

## **Guidance for Public Contracting Authorities: Facilitating the Participation of SMEs in Public Procurement<sup>1</sup>**

### **1. Introduction**

The Government recognises that the small and medium enterprise (SME) sector is very important to the economy and that public procurement can be an important source of business for SMEs. The Cabinet Committee on Transforming the Public Service recently considered issues that face SMEs in the public procurement market. In the present economic climate, the competition for public contracts has intensified and some SMEs are finding it more difficult to win such business. In these circumstances, it is particularly important that small and medium sized businesses are not hindered in competing for contracts that they could perform effectively.

The National Public Procurement Policy Unit (NPPPU) in the Department of Finance promotes and supports policies which facilitate SME participation as much as possible. The National Procurement Service (NPS) in the Office of Public Works was established in 2009 and acts as a centre of excellence providing advice on and implementing procurement policy in line with best practice and Government initiatives, including improved access to public procurement opportunities for SMEs.

The purpose of this new guidance<sup>2</sup> is to restate existing policy and measures and to introduce some new or revised measures relevant to facilitating SME participation in public procurement markets; the aim is to have contracting authorities structure and run their competitive processes for public contracts in a manner that facilitates increased participation by SMEs, while they continue to ensure that all public sector purchasing is carried out in a manner that is legal, transparent, and secures optimal value for money for the taxpayer.

This guidance is not designed to favour the SME sector over other sectors but rather to provide SMEs with a level playing field in competing for public contracts. This is in line with EU policy on increased SME participation in public procurement.<sup>3</sup> The aim is to create markets that have multiple suppliers; this should lead to more competition and improved value for money while maintaining the basic EU Treaty principles of openness and transparency in the market. **At all times, this guidance is to be implemented by contracting authorities in accordance with the principles of EU law, and in a manner that is fully compliant with EC public procurement law and national guidelines.** In the event of any ambiguity between this document and the provisions of the Capital Works Management Framework, the latter takes precedence, where applicable.

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<sup>1</sup> This guidance is issued with Circular 10/10. It is available also on-line at [http://www.etenders.gov.ie/guides/guides\\_list.aspx?Type=2](http://www.etenders.gov.ie/guides/guides_list.aspx?Type=2) (document 26).

<sup>2</sup> Specific guidance in relation to contracts for works and related services is also issued under Circular 10/10. It is available also on-line at: [www.constructionprocurement.gov.ie](http://www.constructionprocurement.gov.ie).

<sup>3</sup> “European Code of best practices facilitating access by SMEs to public procurement contracts”, Brussels: 2008. Available on-line at: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/sme\\_code\\_of\\_best\\_practices\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf)

## 2. Use of *eTenders* Website

The public procurement website [www.etenders.gov.ie](http://www.etenders.gov.ie) (*eTenders*) is a national resource available to both contracting authorities and suppliers which increases transparency and greatly facilitates access to public sector contracts.

### (i) Advertising

Until now, the existing guidelines required contracting authorities to advertise supplies and service contracts with estimated values of more than €50,000 on the national public procurement website in the normal course. This provision was recently extended to include works contracts. Some authorities advertise contracts of less than this value (ranging from €10,000 upwards) as standard practice. It is generally recognised that advertising of contract opportunities promotes SME participation. **Accordingly, all contracts for supplies and general services with an estimated value of €25,000 and upwards are now to be advertised by contracting authorities on the *eTenders* website.** The tender documentation (request for tender – RFT) should be made available on the website for direct downloading by suppliers.

### (ii) Email alerts

The *eTenders* website provides email alerts to registered suppliers<sup>4</sup> when notices of interest to them are published (based on supplier profiles provided). Suppliers should continue to be encouraged to register for this facility.

### (iii) Electronic tendering

The *eTenders* website also provides a facility for secure online submission of tenders by suppliers. Use of the facility by public bodies should become the norm as it can simplify the tendering process for contracting authorities and suppliers. In general, suppliers require no more than a PC and Internet access to use the application; they do not have to incur the expense of acquiring specialist software.

