

Transposition of the new EU Public Procurement Directives: Consultation Document

Department of Public Expenditure and Reform

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1. Introduction

Ireland is required to transpose a suite of three new procurement Directives (Public Procurement, Utilities and Concessions) into national law by 17 April 2016. In Ireland, this is by means of a Statutory Instrument. The new Directives are:

- **Public Procurement:** Directive 2014/24/EU¹ on public procurement, which repeals Directive 2004/18/EC
- **Utilities:** Directive 2014/25/EU² on procurement by entities operating in the water, energy, transport and postal services sectors, which repeals Directive 2004/17/EC ; and
- **Concessions:** Directive 2014/23/EU³ on the award of Concession Contracts, which does not directly replace any previous Directive.

These Directives share generic provisions and for this reason this consultation focuses on the policy questions common across all three Directives. There are features specific to Directive 2014/23/EU and Directive 2014/25/EU that will be considered separately in due course.

Most of the provisions of the Directives are mandatory for Member States to transpose so we are precluded from changing the substance in transposition. In this context, the intention is to adhere to copy-out of the Directive to the greatest extent possible; close alignment with the provisions of the Directive should reduce the scope for misrepresentation or reinterpretation. There are, however, some areas where the Directives permit policy choice on whether, and how, to implement/transpose particular provisions and these choices are the focus of this consultation.

This document therefore highlights the main key policy choices for Member States offered in the new Directives and stakeholders are asked to respond to the specific questions posed. Accordingly, please indicate the question number involved in each of your responses. If you have additional relevant observation/comments on the generic policy choices within the Directives please include them as part of your submission. The material submitted will be considered in drafting instruction for the Statutory Instruments to implement the new Directives.

2. Process

The consultation will run for **6 weeks from 31st October to 12th December 2014**.

All responses/submissions should be sent by email to: transposition@ogp.gov.ie

Any clarification on aspects of this consultation paper should also be emailed to transposition@ogp.gov.ie

All responses will be published on www.procurement.ie

Please confine your responses to the generic policy choices in the new Directives; all other aspects of the Directives are mandatory for Member States to transpose.

¹ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG

² http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG

³ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG

3. Key principles and approach

The rationale for the EU procurement rules (underpinned by Treaty of Rome principles of transparency, non-discrimination, mutual recognition, equal treatment and proportionality) is to open up the public procurement market and to ensure the free movement of supplies, service and works within the EU. The implementing regulations will continue to uphold transparency in the process by maximising suppliers' opportunity to avail of procurement opportunities with a continued focus on value for money outcomes for contracting authorities⁴.

The changes agreed in the Directives are intended to:

- help streamline public procurement processes;
- seek more simplified and flexible rules for the selection of economic operators to allow contracting authorities carry out procurement faster and with less red tape.

In broader economic policy terms, the changes are intended:

- to achieve better value for money outcomes for the taxpayer from public procurement;
- to facilitate greater SME participation in the public procurement market across Europe by improving access to public procurement opportunities;
- to reinforce adherence to applicable obligations in the areas of environmental, social and labour law.

It is important that in transposing EU rules into national law, contracting authorities and tenderers are not unduly burdened by requirements that increase their administrative overhead/bureaucratic load. The approach therefore is to avoid going beyond the minimum requirements to avoid creating unnecessary legislative burdens on contracting authorities and in placing Irish economic operators at a competitive disadvantage. Where appropriate, contract conditions can be used in pursuance of policy objectives, if related to the subject matter of the contract, and if clearly set out in the tender documentation. Guidance on the new Directives covering both the policy choices adopted and the new features will issue to support the transition to the new regime.

4. Policy choices in the Public Procurement Directive for Member States

The following are the main choices available to Member States on how or whether to transpose the common provisions across the three Procurement Directives. The choices are framed as a series of questions and again, in responding please identify the specific question you are answering.

Question 1: Environmental, Social and Labour Law⁵

Member States are required to take “appropriate measures” to ensure that economic operators⁶ comply with applicable obligations in the field of environmental, social and labour law. Applicable obligations denote the national, EU or international law applying in the place where the service is provided or where the works are carried out. Member States have been

⁴ This denotes also contracting entities, as appropriate.

⁵ Article 18(2) of the Public Procurement Directive; Article 36(2) of the Utilities Directive; Article 30(3) of the Concessions Directive

⁶ This term includes suppliers, service providers, contractors and tenderers – see recital 14 of the Public Procurement Directive for information.

given discretion to choose the mechanism to implement this requirement. The choice is between regulatory or administrative measures or some combination of both.

