstill letters or other model forms from any source are used by Service Areas.

Service Areas should seek advice from the Procurement Unit for above EU Threshold tenders.

Updated KCC policy and advice for Tender Assessment Boards is included at [Appendix L](#).

High Court Review

The procedural rules of Court require that the tenderer puts the contracting authority on notice of alleged infringements and of intention to seek review. In general, proceedings must be commenced within 30 calendar days from when the claimant “knew or ought to have known” of the alleged infringement.

The new rules of Court may provide for a preliminary procedure to establish eligibility and, once High Court proceedings are initiated, an immediate suspension of the award takes place until the Court decides on the application for interim measures or review.

SI 130 and 131 have been amended in May 2015 to give leave to contracting authorities to apply to the courts to lift the ‘automatic suspension’ and to give the High Court jurisdiction to lift an ‘automatic suspension’ should it see fit to do so. The amending Regulations are SI 192/2015 – European Communities (Public Authorities Contracts) (Review Procedures) (Amendment) Regulations 2015.

Freedom of Information legislation

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.

Please refer to [Appendix I](#) of this document for the latest FOI Central Policy Unit notice - FOI & Public Procurement dated August 2015.

Release of Details of Price or other information post award

It is normal practice to issue details of the successful tender price. However, before releasing information, local authorities must have regard to:

- The extent to which disclosure could prejudice the competitive position of the successful company*
- The extent to which disclosure could result in benefits to the local authority e.g. resulting in more competitive tenders
- The extent to which disclosure could prejudice the effectiveness of the tender process.

In request for quotation situations or for National tenders, the following is KCC Policy regarding release of information about the procurement to unsuccessful tenderers upon request;

KCC policy (having consulted with the FOI Officer) is to release;

A list of the candidates names in alphabetical order and

EITHER

a list of the tender sums (if price only) in ascending order

OR

a list of the total scores only (if price/quality split applies) in ascending order. No breakdown of these scores to be given.

This policy protects the prices submitted by unsuccessful candidates from identification.

Name of the successful candidate (if requested) may only be released after the work or service or supply has actually commenced or contract award notice published.

* This clause is relevant where tender lump sums based on rates are submitted for quotations. In such cases, disclosing the tender lump sum may allow the rate to be ascertained. Service Areas are advised to contact the Procurement Unit for advice.

Award of contract and publication of Contract Award Notice

Following receipt of evidences and items requested in the Letter of Intent, the contract may be awarded by issuing the Letter of Acceptance.

EU Value Tenders procedure

Legislative References – EU Directive 2014/24/EU Public Sector – Articles 50, 83 and 84

In the case of contracts above EU threshold, information on the contract, including the name of the successful contractor(s) and the price paid, must also be submitted for publication in the EU Journal not more than 30 days after the award.

A contracting authority is also required to prepare a written report, which may be requested by the EU Commission at any time, containing essential information on the award procedure adopted.

National value Tenders policy - eTenders

In order to assist SMEs in sourcing sub-contracting opportunities, Contract award notices must be published for contracts valued over €25,000 (€50,000 for works) advertised on eTenders from 1st August 2014 as required by DPER Circular 10/14.

The information required is the name of the successful tender, the date of the award and the winning price. The award notice will comprise the name of the successful tenderer and their eTenders registration number.

The winning price accepted will be input on eTenders for statistical purposes only but will not be published.

Publication of awards from SupplyGov Frameworks and Council panels

The requirement under Circular 10/14 to publish Contract Award Notices over €25,000 (€50,000 for works) on the eTenders website on completion of the award is applicable to all public contracts (supplies, services and works) including contracts awarded from mini competitions under framework agreements.

This includes contracts awarded under SupplyGov Plant Hire and Minor Building & Civil Works categories. This requirement is being addressed by LGSPC/LGOPC to ensure that the award of the RFT published on SupplyGov.ie can be imported onto the eTenders system.

Tax Clearance

If evidence of the supplier's Tax Clearance online registration number is not forthcoming within a reasonable period, the contract may be awarded to the next most suitable tenderer. The latest available instructions on tax clearance from the Revenue Commissioners should be followed and apply to all contractors, sub-contractors and all grant-aided Contracting Authorities.

There is, in addition, a requirement on Contracting Authorities to report to the Revenue Commissioners certain information regarding contracts awarded if requested.

Tender Deposits

Tender Deposits should not be requested for tenders as per DPER Circular 10/14. However, if required, tender deposits shall be refunded within one month where a bona fide tender was submitted before the closing date for the receipt of tenders and not subsequently withdrawn.

Contract Formation/ Contract Signing/procedures

Service Areas are reminded that the receipt and verification of all requested information such as Insurances, Tax Clearance certificates, Health & Safety, Performance Bonds, Collateral Warranty forms etc as required in the Letter of Intent is necessary before action is taken to form and commence the contract.

- Insurances should be checked with Irish Public Bodies.

- Draft Bond and intended surety should be checked with Procurement Unit.
- Financial Information should be verified with qualified KCC Finance staff.
- Health & Safety Questionnaire to be verified by an appropriate Engineer.

Provided that all required information is in order, contract formation may comprise the issue of the Letter of Acceptance or similar and the drawing up of a purchase order and ordering of goods for low value contracts or issue of Letter of Acceptance and the formal signing of contracts by both parties for larger contracts.

Service Areas are advised that contracts should be signed by the parties in accordance with all necessary legal formalities as contained in the Instructions to Tenderers prior to the intended commencement date of the contract in order to avoid possible disputes during the contract implementation stage.

For this purpose, the correct procedure that is that the final contracts should be forwarded to the successful tenderer in duplicate for signing with a request to return them by a particular date. The contracts should then be signed/executed by the Council and a copy then returned to the successful tenderer.

In respect of major projects where a formal contract signing is usual, Corporate Services should be advised so that they can make arrangements for the necessary photographs, press briefings etc.

Registered Employment Agreements

Registered Employment Agreements (REA)

The decision of the Supreme Court in 2013 was relevant only to the legal status of Registered Employment Agreements. The legal situation in relation to the legal status of REAs has now been rectified by the Industrial Relations (Amendment) Act, 2015 which provides that the Labour Court has the authority to effectively register such agreements.

Notification to Trade Union of contracts awarded

In accordance with Local Authority Procedural agreement with the Trade Unions, details of successful tenderers, name of contractor and/or sub-contractor and description of work to be undertaken shall be inserted in the template form available from Corporate Services, County Hall. This information is then forwarded to the nominated Trade Unions by Corporate Services.

Contract Register of current contracts

Each service area is required to maintain a record of live contracts in place including options taken to extend the original term and details of their expiry date to ensure that the contract is re-tendered in good time. Procurement Unit will maintain a Corporate Contract Register.

Retention of tender etc documents - Time periods

The current National Policy on the retention of Local Authority records is that published by the LGMA in 2002 – this policy document contains specific guidance on the retention or disposal of particular classes of records including archiving policy for tender and contract documents for all service areas. This policy document is on sharepoint for reference.

Generally speaking, all tender documentation must be retained for at least five years, or until the period specified in relevant legislation has expired and shall be produced for inspection by the EU, Local Government or Internal Auditor if so required.

The original of each public advertisement (newspaper advertisement or European Journal contract notice) for TII and EU funded projects must be kept on file for inspection at Audit.

The current version of the TII Project Management Guidelines should be consulted in regard to the time period for retention of tender documents for TII and EU funded projects. The usual period is seven years after the close of the programme.

Where tender documents and relevant files are being consigned to the Council's Storage premises, Service Areas should reduce the amount of documents stored by carefully disposing of duplicate copies of tender submissions etc

A note or record of each tender stored off – site in the Council's Storage premises should be recorded by each Service Area prior to their consignment.

Modification of existing contracts

Legislative References – EU Directive 2014/24/EU Public Sector - Article 72

A contract/framework will be substantially modified and require re-advertisement in the OJEU where the modification:

- would have led to other suppliers participating, becoming qualified or having an offer accepted if known initially
- changes the economic balance in favour of the supplier
- extends the scope of the contract/framework 'considerably'

A contract/framework will also be substantially modified

- where a new contractor replaces the one to which the authority had awarded the initial contract other than for corporate restructuring or under a variation clause

A contract/framework *may* change without re-advertisement in OJEU where:- **A.72(2)**

- minor changes that do not affect its nature *and* do not exceed the relevant EU threshold *and* do not exceed 10% (services/supplies) or 15% (works) of the initial value
- minor changes that do not affect its nature and are explicitly provided for in review or option clauses in the procurement documents
- A contract/framework *may* change without re-advertisement in OJEU where a new supplier replaces the original supplier as a result of corporate restructuring, merger, acquisition or insolvency provided this does not involve other 'substantial' modifications' – **A.72(1)(d)**

A contract/framework *may* be modified without re-advertisement in the OJEU where:

- additional works, services or supplies that 'have become necessary' where a change of supplier would not be practicable (for economic, technical or interoperability reasons) and would involve significant inconvenience or substantial duplication of costs
- The change/modifications of the contract must be limited to 50% of the original contract, but the sum total of all successive modifications do not have to be kept within 50% limit
- the change that arises is unforeseeable by a 'diligent' authority, provided these changes do not affect its nature and value is less than 50%
- in these two cases the authority must publish in OJEU a 'Notice of modifications of a contract during its term'

Termination of contracts

- Authorities must include in contracts a condition that allows, but does not require, termination where
- the contract has been 'substantially' modified, constituting a new award *or*
- the Court of Justice of the European Union has decided that the contract should not have been awarded because the authority committed a serious breach of its obligations *or*
- the supplier should have been excluded on mandatory exclusion grounds (e.g. as a result of conviction for corruption)

Works v. Services

Definition of Public Works Contracts

Legislative References – EU Directive 2014/24/EU Public Sector

Article 1 (6) and (7) defines 'Public works contracts' ;

6) 'public works contracts' means public contracts having as their object one of the following:

- (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;
 - (b) the execution, or both the design and execution, of a work;
 - (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;
- (7) 'a work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;

Please consult the Directive for the list of activities referred to in this Article.