### (iv) Prior Information Notices.

SMEs can be discouraged from tendering due to the timelines involved. As SMEs generally do not have specialised administrative capacities, insufficient time to develop tenders can often be cited as a barrier. Contracting authorities are strongly encouraged to communicate long term purchasing plans to the market as early as possible by publishing Prior Information Notices (PINs) on the *eTenders* website. While it is accepted that the RFT documents will set out precisely the details of the tender, the PIN should at least contain sufficient information to allow a supplier to make an informed decision as to whether it is in a position to participate in the upcoming tender competition. The PIN also gives smaller businesses time to react and prepare for the tender process, to develop partnerships with other small companies, to arrive at innovative solutions and to identify sub-contracting

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<sup>4</sup> Over 60,000 suppliers have already registered on the *eTenders* website.

opportunities with larger companies. Many contracting authorities currently publish a “buyer profile”, with relevant information on their purchases and procurement procedures, on their own websites and this practice is encouraged.

### 3. Increased Use of “Open” Tendering Procedures

The use of “restricted” tendering procedures, which require potential tenderers to show that they meet certain requirements (viz. pre-qualification) before they are invited to submit tenders, is often cited as a barrier to SME participation, especially if contracting authorities set unnecessarily high capacity levels. **In order to address such concerns about pre-qualification criteria, the restricted procedure for tendering competitions should no longer be used for:**

- **advertised contracts for supplies and general services with an estimated value up to €125,000, and**
- **advertised contracts for works and related services<sup>5</sup> with an estimated value up to €250,000.**

This means that the open procedure of competitive tendering will be the norm for advertised contracts up to these levels.

This provision will be kept under review in the light of its impact on operational efficiency and value for money.

### 4. Capacity Requirements: Setting Levels and Seeking Evidence

#### (i) **General**

While it is often necessary for a contracting authority to consider whether a potential tenderer has the capacity to undertake a contract, contracting authorities must be conscious that the way in which they approach this task (e.g. the capacity standards they set, the evidence they require, the time at which the evidence must be provided) can have an impact on the ability and willingness of certain businesses – particularly SMEs – to participate in the competitive process.

**Any capacity levels that are set by contracting authorities must be relevant and proportionate to the circumstances of the contract.** Contracting authorities must avoid setting unnecessarily high requirements. Use of over-restrictive criteria may come about unintentionally from a practice of treating criteria and capacity levels in a standard way (e.g. “cutting and pasting” requirements from other tender documents), instead of examining critically the specific requirements appropriate to each particular contract.

Similarly, contracting authorities must avoid demanding excessive or unnecessary evidence of capacity. Feedback from suppliers suggests that in some instances information is routinely requested which is not relevant, is excessive and may not even be used in the evaluation process. This type of practice must be avoided. **To the fullest extent possible, contracting authorities should allow**

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<sup>5</sup> This means contracts for works, contracts for works contractors’ services (e.g. project supervisor for construction stage) and contracts for works-related professional services (e.g. professional construction design services).

**tenderers at the time of tendering only to declare that they have the relevant and proportionate capacity (as specified in the contracting authority's tender documentation) which is necessary to undertake the contract. The contracting authority should seek verification or evidence of such capacity only in the event of a tenderer being shortlisted or coming under consideration for the award of the contract<sup>6</sup>.** This measure is aimed at reducing the administrative burden on tenderers. Its effectiveness will be kept under review having regard to its impact also on operational efficiency.

Where a restricted tendering procedure is used – typically, now, only an option for advertised contracts exceeding €125,000 for supplies and general services and €250,000 for works and related services – public procurement rules require that pre-qualification criteria must be both proportionate and relevant to the needs of the contract. Contracting authorities are reminded that, under the EU Directives as interpreted by the European Court of Justice, only technical and financial capacity and matters relating to the professional standing of candidates can be used as pre-qualification (selection) criteria; these must not be used as award criteria.

#### **(ii) Financial Capacity**

Establishing the criteria that are relevant and appropriate to a particular contract is, of course, a matter for the contracting authority concerned. The EU public procurement Directives suggest a number of means of seeking evidence of financial standing such as: appropriate statements from banks; extracts from audited accounts (where required under Company Law<sup>7</sup>); company turnover; proof of relevant professional indemnity, public liability and employer liability insurance. Contracting authorities should be flexible in the evidence of financial capacity they seek and accept. Appropriate levels of financial capacity, and the evidence requested to demonstrate it, should be determined only after deliberate consideration of the needs of the contract. **The tenderer self-declaration approach outlined at section 4(i) above – whereby tenderers are to be allowed at the time of tendering to declare that they have the requisite capacity and need only provide evidence of same when they are short-listed or come under consideration for the award of contract – should be used to reduce bureaucracy and administrative burdens on applicants.**