Definition of Public Supply and Services Contracts

Legislative References – EU Directive 2014/24/EU Public Sector

Article 1 (8) and (9) defines 'public supply and services contracts' ;

(8) 'public supply contracts' means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations;

(9) 'public service contracts' means public contracts having as their object the provision of services other than those referred to in point 6;

(as public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a 'public service contract' if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract

The distinction between Part A Priority & Part B Residual services has now been abolished in the 2014 PS Directive

Legislative References – EU Directive 2014/24/EU Public Sector - Article 10

This distinction was always stated as being a temporary measure. However, Article 10 now sets out a list of services that are totally exempt from the Directive. These include employment contracts, public transport contracts and legal services in relation to litigation.

New "light touch" regime for certain services

Legislative References – EU Directive 2014/24/EU Public Sector - Article 74

Although the heading of Article 74 refers to social and health care services, the actual list is set out at Annex XIV. The list includes legal services, postal services etc. Finally the services have to be above a threshold of €750,000.

Approval of Procurement Unit required if Service Areas wish to consider exceptions to the Tendering Guidelines

Negotiated procedure without prior advertising;

Open or restricted tendering should be used for all purchases within their limits, unless there is a valid reason for not so doing.

In very exceptional and limited circumstances, Contracting Authorities may negotiate, without advertising, the terms of the contract directly with one or more parties under Article 32 of the new Directive.

Legislative References – EU Directive 2014/24/EU Public Sector - Article 32

The main instances where this exceptional procedure may be used are:

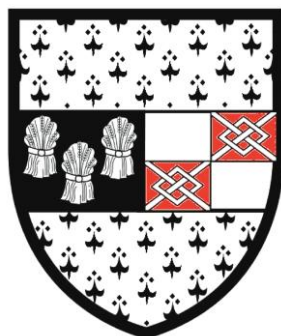
- when the initial tendering procedures have not attracted appropriate tenders (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially)
- where for technical or artistic reasons there is only one possible supplier
- in cases of extreme urgency where circumstances are unforeseen and are outside of the Council's control
- extensions 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 procedure

Service Areas should consult with the Procurement Unit in any case where an exception to the tendering guidelines are being considered by them. The approval of the Procurement Unit will need to be obtained if the exceptional case is to be proceeded with.

The reason why a competitive process was not deemed appropriate by a Service Area in a particular case shall be recorded as part of Chief Executive/Delegated Officer's Order.

Candidates must always be treated fairly and objectively in the subsequent negotiations.

For further information, please refer to Appendix K.



Kilkenny County Council

PROCUREMENT PROCEDURES

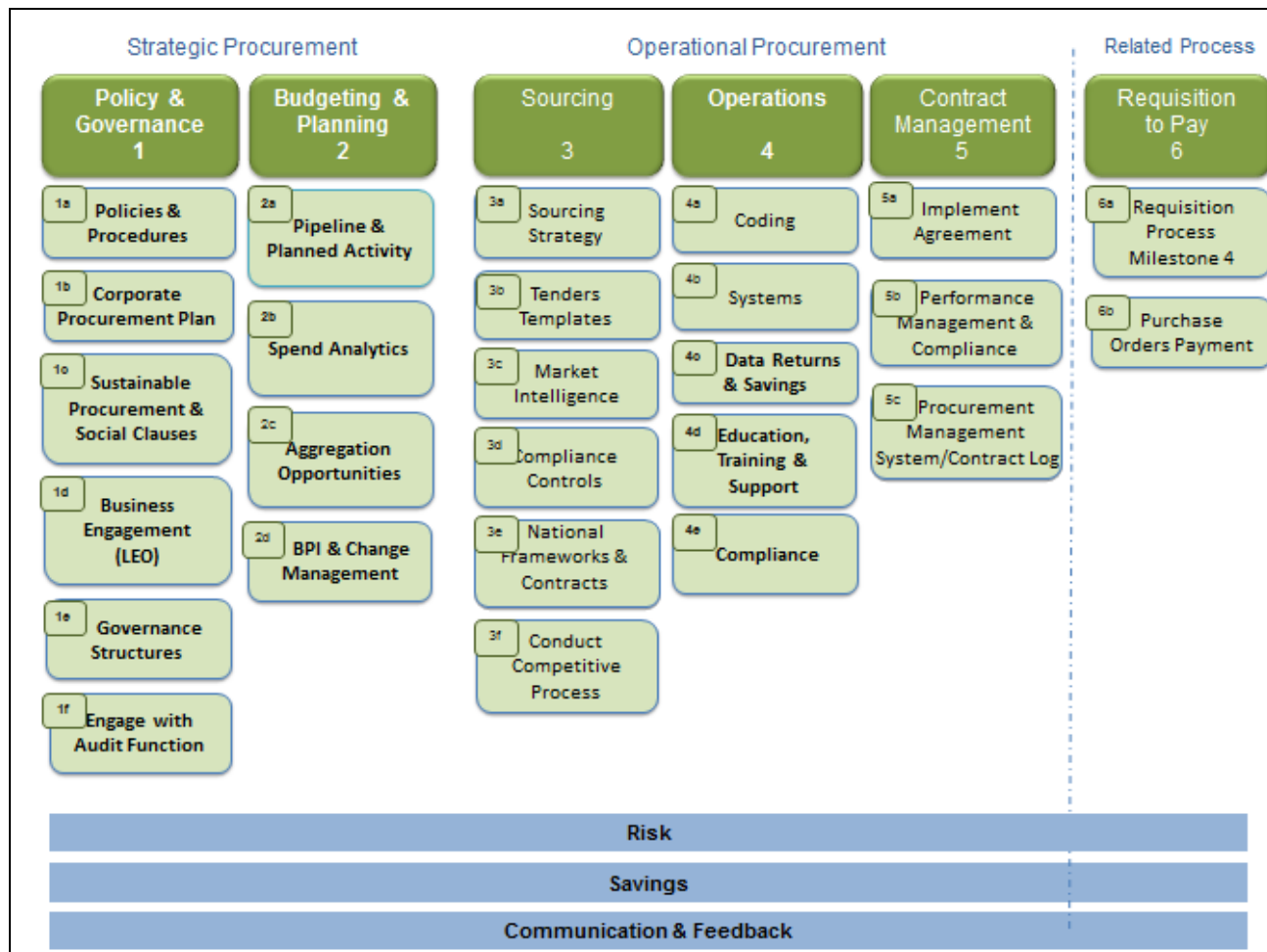
APPENDICES

7th Edition

Effective from November 2016

APPENDIX A – PROCUREMENT UNIT – FUNCTIONS AND OBJECTIVES :

The functions of the Procurement Unit in Kilkenny County Council can be broadly divided into Strategic Procurement and Operational Procurement functions as per the chart below:



Procurement can be divided into 5 high level functions covering both strategic and operational procurement, with risk management, communications and savings to be addressed across all areas.

Brief descriptions of the different areas identified above are:

Risk management:

The procurement function has a key role in identifying and managing risks associated with running procurement competitions. The risks will vary depending on the value and nature of the item being procured.

Communications:

An internal and external communications plan is required for the Procurement Unit. For example, the procurement function ensures that procurement information is disseminated within the local authority. They will collaborate with the LGSPC, LGOPC, OGP and other national organisations; as well as liaising with tenderers and suppliers. Procurement Unit also engages with the broader community, specifically the business community in partnership with the Local Enterprise Offices.

1. Policy and Governance:

Procurement activities are regulated by EU, national and local policies and regulations. The procurement function is responsible for developing, directing and guiding public procurement policy and procedure within the local authority. This includes keeping up to date on changes, and ensuring that staff carrying out procurement competitions adhere to these obligations. The procurement function is in a position to guide the local authority on the inclusion of secondary policies in procurement competitions (e.g. green procurement, social clauses). The procurement function also has a role in engaging with national bodies on the development of national procurement policy.

2. Budgeting and Planning:

A strategic approach to spend analytics should deliver value for money for local authorities. For example, with visibility of the requirement of all sections within each local authority procurement officers are in a position to use a collaborative approach. To facilitate this, the Procurement Unit undertakes tasks such as maintaining an organisation contracts log and tender tracker, carrying out an analysis of spend within the local authority and engaging with the LGSPC and OGP to develop collaborative approaches to procurement. Procurement Officers also identify and lead on areas for procurement process improvement in the organisation.

3. Sourcing:

The procurement function is involved in sourcing goods, services or works required by a local authority. A number of different tasks are incorporated from deciding a sourcing strategy, devising tender templates and notification letters required to conduct a competitive process.

4. Operations:

The Procurement Unit has to have suitable processes and systems in place to carry out its function – including product coding, contract logs and tender tracker and tools for recording savings. The Procurement Unit is also responsible for providing support and training for local authority staff with procurement responsibilities. The procurement function ensures that procurement competitions are carried out in line with EU Directives, regulations, legislation, policies and procedures. The procurement function is involved in promoting procurement best practice in the local authority.

5. Contract Management:

Once a competitive process is completed the Procurement Unit retains a role in contract management along with the relevant section, for example by ensuring that authorized performance bonds are submitted for relevant works contracts, implementing contract agreements, performance management and maintaining a record of all local contracts.

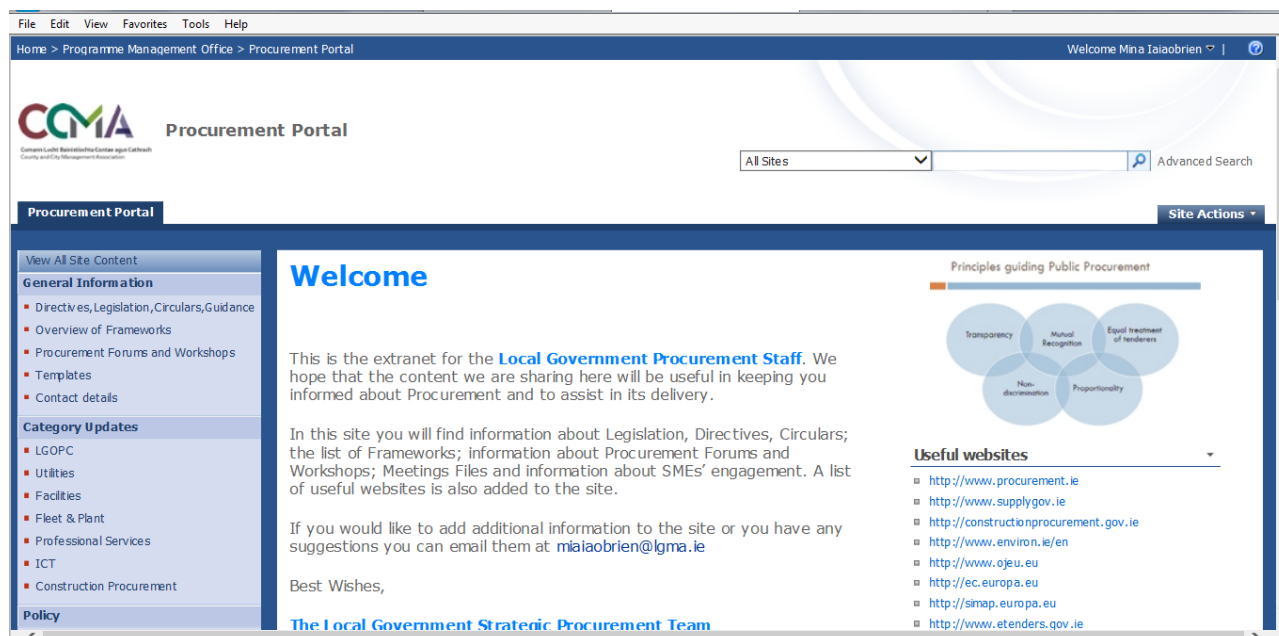
6. Requisition to Pay:

The Procurement Unit enhances control on spend that is compliant by involvement in the requisition process and purchase orders payment.

APPENDIX B – PROCUREMENT INFORMATION SOURCES :

Procurement Unit to make contact on behalf of KCC Service Areas.

The Procurement Unit has established contacts in the OGP, DPER AND LGMA/LGSPC. It is KCC policy that all queries should be brought to Procurement Unit who will respond to the Service Area.



In certain cases, the responses received from our contacts may be of relevance to a number of Service Areas and these will be circulated to the relevant Service Areas.

Contact points in the Office of Government Procurement :

www.procurement.ie

Tel: 076 100 8000

E-mail: support@ogp.gov.ie

E-mail: construction@per.gov.ie - Public Works Queries Only

i. Guidelines and Directives

The Public Procurement guidelines are available on the eTenders website www.etenders.gov.ie (under Guides/General Procurement Guidance) and on the Department of Public Expenditure and Reform website www.gov.ie/dper under Publications.

EU Directives are available on <http://europa.eu.int/eur-lex/en/index.html>, or the EU public procurement website <http://simap.eu.int> under 'Rules and Guidelines'. General information on EU public procurement issues is also available on this website.

Principal EU Directives

- Public Authorities Contracts Sector 2014/24/EU
- Utilities Directive 2014/25/EU
- Concessions Directive 2014/23/EU
- Remedies Directive 2007/66/EC

Regulations

- European Communities (Award of Public Authorities' Contracts) Regulations 2016
- S.I. No. 130 of 2010 entitled - European Communities (Public Authorities Contracts) Review Procedures Regulations 2010
- Amending Regulations S.I. 192/2015 entitled – European Communities (Public Authorities Contracts) (Review Procedures) (Amendment) Regulations 2015.

Circulars

- Circular IPPP 10/2006 November 2006 - Construction Procurement Reforms
- Circular 6/10 Construction Procurement Reform – the new Capital Works Management Framework (CWMF)
- Circular 05/13 – Procurement of Legal Services
- Circular 13/13 - The Irish Public Spending Code
- Circular 16/13 - Revision of arrangements concerning the use of Central Contracts put in place by the NPS/now OGP
- Circular 10/14 - Initiatives to assist SMEs in Public Procurement
- Circular 01/16 - Revised arrangements re Public Works contracts
- Circular 02/16 – Arrangements for Digital and ICT – related Expenditure

Official Journal of the EU

Online publication of notices is available on www.etenders.gov.ie or <http://simap.eu.int>

The email address of the OJEU for publication of notices is mp-ojs@opoce.cec.eu.int

ii. Some relevant websites:

- Office of Government Procurement – www.procurement.ie
- National Public Procurement website - www.etenders.gov.ie
- EU Public Procurement website - <http://simap.eu.int>
- Irish Government website - www.gov.ie
- General EU website - <http://europa.eu.int>
- Forum on Public Procurement in Ireland - 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 - for Freedom of Information, Prompt Payment legislation.

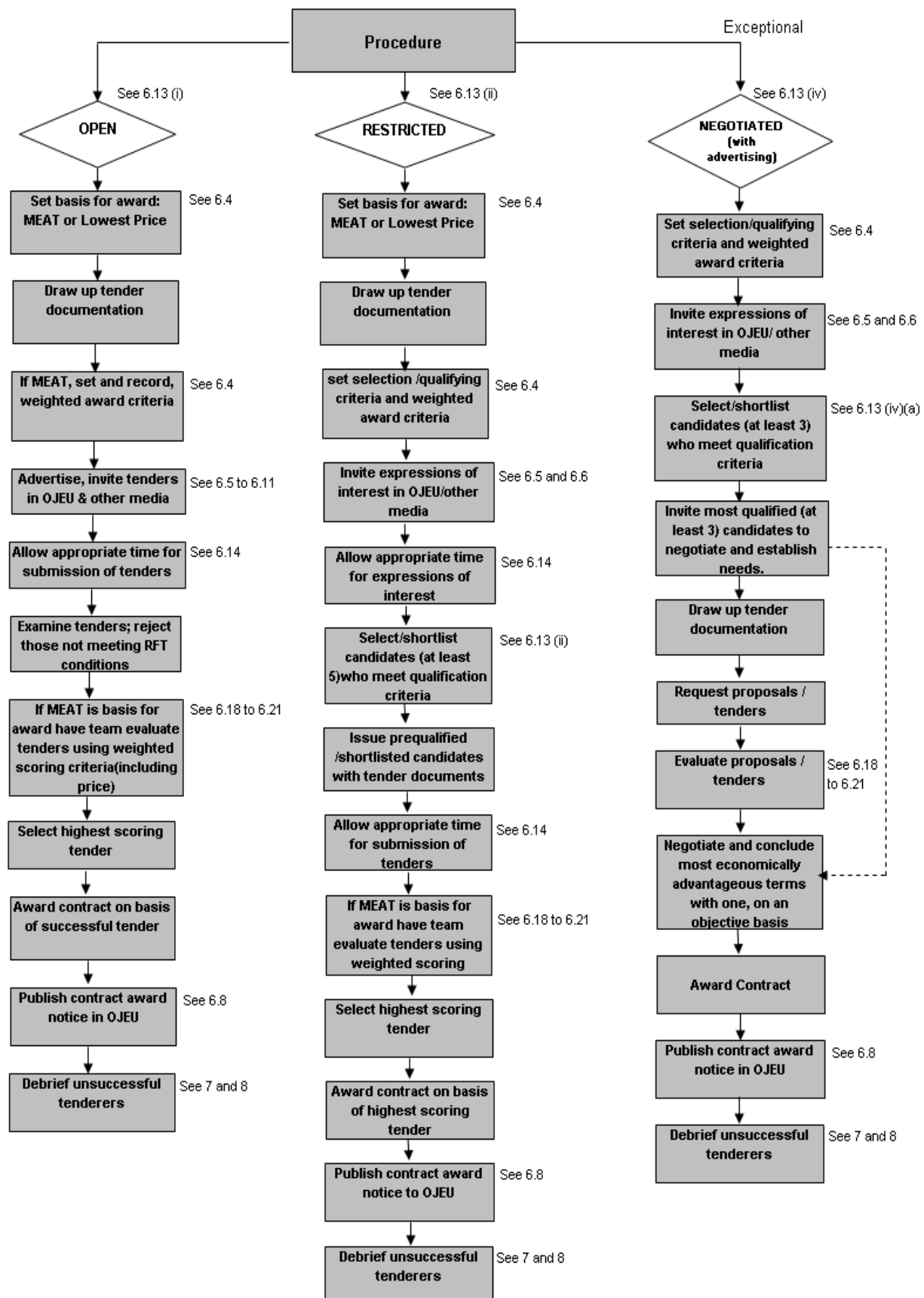
iii. eTenders - Policy and Guidance Documents

As part of the process of encouraging procurement management reform and the corporate procurement planning process, the OGP is committed to putting in place a suite of policy and guidance documents to support improved procurement practices. This series should help those who make strategic decisions on procurement, those who are responsible for developing their body's Corporate Procurement Plan and those who are responsible for implementing these plans.

APPENDIX C – EU PROCUREMENT PROCEDURES:

Steps in conducting a Competitive Process for contracts above EU Thresholds

[for details refer to Public Procurement Guidelines – Competitive Process (Sections 6, 7 and 8). These guidelines are published on the national public procurement website www.etenders.gov.ie].



i. **Open Tendering – Above EU Threshold**

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.

Time Scales

Open Procedure	Normal	where the contracting authority accepts electronic tenders	where the contracting authority published adequate PIN	if urgent – under new accelerated open procedure
The minimum time limit for receipt of tenders from despatch of notice	35 days	30 days	15 days	15 days min.

ii. **Restricted (2 stage) Tendering – Above EU Threshold**

This is a two stage process, whereby any party may request to participate.