Contracting authorities should be flexible in the type of proof of financial capacity it accepts from potential tenderers. The means of proof listed above are not exhaustive. There can be genuine reasons why a firm has difficulty in providing a particular type of evidence requested (e.g. a recently established business will not be in a position to provide evidence of two or three years' turnover) or why the data might not be reflective of its underlying operational situation (e.g. early start-up costs may reflect disproportionately in a new firm's balance sheet or profit and loss account). Therefore, authorities should consider alternative means of satisfying themselves about whether or not there is a genuine financial risk should the company turn out to be a winning tenderer. Procurement rules explicitly promote this approach, for example, by providing for acceptance of guarantees or undertaking by a parent company or other third party. A flexible approach needs to be adopted to encourage small and start-up companies.

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<sup>6</sup> Specific guidance in relation to contracts for works and related services is also issued and is available on-line at: [www.constructionprocurement.gov.ie](http://www.constructionprocurement.gov.ie) See Guidance Note GN 2.3.1.2. in relation to works and works contractors' services.

<sup>7</sup> The current turnover threshold for audit exemption under Company Law is €7.3 million (subject to a number of conditions).

Determining and evaluating the relevant financial capacity levels requires appropriate expertise. If this not available in-house, it may be necessary to source it from an appropriately qualified third party.

**(iii) Company Turnover - some general issues, broad guidance**

Contracting authorities frequently use the ratio “tenderer’s turnover : contract value” as a measure in deciding whether a business has the financial capacity and strength to perform a contract. From time to time, queries arise about the appropriate turnover ratio levels: either from a contracting authority considering the appropriate level to set for its contract or, occasionally, by potential tenderers who feel they are excluded from a tendering opportunity by an unnecessarily high requirement. Concerns could be raised about a tenderer for whom a contract would represent a high proportion of the firm’s turnover, relating to its ability to provide the financial resources necessary for the contract and also the possibility that the tenderer could become over reliant on the contract. Clearly, each project will have different requirements depending on its particular features and the level of risk to the contracting authority arising from non-performance. Therefore, it is not possible to devise provisions to be applied to every situation. An appropriate turnover level would depend on the particular features of the project and other potential risks to the contracting authority arising from supplier not having the capacity to fulfil its contractual obligations.

In considering this issue recently, the NPPPU conducted an informal survey among public purchasers in Ireland and in other EU Member States in an effort to identify what might be broadly acceptable practice in this regard. **Responses indicate that appropriate amounts for annual turnover can range from half the value to three times the value of a contract, depending on the size, duration, nature and complexity of the contract.** A service contract for, say, intellectual type services would tend to be at the lower end of this range, while a works contract requiring significant capital resources would typically be at the higher end.<sup>8</sup> Contracts for strategically important procurements may exceptionally justify the setting of higher levels. **The key consideration is that the turnover level chosen is proportionate to and justified by the needs of the contract.**

A contracting authority should consider whether reliance on a firm’s historical turnover data is the most relevant information in determining its suitability as a potential supplier. Reduced or fluctuating turnover may be due to market conditions and not be a reflection of the capacity or resources of a tenderer. Moreover, a measure based on historic turnover might not fully reflect a firm’s present ability to undertake a contract, e.g. it would not capture the impact of any recent investment in expanding the firm’s capacity. For some contracts it may be appropriate to consider only the portion of a tenderer’s turnover that is attributable to the specific type of works, supply or service activity that corresponds to the contract to be awarded.

## **5. Insurance**

Contracting authorities sometimes require that candidates or tenderers have certain insurance cover for particular risks (e.g. professional indemnity, public liability). In accordance with the principle

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<sup>8</sup> Specific guidance on levels of turnover requirements for works and related services is being prepared. It will be issued shortly and published on the construction procurement website [www.constructionprocurement.gov.ie](http://www.constructionprocurement.gov.ie).

outlined in section 4(i) above, any such requirement set by a contracting authority must be **both relevant and proportionate** to the circumstances of the contract.

Any requirement for insurance cover should be signalled by the contracting authority in the tender documentation and **tenderers should be asked to declare that they can obtain such cover but should not be required to have it in place at the time of tendering**. Only the winning tenderer need obtain the appropriate cover and produce evidence of same in order to allow for the award of contract.