As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU or e-tenders website and expressions of interest are invited from potential tenderers, seeking information on the level of financial, economic and technical expertise and capacity.

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.

Time Scales

Restricted Procedure	Receipt of Expression of Interest	Receipt of Tenders
Normal	30 days	30 days
Electronic Tenders	30 days	25 days
With adequate PIN	30 days	10 days

Where genuine urgency renders these time limits impracticable, shorter time-limits may be applied under the new Accelerated Restricted Procedure 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.

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 previous experience, expertise and competency of candidates set out in the new Directive (Articles 57 to 64 of Directive 2014/24/EU Public Sector) 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. Short-listing 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 twenty.

In all open and restricted procedures negotiations with candidates or tenderers on fundamental aspects of contracts, variations of which are likely to distort competition and in particular, on prices are ruled out. Any clarification or supplementing of tenders shall be given to all prospective tenderers.

iii. Other Tendering Procedures

Competitive Dialogue. This is a procedure, restated in Article 30 of Directive 2014/24/EU Public Sector. It is used in situations where:

An authority cannot objectively define the technical means in terms of performance or functional requirements capable of satisfying their needs or objectives

Or

cannot objectively specify the legal / financial makeup of a project e.g. public private partnerships (PPP's).

Contracting authority conducts a dialogue with the candidates with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

The contracting authority

- Is allowed to discuss all aspects of the contract with each candidate
- Must not use to restrict or distort competition
- Must not alter fundamental aspects of the offer
- Must not impose substantial new requirements on successful tenderers

How it works

The contracting authority

- Publishes contract notice/advertisement – specifying needs, objectives and performance requirements
- Consults with pre-qualified candidates to identify and define best means to satisfy needs
- Grants confidentiality and equal treatment to all candidates
- May allow the procedure to take place in successive stages to reduce numbers of solutions, by applying award criteria set out in notice or descriptive document to solutions
- Ends dialogue when it has identified the solution(s) capable of meeting its needs
- Requests tenders (at least three) on the basis of identified solution(s)
- Applies award criteria from notice/advertise
- Selects the most economically advantageous tender

Competitive procedure with negotiation. This is an exceptional procedure, which may be used only in the limited circumstances set out in Articles 29 of the new Directive 2014/24/EU Public Sector

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 (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.

Selective tendering or a pre-selection tendering process is only permissible subject to the approval of the Chief Executive or his/her Deputy.

Innovation Partnership – this is a new concept introduced in the new Directive 2014/24/EU Public Sector for contracting authorities to develop long-term innovation partnerships with key suppliers for complex and innovative market solutions to specific problem areas.

Legislative References – EU Directive 2014/24/EU Public Sector – Preamble Paragraph 49

(49) Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase. The innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation and contracts should be awarded on the sole basis of the best price- quality ratio, which is most suitable for comparing tenders for innovative solutions. Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary 'market-pull', incentivising the development of an innovative solution without foreclosing the market.

Contracting authorities should therefore not use innovation partnerships in such a way as to prevent, restrict or distort competition. In certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects.

APPENDIX D - REQUEST FOR TENDERS:

i. Format of Request for Tender (RFT) Documents

RFT's generally contain the following sections:

- Background and summary of requirements
- Financial and invoicing arrangements
- Contact details for further information and query handling – as well as rules relating to same
- General instructions to tenderers in relation to submission of tenders
- Required format of tender responses
- Specifications (comprehensive and unambiguous descriptions) of the services, goods or works required.
- Conditions applicable to the contract including, for example, time for delivery, payments schedule, liability for defects, insurance provisions, settlement of disputes etc
- Examination and evaluation of tenders - the RFT must state all of the criteria being applied in the award process, giving the relative weighting for each criterion. If it is not technically possible to indicate criteria weightings in advance, they must be listed in descending order of importance.
- Obligations and restrictions imposed by the contracting authority

ii. Tips for Request for Tender (RFT) Documents

- Start with the Request For Tender (RFT) sample on the etenders website at www.etenders.gov.ie. If you are unfamiliar with writing tender documents, this is a good place to start, as the sample acts as a guide to writing the document.
- Be very clear in what you are looking for to ensure that you get tenders that fit your needs. Make sure you set out under what criteria the tenders will be evaluated.
- Avoid using ambiguous phrases that maybe misinterpreted by the suppliers, such as "quality of tender" in the award criteria, and address in the RFT any possible questions that may arise. If appropriate, ask someone not involved in the project to read the documentation and ensure it is clear. You will have a better chance of getting what you want if you are very specific in stating exactly what you will measure (e.g. the extent to which the tender meets the technical requirements specified in a certain paragraph, etc.)
- It can be helpful to include a return check list (with tick-boxes) for suppliers so that they can be sure that they have satisfied all requirements mentioned in the documents. This can also be helpful to the buyer in summarising what they need from suppliers.
- Include any timescales associated with the project early in the notice. This includes the latest date for submission of queries relating to the project, the closing date and time for submission of tenders, etc. Many buyers only state the closing date; however, suppliers often like to know when the evaluation might be completed or when the contract is likely to take effect.
- In some projects, it may be useful to indicate a budget for the project in the RFT. This can give potential suppliers an idea of the range of the project, and they can tailor their submissions to meet this budget. For example, in an advertising tender, you might want to

see how much of your budget will be used on actual advertising and how much will be charged in the management fee.

- If possible, upload any tender documentation that may help clarify the tender on to the etenders website. This will reduce the need for contracting authorities to send any relevant documentation manually at a later date.
- When uploading any tender documentation, ensure that the size of the documents is kept small. This will allow the documents to be accessed by those on slower internet connections, such as dial-up. It is also useful to consider using PDF documents, which are harder to alter than standard text documents.
- Contracting authorities may also include a statement in the RFT prohibiting the RFT being passed to a third party without the authorities' permission. This is particularly relevant in the case of tenders advertised and documentation made available on the etenders website. Candidates who register with the site and download tender documents will automatically receive any clarifications or additions to the original documentation. If the documentation is passed on by a third party to a supplier not registered with the site, that supplier may miss out on important additional information.



APPENDIX E – FRAMEWORK AGREEMENTS:

Legislative References – EU Directive 2014/24/EU Public Sector – Article 33/Regulation 33 of 2016

These agreements allow public bodies to procure goods and/or services from reliable suppliers on an ongoing basis without having to go through the full procurement process each time. Framework agreements are an umbrella type agreement which establishes the terms of future contracts. per Article 33 of new Directive 2014/24/EU and Regulation 33 of the 2016 Public Sector Regulations.

Accordingly, the key features of frameworks are:

- An Agreement – between one or more contracting authorities and one or more suppliers – which sets out the terms for future contracts to be awarded under the framework – note that if all terms are not established, then further agreement will be required.
- Specific rules are laid down in the Regulations regarding the award of the framework agreement and the subsequent award of contracts under the framework.
- Framework agreements must be for a specified period and must not exceed 4 years unless in exceptional circumstances.
- Single Operator Frameworks are generally used for standard products or services or when the framework member can be used for further contracts relating to the project.
- Multi-Operator Frameworks can be used to keep competition at a high level or to ensure access to capacity to deliver any requirements.
- The competitive process in Multi-Operator Frameworks can be based on an initial contract (which should be representative of contracts to be awarded under the Framework or based on rates for works or supplies or based on a mock / sample contract).
- There must be at least 3 suppliers in multi-supplier frameworks - unless there are an insufficient number of candidates or tenderers.
- Contracts may be awarded by applying the terms set out in the framework e.g. Cascade Method where prices/scope of work is well defined – Award to framework member ranked No 1 and if they cannot deliver, No.2 is chosen and so on - or by conducting a mini-competition between all members of the framework capable of delivering the contract. It is not permitted to simply rotate the work among the framework members.
- However, any reasonable and functional way of allocating the orders arising such as cascade with a percentage allocation or simple percentage allocation can be used provided it is indicated in the original RFT. Advice from the Council's Procurement Unit should always be sought on this matter.
- The award of the Framework agreement can be used in conjunction with open, restricted, competitive dialogue and negotiated procedures; furthermore it must be determined by applying award criteria i.e. MEAT or lowest price or ultimate cost and the normal rules of procedure must be followed up to award of contracts based on the framework (i.e. advertising, timelines, evaluation, award notice etc.)

The rules on Frameworks do not apply to Annex XIV (e.g. legal services) and all purchases under the framework must be aggregated in determining the contract value for threshold purposes.

Minor changes to rules for frameworks – new PS Directive 2014

Legislative References – EU Directive 2014/24/EU Public Sector – Article 33

- The new Directive makes it clear that only contracting authorities identified in the OJEU notice may use the framework and that certain contracts awarded may exceed the term of the framework

- Where a framework allows the authority a choice between applying the terms of the framework or re-opening competition within the framework, the choice must be made by applying objective criteria set out in the procurement documents
- Authorities take legal responsibility for applying the rules set by a Central Purchasing Body when using their frameworks to award contracts

Contracts v Frameworks

Contracting Authorities can award Contracts for defined requirements or Framework Agreements – a mechanism to award future contracts of a repetitive nature without having to advertise individually. In both cases, they must be established and concluded in accordance with the advertising and procedural rules of the various EU Directives.

Panels v Frameworks

Panels are only suitable for below EU Threshold situations. Frameworks apply to above and below EU Threshold situations. Panels are always open to new entrants while parties are fixed once framework is established. Panels allow the contracting authority to create a tender list while frameworks provide the authority with a “ready made” tender list once established.

Method of selection from a tender list may be by application of selection criteria, rotation, random selection or all three. Method of award of contract in frameworks is either on the basis of the original tenders submitted or on foot of mini-competition between all those admitted to the framework.



APPENDIX F – NATIONAL PROCUREMENT PROCEDURES:

i. National Procurement Procedures

Where the Public Procurement Directives do not apply, Irish public bodies are required to follow the Green Book and Public Procurement Guidelines Competitive Process – Supplies and Services, both published by the Department of Finance.

The Green Book contains specific rules regarding

- The selection of consultants (except management consultants)
- Property transactions
- The purchase of goods
- Planning and design contests and
- Tendering procedures.

Rules for the engagement of construction consultants are contained in the Department of Finance Circular 11/87, which is appended to the Green Book. Guidelines for the engaging of management consultants are established by the Department's "Engaging Consultants: Guidelines for the Civil Service (1999)".

New Irish guidelines for supplies and services were introduced in 2004 when the Green Book was supplemented by the Department of Finance's "Public Procurement Guidelines Competitive Process – Supplies and Services". Those guidelines refer only to the procurement of goods and services (excluding construction related services). The basic principle is that public bodies should always use a competitive process when purchasing goods or services.

ii. Department of Finance Circular 10/10

Circular 10/10 was issued on the 13th August 2010. It is titled "Facilitating SME Participation in Public Procurement - Guidance for Public Contracting Authorities".

It was replaced by DPER Circular 10/14.

iii. DPER Circular 10/14

Circular 10/14: Initiatives to assist SMEs in Public Procurement

1. In the context of the reform of the Public Service and the establishment of the Office of Government Procurement, it has been decided to update and strengthen measures aimed at facilitating SME participation in Public Procurement in order to reinforce their application across the public sector. This circular therefore replaces Department of Finance Circular 10/10 and applies to all public sector bodies. The Capital Works Management Framework (CWMF) suite of guidance, standard contracts and generic template documents will continue to apply to works and works related services as set out in Circular 06/10. They are available to download from the website www.constructionprocurement.gov.ie.

2. The Programme for Government identified the role public procurement can play as an instrument to support innovation and allow greater access for SMEs, including Micro- Enterprises, to the public sector market. As part of the Public Service Reform Plan, the Government established the Office of Government Procurement (OGP) to drive a new consolidated and integrated approach to public procurement. The OGP is committed to ensuring that SMEs are fully engaged with public sector procurement and the opportunities presenting. In conjunction with the Department of Jobs,

Enterprise and Innovation, the OGP has set up a high level group on SME access to Public Procurement. The focus of this group is to develop and monitor strategies for SME access to public procurement. The group also has regard to the Government's Action Plan for Jobs and specifically those actions aimed at maximising procurement opportunities for SME in the public sector.

3. The guidance in this circular is designed to further enable SMEs in competing for public contracts. This is in line with EU policy on increased SME participation in public procurement. At all times this guidance is to be implemented by buyers in accordance with the principles of EU law, and in a manner that is fully compliant with EU public procurement law and national guidelines. All public sector procurement contracts within the EU, irrespective of value, are covered by the principles set out in the Treaty on the Functioning of the European Union (TFEU) of non-discrimination, equal treatment, proportionality and transparency. Regulations, circulars, guidelines and standard forms in relation to procurement of goods and general services are available on the OGP website at: www.procurement.ie and for construction works and related services at www.constructionprocurement.gov.ie.

4. As a general principle, the guidance sets out positive measures that buyers should take to promote SME involvement in public sector procurement.

4.1 Market Analysis

Buyers should undertake market analysis prior to tendering in order to better understand the range of goods and services on offer, market developments and innovation, what commercial models are available, the competitive landscape, and the specific capabilities of SMEs etc. Initial consultation with the market should not have the effect of precluding or distorting competition. To ensure transparency, any information provided by the buyer during this process should be circulated to any potential tenderer.

The OGP has established Category Councils for 16 categories of goods and services bought by the Public Service². Details of the categories are set out in Appendix 1. The role of each Category Council is to develop commercial strategies for sourcing goods and services in their category in line with the needs of customer organisations and in the context of obtaining best value for money. Each council is made up of members who are nominated by the departments and agencies that are the main users of the category. This initiative strengthens the professional approach that Government is now attaching to public procurement. Buyers can contact the Category Council lead (support@ogp.gov.ie) to understand how their needs align to the Category Council strategy or may be met by an existing framework or contract.

4.2 Sub-dividing Contracts into Lots

The sub-division of contracts into lots facilitates access by SMEs, both quantitatively (the size of the lots may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely to the specialised sector of the SME). Lots may be also decided on a geographic basis, a work package basis, an internal organisation structure basis, etc. Buyers should, where reasonable and without compromising efficiency and value for money, consider breaking contracts into lots, enabling smaller businesses to compete for these elements. Buyers must consider the aggregate value of the lots required to deliver a single national requirement when deciding whether a contract needs to be advertised on eTenders and in the Official Journal of the European Union (OJEU).

4.3 Consortium Bids

SMEs are encouraged to consider using consortia where they are not of sufficient scale to tender in their own right. Template tender and contract documents allow for consortia to tender for public procurement opportunities. Suppliers considering forming a consortium to bid for public sector opportunities should seek legal advice in relation to the structure and operation of the consortium

to ensure that it is fit for purpose and complies with their legal obligations particularly in relation to competition law.

4.4 Less use of “restricted” tendering and greater use of “open” tendering

Buyers should use open tendering for contracts below €134,000 (exclusive of VAT) in the case of advertised contracts for general goods and services. In the case of advertised contracts for works and works related services, separate guidance in relation to thresholds will issue shortly. Above these levels buyers should decide which tendering procedure is most appropriate in each case. This provision will continue to be kept under review in the light of its impact on operational efficiency, fairness to SMEs and value for money.

4.5 Capacity Requirements

Buyers should ensure that any capacity levels set for candidates/tenderers are relevant and proportionate to the circumstances of a particular contract. For example, where experience is specified as a qualifying or competitive criterion, it should not be framed in such a way as to unduly narrow a field of eligible tenderers by specifying an exact work type or industry. Buyers may consider the previous experience of individuals who have formed a start-up SME that has yet to establish a track record as a company. Documentary evidence of financial capacity to undertake a project should not be sought by buyers early on in the procurement process. Instead candidates/tenderers should declare that they meet the minimum standards required by the buyer and will produce the necessary documentation (e.g. bank statements, audited accounts, proof of professional indemnity, etc.) when provisionally short-listed in a restricted procedure or when chosen as the successful tenderer in an open procurement competition.

The CWMF for works and works-related services includes a suite of standard prequalification questionnaires and standard declarations as well as standard Instructions to Tenderers and Forms of Tender. These are available to download at www.constructionprocurement.gov.ie under Pillar 2/ITTs; Pillar 3/Questionnaires. Associated guidance on Minimum Standards for Pre-qualification are available under Pillar 4/Guidance.

4.6 Turnover requirements

Buyers frequently use the ratio “company’s turnover to contract value” as a measure in deciding whether a business has the financial capacity and strength to perform a contract. In assessing the financial capacity of a supplier to do a job, buyers, as a matter of general policy, should not for routine (e.g. low-value, high volume) goods and services competitions set company turnover requirements at more than twice the estimated contract value. This is in line with revised EU rules and is designed to support SME involvement in public procurement. The turnover limit for Framework Agreements should be set in general vis-a-vis the likely size of individual contracts or drawdowns in the framework. It is appreciated that for non-routine services and goods competitions it may be necessary to apply higher turnover requirements. The CWMF for works and works-related services includes detailed guidance on Minimum Standards for Pre-qualification of Works and Consultants, which are available to download at www.constructionprocurement.gov.ie under Pillar 4/Guidance.

4.7 Innovation

The Government recognises that creative ideas for new and innovative solutions and products often come from SMEs. Buyers should, where possible and appropriate, encourage new and innovative solutions by indicating in tender documents where they are prepared to accept reasonable variants to the specifications. Alternatively or in addition, requirements may, for example, be set out in terms of a deliverable which allows tenderers to provide creative and innovative solutions. This output-oriented approach may enable buyers to concentrate on the functional requirements of a product they would like to have but leaves tenderers the freedom to develop new, innovative goods or services which might better correspond to the actual need of the buyer. SMEs can contact the Category Councils (support@ogp.gov.ie) identifying innovative offerings that they can offer.

4.8 Framework Agreements

Breaking framework agreements into lots can be an effective way of opening up opportunities to SMEs. Depending upon requirements, framework agreements can be divided into lots on the basis of geography, specialism and/or value. This can encourage a range of SMEs to bid for business appropriate to their capacity, specialism and location.

5. eTenders assisting SMEs

5. The OGP will continue to promote the optimum use of the eTenders portal as a tool for facilitating the involvement of SMEs in public sector procurement. The use of electronic tendering aligns to the Government's e-commerce strategy and reduces costs for buyers and suppliers. It also fulfils new EU obligations in relation to data capture and measurement, and creates a useful audit trail and enables future proofing and streamlining.

5.1 Advertising of contract opportunities to promote SME participation

Buyers continue to be required to advertise all contracts for supplies and services with an estimated value of €25,000 (exclusive of VAT) and upwards on www.etenders.gov.ie. The advertising threshold for works and works related services remains at €50,000 (exclusive of VAT). As before, buyers should extend the use of the eTenders website to include tenders for low value purchases where possible. Buyers should be aware that for supplies of goods and general services that the eTenders system supports quick quotes for tenders under €25,000 (exclusive of VAT). This facility is available in an efficient, quick and simple manner utilising data from registered SMEs under a multiplicity of categories. The running of a minicompetition from an existing framework on eTenders is also a quick and easy process to follow.

5.2 Publication of Contract Award Notices

Buyers are required to publish all Contract Award Notices over €25,000 on the eTenders website on completion of the award. This is a separate step to publishing on the OJEU and will facilitate measurement of SME participation in public procurement. This provision will be effective from 1 August 2014.

5.3 Registration and Email Alerts

OGP encourages suppliers to register with accurate company information on www.etenders.gov.ie to ensure maximum exposure to tendering opportunities within their sector. Email alerts are provided to registered suppliers in relation to procurement opportunities arising in their respective areas as determined by the Common Procurement Vocabulary (CPV) codes they have selected for their company profile on eTenders. Registered suppliers should critically analyse the range of CPV codes attaching to their registration to maximise the extent of e-mail tender opportunity alerts and to ensure they are selected as part of a relevant quick quote. The more company information entered, the more exposure a supplier may have to opportunities as buyers use eTenders to search for relevant suppliers for quick quotes.