#### **6. No Charging for Tendering Opportunities**

Public contracting authorities are **not to use arrangements which involve potential tenderers having to pay so as to access competitions for public contracts**. Such charging would represent a particular problem for SMEs.

#### **7. Debriefing Unsuccessful Candidates**

All contracting authorities should constructively de-brief unsuccessful bidders in line with current policy and guidelines and their obligations under revised Remedies Directives.

#### **8. Short-listing**

In instances where it is appropriate to use the restricted tendering procedure (see section 3 above) and the number of candidates meeting the specified minimum qualifying standards is too large to invite all to tender, or is greater than the number or maximum number of tenderers indicated in the contract notice, then a short-listing of candidates may be undertaken. **Any short-listing procedure must be on the basis of objective and non-discriminatory criteria or rules made known to candidates**. Selecting on the basis of those with the highest qualification levels (technical, financial etc.) will generally militate against SMEs. To avoid this, other objective rules and methods should be considered. One possibility is to use random selection (such as drawing lots), publicised in advance, in a procedure that is transparent and ensures equal treatment of all those meeting the minimum requirements<sup>9</sup>.

#### **9. Sub-dividing Contracts into Lots**

The sub-division of public purchases into lots clearly 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). **Where appropriate and practical and without compromising efficiency and value for money, contracting authorities should consider dividing contracts into lots.**<sup>10</sup> Facilitating participation in this way broadens competition to the benefit of contracting authorities and suppliers.

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<sup>9</sup> Guidance Note 2.3.1.1 *Short Listing of Works Contractors using Suitability Assessment and Random Selection* sets out procedures for short listing works contractors (Pillar 4 [www.constructionprocurement.gov.ie](http://www.constructionprocurement.gov.ie))

<sup>10</sup> Contracts must be published in the Official Journal of the EU (OJEU) and awarded in accordance with EU Directive procedures if the total value of all lots exceeds the relevant threshold.

## **10. Framework Agreements**

In establishing framework agreements, contracting authorities are to consider how proposed arrangements will impact on SMEs. While total demand may be aggregated, requirements will generally be drawn down in small lots, in many cases following mini-competitions. **Contracting authorities are to ensure that the terms of the framework facilitate the inclusion of smaller enterprises if these can meet requirements or compete for particular lots.** Contracting authorities need to ensure that SMEs (who can often believe the scope of a framework precludes their involvement) are not deterred from taking part; special attention is to be given to keeping pre-qualification criteria proportionate (where this approach is permitted – see section 3 above). There will be instances where SMEs' flexibility and ability to respond speedily to requirements could place such enterprises in a particularly favourable position to participate and compete effectively.

## **11. Further Measures**

### **(i) Public Procurement and Business Growth**

Contracting authorities should encourage new businesses particularly to tender for smaller public contracts so that they can establish a track record which will help them to progress to competing in time for larger public and private sector contracts. Encouraging sub-contracting is also an important aspect in securing the best possible solution for contracting authorities. It can also benefit larger companies by enabling them to strike up collaborative partnerships with small innovative firms engaged in cutting-edge technology.

### **(ii) Innovation**

The “Buying Innovation -10 Step Guide”<sup>11</sup> published by the Procurement Innovation Group established by the Department of Enterprise, Trade and Employment highlights the role that SMEs can play in smart and innovative procurement. Creative ideas for new and innovative solutions and products can come from small and medium sized enterprises. Contracting authorities can promote their participation by encouraging joint bids from SMEs or affording sub-contracting opportunities. Authorities can also encourage new and innovative solutions by indicating in tender documents that they are prepared to accept variants to the specifications, where appropriate.

### **(iii) Green Procurement**

The forthcoming National Action Plan on Green Public Procurement can further stimulate the market to innovate and to supply more cost-effective and sustainable procurement options. SMEs are acknowledged as key suppliers of eco-innovation as many are engaged in developing and providing specialist and innovative green products and services.

### **(iv) Pre-Tender engagement with the Market**

For certain requirements, contracting authorities may need access to technical knowledge to research the market for solutions, draw up specifications and evaluate proposals. It is important that contracting authorities consult the market before tendering as it enables them to understand and identify new developments taking place in the marketplace and what types of companies, including new SMEs, can provide solutions. This requires a strategic and professional approach to the public procurement function and as part of this the contracting authority must ensure that any consultation

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<sup>11</sup> The Guide can be accessed at <http://www.deti.ie/publications/trade/2009/buyinginnovation.pdf> .



does not give a competitive advantage to a particular firm or group of firms and that all parties have an equal opportunity in all public tendering.