5.4 Supplier Data Bank

In relation to goods and services, buyers should encourage suppliers to upload their business details (tax clearance, insurance, health and safety and financial data) on the eTenders system. This data will automatically reload when the supplier revisits the site to tender for other contracts. This facility is aimed at easing the administrative burden of suppliers competing in multiple tenders.

5.5 PINs

Buyers should communicate long term purchasing plans to the market as early as possible by publishing Prior Information Notices (PINs) on the eTenders website. The OGP recognises that communicating long-term procurement plans to the market, gives the market time to react and develop solutions. This is particularly important in the case of large and complex contracts, where SMEs might need time to find partners for joint or consortia bidding. PINs reduce the time required for responses when publishing relevant RFTs.

5.6 Requests for Tenders/Expressions of Interest (RFTs/ EOIs)

Buyers should publish RFTs or EOIs on eTenders for direct downloading by suppliers. Standard Instructions to Tenderers and Forms of Tender for works and works-related services are available as part of the CWMF, and are available to download at www.constructionprocurement.gov.ie under Pillars 1 and 2.

5.7. Online submission of Tenders

For goods and services buyers should promote the online submission of tenders by suppliers as the norm as a means of simplifying the tendering process and reducing the costs of tendering.

6. Insurance

6. Buyers should only require such types and levels of insurance which are proportionate and reasonable in the context of the particular contract. Factors which may be considered by buyers for the supply of goods and general services should include: the risks involved, the value of the contract and the subject matter of the contract. The required insurance coverage will vary from contract to contract as will the style of insurance cover available to suppliers, particularly in relation to professional indemnity risks. Any requirement for insurance cover should be signalled in the tender documentation. Tenderers should be asked to declare that they can obtain such cover but should not generally be required to have it in place at the time of tendering. Documentary evidence of the required insurance will only be required when a candidate has been identified as a successful tenderer in a procurement competition. In carrying out competitions for the acquisition of routine low-to-medium-risk goods and services buyers should use Appendix 2 as a guide to assessing insurance level requirements. For bespoke and or complex competitions or if the buyer has concerns with regard to any aspect relating to subject matter of the procurement then buyers (covered by the State Claims Agency) should contact the State Claims Agency for assistance in setting appropriate insurance levels. In addition other tenderers not covered by the State Claims Agency are asked to contact their risk management department or relevant insurance advisor to determine the appropriate levels of cover. Guidance for works and works related services are available on www.constructionprocurement.gov.ie under Pillar 4/Guidance Notes on Minimum Standards for Pre-qualification for Works Contractors and Construction Service Providers.

7. Life Cycle Costs

7. The EU public procurement directives offer the possibility to award contracts either on the basis of the lowest price or on the basis of the most economically advantageous tender (MEAT). Where the award of contract is based on MEAT, the buyer, where appropriate, should take into account not just the current but the whole life-cycle costs. This allows buyers to take account of various elements relating to the subject-matter of the contract, including, for example quality, technical merit, functional characteristics, running costs, costeffectiveness, after-sales service and technical assistance, etc. Where appropriate buyers should seek full life-cycle costing solutions in their tender documents.

8. No Charging for Tendering Opportunities

8. Buyers must not use arrangements which involve candidates/ tenderers having to pay so as to access competitions for public contracts. Such charging would represent a particular problem for SMEs. This does not preclude buyers from seeking a deposit for hard copies of tender documents which is refundable upon receipt of a bona fide tender.

9. Feedback

9. In order to prepare for future bids, it is very helpful for an unsuccessful tenderer to see which aspects of its bid were considered strong by a buyer and which aspects were considered weak. For contracts above EU thresholds for which advertising of contracts in the Official Journal of the EU is obligatory, buyers are required to give appropriate feedback to companies who have participated in a public procurement competition. For all other contracts buyers are strongly encouraged to provide written feedback as a matter of good practice.

Enquiries

Any queries in relation to the operation of this circular regarding goods and general services can be addressed to support@ogp.gov.ie. Queries in relation to works and worksrelated services should be emailed to: construction@per.gov.ie. Queries in relation to specific central procurement frameworks should be channelled through www.procurement.ie.

APPENDIX G – PRINCIPLES REGARDING FORMULATION AND DISCLOSURE OF AWARD CRITERIA ETC:

This appendix sets out general procurement principles regarding the duty of transparency (and of equal treatment) and the necessity to disclose award sub-criteria and/or other underlying marking schemes in tender documents.

It is necessary, arising from judicial comment in a recent procurement legal case *RPS v Kildare County Council, High Court 2015* regarding the award of an above EU Threshold consultancy contract, to re-state basic principles in this area.

- The award criteria must be formulated, in the contract documents or the tender notice, in such a way as to allow all reasonably well-informed and diligent tenderers to interpret them in the same way – see *SIAC Construction Ltd v County Council of the County of Mayo (2001)*
- The award criteria must be drawn up in a clear, precise and unequivocal manner to facilitate both tenderers and the contracting authority alike – see *Commission v The Netherlands (2013)*
- The true meaning and effect of the published award criteria is a matter of law for the court – see *Clinton v Department of Employment NI (2012)*
- A failure by the contracting authority to comply with the award criteria (such as changing the award criteria or marking scheme during the tender process without notifying the market) is a breach of the duty of transparency – see *Easycoach Ltd v Department for Regional Development NI (2013)*
- Unlike other allegations made during procurement disputes, such as manifest or obvious error in the tender evaluation process, a breach of the obligation of transparency or equal treatment does not allow for any margin of appreciation on the part of the contracting authority by the court – see *Lion Apparel Systems v Firebuy Ltd (2007)*

In summary,

1. Where there is a breach of the principles of transparency or equal treatment, the contracting authority has no margin of appreciation.
2. Where there has been an error in the evaluation of bids, which involves a degree of judgment or assessment, a contracting authority does enjoy a margin of appreciation.
3. A court will only intervene in a scoring decision made by an evaluator if that decision is so unreasonable that no unreasonable person acting reasonably could have made it.

Judicial criticism of the use of stepped scoring bands in certain tender assessments – *RPS v Kildare Co Co case 2015*

The use of the stepped scoring band approach (whereby a tender response got a specified mark (100% or “excellent”, 80% or “very good”, 60 % or “good” and so on) by reference to the band into which it fell and with no provision for awarding any score between these stepped marks has expanded in use in Irish public procurement practice in recent years.

While this approach is obviously suitable for simple and inexpensive tender competitions and quotations, its deployment here in an above EU Threshold works consultancy tender was criticized by the Court in this case.

The Court held that it was a crude mechanism with great scope for subjectivity and a potential for large gaps in marks which did not necessarily correspond to equivalent differences in quality.

Furthermore, it also led to the Contracting Authority giving the the narrative equivalent to the relevant band in the statutory debriefing letters to the unsuccessful tenderers (phrased in terms of excellent, very good, good etc) and a handful of additional words to indicate comparative quality between the unsuccessful and successful tenderers. The use of such formulaic reasons instead of bespoke reasons by the Council was equally frowned upon by the Court.

It is therefore the Council's policy that the stepped scoring band approach be used only in limited circumstances such as for minor quotations and certain below EU Threshold competitions not attracting cross border interest with the approval of the Procurement Unit.

Implications of recent case *RPS v Kildare Co Co HC 2015* regarding debriefing of tenderers

The recent High Court decision in *RPS v Kildare Co Co HC 2015* seems to cast doubt on the common understanding by contracting authorities that a compliant standstill letter is sufficient to discharge their debriefing obligations.

A possible obligation in this case to enter into a dialogue with unsuccessful tenderers including potentially a debrief meeting is an unwelcome development. It is difficult to reconcile the Court's comments on the debrief meeting and on the normal 30 day limitation period not re-starting with the wording of the Remedies Regulations which state that the limitation period commences when the applicant "knew or ought to have known" of the alleged infringement, particularly when such new information comes to attention of a tenderer at such a debriefing meeting.

It is important to note that the *RPS* case and any implications under the Remedies Regulations only apply to above EU Threshold contracts.

The vast majority of Council tenders will therefore not be affected.

APPENDIX H – TENDERS – LOCAL GOVERNMENT REGULATIONS:

Regulations for the seeking, reception and examination of tenders made by Kilkenny County Council are contained in Section 229 of the Local Government Act, 2001. Corporate governance requires that the process of entering into contracts for the procurement of goods and services be governed by set down procedures to ensure openness, transparency and accountability together with adherence to value for money principles.

iv. Preliminaries and Scheme Approval

The following requirements and principles should be followed before seeking tenders. It is recommended that a briefing document is prepared in respect of all tenders.

A briefing is not required in the following situations:

- hire of machinery from the Machinery Hire List;
- purchase of goods/materials or road making materials from the Annual Tender List;

The decision to prepare a brief is endorsed by the Chief Executive/Director as appropriate.

In association with, and in response to, the proposal above, the Chief Executive/Director of Services prepares written outline details of the requirements, specifying the total estimated cost and proposed funding.

It will be necessary to apply for and obtain whatever preliminary approvals are required from DOEHLG, the Planning Dept. etc.

Confirmation will also be given that there are no reasons, statutory or otherwise, why the project cannot proceed. (Consultants are not involved at this stage unless highly specialised information is required).

The appointment of consultants is a function for the Chief Executive, and consultants can only be retained once their employment has been approved by a formal Chief Executive Order. An appropriate open and transparent procurement process for consultants is to be followed. Clarity is also required regarding the purpose, negotiated fees and the service required.

Procedures for the Engagement of Consultants and calculation of fees shall be based on the following documentation:

Circular Letter BC 5/87

- Department of Finance Circular L11/87
- Department of Finance Guidelines 1994 Edition ('The Green Book').
- Guidance booklet "Guidelines for Engagement of Consultants in the Civil Service" – March, 1999.

Based on satisfying the various requirements of the Local Authorities, the Chief Executive /Director decides by Chief Executive Order/Delegated Order to proceed to the preparation of the Preliminary Report.

Initial documentation is prepared to satisfy statutory requirements, planning approval, environmental impact assessment/statement, interested parties, objectors etc. so that amendments can be included in the detailed design. Decide on whether documentation and/or design will be prepared in-house or by consultant(s) (The hire of consultants is subject to procurement procedures, be this Kilkenny Local Authorities/National/EU, and consultants employment is the Chief Executive's prerogative.)

The Director of Services/ Head of Section prepares a certificate confirming that all is in order to proceed to the Final Report and preparation of Contract Documents stage.

Confirmation will be given, that, among other matters the following are in order:

- Compliance with statutory requirements.
- Funding clarified, and if from an outside body will be agreed in writing by them.
- If costs are being shared that other parties have accepted their responsibilities in writing and their commitment is bonded.
- Tender documents, plans and designs and specifications can be prepared in order to achieve the proposed works.

The final report includes

- Detailed design and specifications together with detailed costings
- Land Acquisitions /CPOs
- Water abstractions/Wayleaves
- Polluter Pays Report (for water services)
- Archaeological surveys and work
- On being satisfied that all requirements are met the Chief Executive/Director by Chief Executive Order/Delegated Order authorises proceeding with the preparation of the contract documents and a final review of total project cost, subject to the approval of the funding authority, if required.
- The above being complied with, the Chief Executive /Director authorises by Chief Executive / Delegated Officer's Order advertising for tenders.

Advertising procedure will follow EU/National/ Kilkenny County Council's requirements using the e Tenders website.

APPENDIX I – FREEDOM OF INFORMATION:

FOI Central Policy Unit Notice No. 5

FOI & PUBLIC PROCUREMENT

1. Public Procurement

The EU Treaties set out the principles of fairness and openness in public procurement. EU Public Procurement Directives establish particular legal obligations on Contracting Authorities where the value of the contract is over specified thresholds. **The guiding principles of openness, fairness and transparency will always apply, however, irrespective of the value of the particular contract.** These principles complement FOI and should guide all policy and practice in the procurement area.

The Freedom of Information Act 2014 means that FOI bodies are not in a position to give guarantees of confidentiality. It is suggested instead that FOI bodies should be proactive in taking measures to enable them to effectively manage the tendering process in an FOI context.

2. Suggested Steps to meet the changed context arising from FOI

General Procurement Requirements

1. Develop a policy setting out the information that the FOI body would wish to routinely release regarding the tender process, outside of FOI (see para. 4 on page 3)
2. Be careful not to introduce bias into the specification of requirements
3. Be specific about the criteria against which applications will be evaluated. Advertisements or tender documents should clearly indicate the following:

(i) qualitative selection criteria (i.e. minimum mandatory requirements) - these might include evidence of financial standing, technical capability, etc.

(ii) award criteria - this may be either the lowest price or the most economically advantageous tender (i.e. using various criteria such as price, period for completion, running costs, technical merit, etc.)

4. Document carefully the decision making process in relation to the selection of the successful tender. Where feasible, allocate weighting to the award criteria.
5. Give good detailed reasons for decisions to unsuccessful tenderers.

In anticipation of FOI requests

1. Inform all applicants at the outset: a) about FOI when issuing requests for tenders or placing advertisements in the newspapers and b) of the FOI body's policy regarding information it intends to release outside of the FOI Act
2. Ask applicants to identify sensitive information, when forwarding material to you
3. Always consult with the person or company concerned before making a decision on an FOI request by a third party

3. Informing companies in advance about FOI:

As many firms are unlikely to be familiar with the FOI Act it is suggested that information about FOI be included in a prominent position on the tender documentation.

FOI bodies can also reduce significantly the work involved in consulting with third parties on FOI requests by alerting persons in advance to its existence. The following standard statement is suggested for inclusion in tender documents:

"(i) The (FOI body name) proposes that the following information relating to this tender competition will be made available on request:

(ii) The (FOI body name) undertakes to hold confidential, any information provided by you in this (tender) subject to:

- (a) disclosure of the information specified at (i) above as liable for release to the public
- (b) the (FOI body name) obligations under law, including the Freedom of Information Act, which came into effect on the effective date by the FOI body.

You are asked to consider if any of the information supplied by you in this (tender) should not be disclosed because of its sensitivity, (*other than that referred to at (i) above*). If this is the case, you should, when providing the information, identify same and specify the reasons for its sensitivity. The (FOI body name) will consult with you about sensitive information before making a decision on any Freedom of Information request received.

If you consider that none of the information supplied by you is sensitive, please make a statement to that effect. Such information may be released in response to an FOI request."

4. What information should routinely be made available outside of FOI?

As a matter of course the following information should be made available:

- (i) *qualitative selection criteria* (i.e. minimum mandatory requirements) - these might include evidence of financial standing, technical capability, etc.
- (ii) *award criteria* - this may be either the lowest price or the most economically advantageous tender (i.e. using various criteria such as price, period for completion, running costs, technical merit, etc.)
- (iii) *detailed reasons to unsuccessful candidates* as to why their application was rejected.

Departments

Departments should note that where contracts are subject to the EU Public Procurement Directives, a written report on each contract awarded should be prepared which must be sent to the Commission at its request (Article 7(3) of 93/36/EC and Article 12(3) of 92/50/EC refer).

5. What about details of the successful tender price?

This is a matter for each FOI body to determine in relation to each individual product or service, having regard to the requirements of the FOI Act. The criteria to be considered may differ depending on the nature of the product or service, the number of companies or persons in a position to submit tender applications in each instance and the point in time in which the FOI request is made. In formulating an approach, Departments must have regard to:

- the extent to which disclosure could prejudice the competitive position of the successful company
- the extent to which disclosure could result in benefits to the Department e.g. resulting in more competitive tenders
- the extent to which disclosure could prejudice the effectiveness of the tender process

Practice favours the release of the successful tender price in most cases.

While given that the FOI Act of 2014 is very new and as such there are no cases in the OIC which have been processed under the new Act to date the old cases may prove to be good reference when considering a request of this nature.

In a decision letter dated 25 June 2001 the Information Commissioner provided a summary of his views regarding records relating to tenders, including pricing. In general, the Information Commissioner takes the view that when a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. He has also taken the view that the public interest favours the release of such information, but points out that exceptions may arise. Further details of the Information Commissioner's approach to tenders are contained in Appendix I

6. Can details of pricing structures, product specification, etc. be protected from third party access under FOI?

Yes. The provision of the FOI Act (section 36) requires that such information be protected where any of the following circumstances apply:

- A. the record contains trade secrets of a person other than the requester concerned, or

B. the record contains financial, commercial, scientific or technical or other information

(i) whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates,
or (ii) could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation,
or

C. information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Where the FOI body wishes to release such information, it may only do so in the following circumstances:

- where the person or company concerned consents to release
- where the information or information of a similar type is generally available to the public e.g. where the Minister would give such information in answer to PQs
- where the person or company has been advised, at the time that the information is received, that the information will be released
- where the department believes that the public interest would be better served by disclosing rather than by refusing to disclose the information. In this instance, the views of the persons or company concerned must be sought in advance of a decision being made. Where the company refuses to agree to disclosure of the information, the matter will fall for decision by the Information Commissioner. Consultation procedures required under the FOI Act are outlined in Appendix II.

7. Compliance with Public Procurement Procedures

The national public procurement website www.etenders.gov.ie should be consulted for up to date public procurement guidance, including guidance on disclosure of information.

ANNEX I



The Information Commissioner has made a number of significant decisions in relation to tenders including **Decision of 31/03/1999 (Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and The Office of Public Works) and Decision of 25/06/2001 (Mr. Mark Henry and the Office of Public Works)**. The full text of these decisions can be accessed at www.oic.gov.ie

In the latter decision, the Information Commissioner provided the following a general summary of his views regarding records relating to a tender competition:-

- FOI bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.
- 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, 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(1)(a) of the FOI Act even following the conclusion of a tender competition.
- Tender prices generally qualify as commercially sensitive information for the purposes of sections 27(1)(b) and (c) of the FOI Act. Depending upon the circumstances, product information can also be considered commercially sensitive under section 27(1)(b).
- 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, published on 13/01/2000).

- Other successful tender information which is commercially sensitive (for example, details of the internal organisation of a tenderer's business, analyses of the requirements of the FOI 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 the goods or services purchased by the FOI body.
- 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. 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.