A Masters Diploma course at Dublin City University and other part-time diploma courses offer public purchasers the opportunity to obtain the necessary professional expertise. Contracting authorities are encouraged to consult Enterprise Ireland which can arrange for technical advisors to provide advice and market information to help a contracting authority identify types of products or services available from the SME community. Contracting authorities are also encouraged to keep in contact with industry organisations and participate in trade fairs, conferences, etc. to engage with the SME community.

**(v) Tax Clearance**

Tenderers being awarded a public contract must have tax clearance. Most applications for Tax Clearance Certificates can now be made online. **To reduce administrative burdens (on contracting authorities and tenderers), use of this online facility is strongly encouraged.** It can be accessed at [www.revenue.ie](http://www.revenue.ie) under “What can I do online”, “Tax Clearance”. Contracting authorities can verify online the tax-cleared status of applications for tenders, which eliminates the need for submission of a hard copy of a Tax Clearance Certificates.

**(vi) Further Simplification and Streamlining of Tendering Process**

Tenderers and potential tenderers for public contracts sometimes criticise the tendering process as being bureaucratic, burdensome and a deterrent to businesses, especially to SMEs. The measures set out in this guidance should considerably improve the situation. In addition, as a general rule, contracting authorities should use straight-forward, and where possible, standard documentation to assist suppliers, have better structured tendering, and “de-mystify” the public procurement process.

Some further initiatives are being developed in this regard (including model forms of contracts and tender documents for supplies and services, register of suppliers and service providers) and these will be notified to contracting authorities over the coming months.

*The provisions of this document do not constitute legal advice but are guidelines reflecting Department of Finance policy.*



**Summary of Measures by Contracting Authorities  
to Facilitate the Participation of SMEs in Public Procurement**

- Contracting authorities are to advertise all contracts for supplies and services with an estimated value of €25,000 and upwards on [www.etenders.gov.ie](http://www.etenders.gov.ie) (*eTenders*) (Section 2).
- Contracting authorities should, as the norm, use the electronic tendering facility on *eTenders* (Section 2).
- Contracting authorities are to use “open” tendering procedures for advertised contracts for supplies and services up to €125,000 in value, and for advertised contracts for works and related services up to €250,000. Beyond these levels they may decide which tendering procedure is most appropriate in each case (Section 3).
- Contracting authorities must ensure that any capacity levels they set for tenderers are relevant and proportionate to the circumstances of the particular contract (Section 4).
- Contracting authorities should allow applicants to self-declare their capacity to undertake the contract, and should seek verification or evidence of such capacity only in the event of the tenderer being short-listed or coming under consideration for the award of a contract (Section 4).
- Contracting authorities should be flexible in accepting alternative means of verification of capacity if suppliers are having difficulty in providing one kind of evidence sought (Section 4).
- Contracting authorities may only set insurance requirements that are relevant and proportionate to the circumstances of the contract, should require tenderers only to declare that they can obtain the cover, and should only seek evidence of the cover in place from the winning tenderer to allow for the award of contract (Section 5).
- Contracting authorities are not to use arrangements that involve potential tenderers having to pay so as to access opportunities to compete for public contracts (Section 6).
- Contracting authorities should provide constructive de-briefing to unsuccessful tenderers (Section 7).
- Contracting authorities may only short-list on an objective and non-discriminatory basis (Section 8).
- Contracting authorities should avail of the possibility to award contracts in “lots” where this can be done without compromising efficiency and value for money (Section 9).
- Contracting authorities should ensure that framework agreements facilitate the inclusion of smaller businesses where these could meet requirements or compete for particular lots (Section 10).
- Contracting authorities should encourage joint bidding among SMEs and sub-contracting in the case of larger contracts. They should be aware of the potential of SMEs as suppliers of innovative solutions and in contributing to eco-innovation (green procurement) (Section 11).
- Contracting authorities should describe their requirements in functional terms where appropriate (“ask for a solution, do not prescribe it”) (Section 11).
- Contracting authorities should use the online tax clearance system put in place through the Revenue Commissioners website [www.revenue.ie](http://www.revenue.ie) (Section 11).
- Contracting authorities should use simple, and where possible, standard documentation to assist suppliers, have better structured tendering, and “de-mystify” the public procurement process (Section 11).