ANNEX II Consultation Process in Summary

- a careful inspection of the contents of the records involved to determine if they concern the interests of a third party
 - an initial assessment as to whether disclosure in the public interest may be considered
 - if the initial assessment tends towards disclosure in the public interest, identification of the third parties with whom consultation is required in accordance with section 38.
 - if the initial assessment tends towards refusal, consideration of consultation with relevant third parties to determine if they have views on release or disclosure which may not have formed part of your initial decision making.
 - take all reasonable steps to locate and make contact with relevant third parties
 - within 2 weeks¹ (or 4 weeks if the number of records to be considered or the number of third parties to be consulted is such that compliance with the initial 2 week time period is not reasonably possible), notify them in writing of -
 - the request (but not necessarily the name of the requester) and enclosing copies of the records concerned, where possible
 - that the decision maker is considering a preliminary decision to disclose the information and details of the public interest criteria under consideration. Details of the exemption under consideration should also be explained.
 - the third party's right to make a submission within 3 weeks
 - that any submission will be carefully considered before the final decision is made, and
 - the third party will be advised of any decision to release the information
 - that if the decision is to grant the request against the wishes of the person consulted, that person shall have the right to seek independent review of the decision by the Commissioner before any information is released
- ¹ In the FOI Act a week is 5 consecutive working days i.e. the term excludes a Saturday, a Sunday and a public holiday. Cognate words (2 weeks, 3 weeks etc.) should be read accordingly).
- within 2 weeks of receipt of submissions (or within 2 weeks of the expiration of the time limit available to the third party) critically analyse the submissions received in the light of the relevant exemption provision and public interest considerations
- if unable to consult, request the permission of the Commissioner to proceed to a decision
 - objectively assess the likely effects of disclosure
 - consider the results of any other enquiries made to ascertain the public interest in disclosing or withholding the information

- weigh the various public and private interests involved
- inform the third party and the requester of the decision. If the decision is to grant the request, advise a) the third party of his or her rights of appeal and b) the requester that the information must be withheld until the time for appeal to the Commissioner has expired

IMPORTANT NOTE: Reference to the Freedom of Information Acts should be made in Tender Documentation by insertion of the following paragraph:

"Kilkenny County undertakes to use its best endeavours to hold confidential any information provided by you in this Tender subject to the Council's obligations under Law including the Freedom of Information Act, 2014. Should you wish that any of the information supplied by you in this tender should not be disclosed because of its sensitivity, you should, when providing the information, identify same and specify reasons for its sensitivity. Kilkenny County Council will consult with you about this sensitive information before making any decision on any Freedom of Information request received. In the event that the Council decides to release particular information relating to you, you will have the option of appealing this decision to the Information Commissioner. Please note that in the event that no information is identified by you as sensitive, with supporting reasons, then it is likely to be released in response to a request under the Freedom of Information Act."

For further FOI decisions see the website of the Office of the Information Commissioner www.oic.gov.ie

FOI Publication Scheme – April 2016

Kilkenny County Council undertakes to publish the following procurement information under this scheme;

Corporate Procurement Plan adopted by the Council

Procurement Procedures document approved by Management Team

Link to eTenders website re Council published tenders and award notices

APPENDIX J – PROFESSIONAL INDEMNITY INSURANCE:

DPER Guidance Note GN1.6.3 – Prequalification of Consultants using Minimum Standards for Suitability Criteria sets out suggested minimum standards to be used in the suitability assessment questionnaires for technical service providers.

Service Areas should note that, in particular, new minimum standards are suggested by DPER for previous company turnover and appropriate PI and EL insurances in respect of Consultants.

PI Cover levels, excess limits etc should be verified by Service Areas having regard to the DPER Guidance Note GN1.6.3.

If there any further queries regarding PI, these should be forwarded by email initially to KCC Insurers IPB and confirmed with the Procurement Unit prior to the advertising of any consultancy tenders on the eTenders website.



Irish Public Bodies contact details are;

Gerry Denvir Gerry.denvir@ipb.ie

Service Areas requiring further information may also contact the Underwriting Section at Tel 01 6395500.

DPER Circular 10/14 – Extract - Guide to Setting Insurance level Requirements

The matrix below can be used as a general guide to setting insurance level requirements for routine low-to- medium-risk goods and general services.

Type of Insurances and typical Indemnity Limits

Employer's Liability €12.7m
Public Liability €6.5m
Motor Liability €6.5m
Environmental Indemnity €2m

Professional Indemnity Contract Value (min. €50,000)
Product Liability Contract Value (min. €50,000)

APPENDIX K – REQUIREMENT TO CONTACT PROCUREMENT UNIT:

When Service Areas are drafting their tender prior to advertising

Services Areas required to make initial contact with the Procurement Unit if their procurement is required to be advertised on eTenders and also to agree draft tender specification and procurement process. Services Areas are required to obtain the formal approval of the Procurement Unit prior to advertising any tender on eTenders.

When finalizing use of the Request for Tender (RFT) Templates

Service Areas are required to contact the Procurement Unit regarding the use of the appropriate RFT templates developed by OGP for goods and services or DPER under the CWMF for works and works services.

When drafting appropriate Selection and Award criteria /Accreditation etc.

Service Areas are required to contact the Procurement Unit regarding the application of selection and award criteria in their tenders. This provision also applies to the drafting of requirements regarding accreditation or other statutory permits.

Contract award; when drafting Standstill Notifications for National or EU Contracts

Service Areas are required to contact the Procurement Unit regarding the correct forms of standstill notification letters to be issued to apparently successful tenderers, unsuccessful tenderers or non-compliant applicants or candidates for National or EU Contracts.

When drawdowns of supplies other than from OGP National Framework Competitions is being considered

Service Areas are required to obtain the approval of the Procurement Unit in any case where a drawdown of supplies from the relevant OGP Framework is not used.

When considering significant exceptions to the normal tendering rules

Service Areas are required to obtain the approval of the Procurement Unit in significant cases where a competitive process is not deemed to be necessary in addition to noting same on the relevant Chief Executive or Delegated Order.



APPENDIX L - KCC POLICY FOR TENDER ASSESSMENT TEAMS:

The following is an abridged extract from the Remedies Regulations SI 130/2010 re standstill notices for contracts valued above the current EU Thresholds for Works and Supplies and Services.

- (1) The noticeshall be as set out in this Regulation.
- (2) Such a notice —
 - (a) shall inform the candidates and tenderers concerned of the decisions reached concerning the award of the contract...., including the grounds for any decision not to award a contract.....for which there has been a call for competition,
 - (b) shall state the exact standstill period applicable to the contract, and
 - (c) for each unsuccessful tenderer or candidate, shall include—
 - (i) in the case of an unsuccessful candidate, a summary of the reasons for the rejection of his or her application,
 - (ii) in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of his or her tender.
- (3) In the case of a tenderer who has submitted an admissible tender (that is, a tender that qualifies for evaluation under the rules of the relevant tender process), the summary required by paragraph (2)(c)(ii) shall comprise -
 - (a) the characteristics and relative advantages of the tender selected,
 - (b) the name of the successful tenderer, or, in the case of a framework agreement, the names of the parties to it, and
 - (c) in the cases referred to in paragraphs (9) to (11) of Regulation 23 of the Public Authorities' Contracts Regulations, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements.
- (4) In the case of an unsuccessful candidate, the information to be provided under paragraph (2)(c)(i) may be provided by setting out—
 - (a) the score obtained by the candidate concerned, and
 - (b) the score achieved by the lowest-scoring candidate who was considered to meet the pre-qualification requirements, in respect of each criterion assessed by the contracting authority.
- (5) In the case of an unsuccessful tenderer, the information to be provided under paragraph (2)(c)(ii) and subparagraphs (a) and (b) of paragraph (3) may be provided by setting out—
 - (a) the score obtained by the unsuccessful tenderer concerned, and
 - (b) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority.
- (6) In the case of a framework agreement to which more than one tenderer has been admitted, the information to be provided to each unsuccessful tenderer under paragraph (2)(c)(ii) may be provided by setting out—

- (a) the scores obtained by the tenderer concerned in respect of each criterion assessed by the contracting authority, and
- (b) the scores obtained in respect of each criterion assessed by the contracting authority by the lowest scoring tenderer who was admitted to the framework.

From a practical perspective, one of the most important aspects of the Remedies Regulations is the nature and extent of the obligation imposed on contracting authorities to debrief candidates and tenderers.

Under the terms of the Remedies Directive, the communication of the award decision to any tenderer or candidate concerned must be accompanied by **a summary of the reasons required** pursuant to Article 41(2) of the EU Procurement Directive (Directive 2004/18), namely the **reasons for the rejection of any application or tender** and, in the case of any tenderer who has made an admissible tender, **the characteristics and relative advantages of the tender selected** as well as the name of the successful tenderer or the parties to the framework agreement.

The Irish Remedies Regulations indicate that this information "may" be provided by setting out (i) the score obtained by the unsuccessful tenderer concerned, and (ii) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority.

The unsuccessful tenderer must be provided with *"sufficient information to seek effective review"* as required by the Remedies Directive. It is important that sufficient information is given to the unsuccessful tenderer so that it is placed in a position to decide whether or not it can, or should, seek to review the award.

KCC guidance on the summary of reasons required/reasons for the rejection of the tender/ the characteristics and relative advantages of the tender selected

KCC policy is that the pre-establishment of clear evaluation criteria for award prior to tender and the application of these criteria objectively in awarding the contract will assist the tender process and outcome.

DPER Circular 10/14 says that "All contracting authorities should constructively debrief unsuccessful bidders in line with current policy and guidelines and their obligations under revised Remedies Directives."

KCC policy to constructively debrief unsuccessful bidders is that as much information as possible is provided in the standstill letter for contracts published in the OJEC.

Legislative References – EU Directive 2014/24/EU Public Sector - Article 55

- Authorities must as soon as possible inform each candidate and tenderer of decisions reached
- On request from the candidate or tenderer, authority must as soon as possible and in any event within 15 days from receipt of a written request inform:
- Any unsuccessful candidate of the reasons for the rejection of its request to participate
 - Any unsuccessful tenderer of the reasons for rejection of its tender including reasons for non-equivalence or failure to meet performance or functional requirements
 - Any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement
 - Any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers

Summary of reasons

Case law and administrative law principles suggest that – “Reasoning must be disclosed in a clear and unequivocal fashion” and “reasons given must reflect the actual conduct of the evaluation procedure.”

Therefore, for a valid standstill letter, KCC require a summary of the reasons as to why the particular tender was rejected.

The summary of reasons includes

- (1) The characteristics and relative advantages of the tender selected
and
- (2) the scores.

The characteristics and relative advantages of the tender selected – these should be explained by way of reference to the unsuccessful tenderer.

A suitable narrative is required for each qualitative criterion. If a particular qualitative criterion attracts more marks than others (which is often the case), more attention should be given to this criterion.

The characteristics and relative advantages of **the tender selected** have to be provided – therefore, there is no obligation to provide information on **other** unsuccessful bids.

Where the successful and unsuccessful bidders have been awarded **the same score under a particular quality criterion**, then there is **no relative advantage** and no requirement to inform the unsuccessful bidder on this aspect. However, the characteristics of the successful tenderer should still be provided.