The Directives do not require the use of regulatory measures to implement this obligation. The Public Procurement Directive confirms⁷ that relevant obligations could be mirrored in contract clauses. In practice, this would mean that standard contract conditions that reflect the relevant applicable obligations in contract clauses could be developed by the OGP for use by contracting authorities. Guidance material would refer to the standard contract clauses requiring compliance with applicable obligations for inclusion in procurement documents.

Stakeholders are asked to comment on the approach for implementing article 18(2) requirement. In signalling a preference, please indicate the proposed measures and reasons for your choice having regard to the key principles set out at 3 above.

Question 2: Group participation of Economic Operators⁸

Member States have the choice to establish “standard terms” for how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability⁹. This does not refer to the legal form that the group or consortium should take but rather that way in which information on financial standing and technical ability is to be provided.

The choice for Member States is whether to implement this provision and, if so, how – by regulatory or administrative measures (i.e. standard terms in Irish contract documents). Alternatively, the Directives permit contracting authorities themselves to set out in procurement documents how groups of economic operators are to meet these requirements.

Stakeholders are asked to state whether Ireland should establish “standard terms” for how groups of economic operators are to meet the requirements for economic/financial standing and technical and professional ability. If yes, please indicate (i) the reason for your choice and in particular any examples of where the absence of national terms has caused difficulty on the ground and (ii) the particular mechanisms/approaches you consider appropriate to meet this requirement.

Question 3: Electronic communications and e-procurement¹⁰

The Directives set out a programme for applying electronic means of communications to all communication and information exchange. There are a number of provisions in the Directive which are intended to encourage or require the use of electronic communications and

⁷ Recital 39 of the Public Procurement Directive refers.

⁸ Article 19(2) of the Public Procurement Directive; Article 37(2) of the Utilities Directive; Article 26(2) of the Concessions Directive

⁹ Requirements in Article 58 of the Public Procurement Directive on selection criteria.

¹⁰ Articles 22; 36; 90 in Public Procurement Directive; Articles 40; 54; 106 in Utilities Directive; these choices do not apply to Concessions. The choice in the Concessions is around (a) mandating the means of communications and information exchange or to leave the choice to the authority concerned (29(1)) and mandate the use of electronic means of communication beyond those made obligatory in Article 33(2) and 34 (see Article 29(1) of the Concessions Directive)

electronic procurement procedures and techniques. There are a number of operational policy choices for Member States to consider in this area.

- *Level of electronic security*¹¹

Member States are required to establish a “framework” to specify the level of electronic security required in the various stages of the procurement procedure.

(a) Stakeholders are asked to consider whether the details of a framework should be set out in the Regulation or if it is preferable to provide non-statutory advice and guidance and a cross reference to existing policies and best practice.

- *Use of electronic signatures*¹²

Use of advanced electronic signatures is not a feature of the existing e-procurement environment in Ireland and its use is likely to impose undue costs on users and SMEs, in particular.

(b) Stakeholders are asked to say whether they favour the use of advanced electronic signature.

- *Compulsory use of use e-Catalogues for certain types of procurements*¹³

There is low usage of e-Catalogues across the system currently and mandating use would be problematic for SMEs, in particular.

(c) Stakeholders are asked to indicate if they favour mandating the use of e-Catalogues for certain types of procurement.

*Question 4: Conflicts of interest*¹⁴

Under article 24 there is a requirement that Member States take “appropriate measures” against conflicts of interest in the conduct of procurement procedure to avoid any distortion of competition and to ensure equal treatment of suppliers. Conflicts of interests should cover situations where a person (member of the contracting authority or service provider acting on their behalf (consultant)) plays a role in the procurement procedure on the side of the contracting authority in a situation where conflicting private or professional interests could result in behaviour not fully serving the interests of the contracting authority. The person may have financial, economic or other personal interests which might be perceived to compromise their impartiality and independence in the context of the procurement procedure. The choice

¹¹ Articles 22(6)(b) of the Public Procurement Directive; 40(6)(b) of the Utilities Directive

¹² Articles 22(6)(c) of the Public Procurement Directive; 40(6)(c) of the Utilities Directive.

¹³ Article 36(1) second sub paragraph of Public Procurement Directive; Article 54(1) of the Utilities Directive

¹⁴ Article 24 of the Public Procurement Directive; Article 42 of the Utilities Directive; Article 35 of the Concessions Directive.

is to decide what appropriate measures to put in place; codification in the regulations of what constitutes conflicts of interest or appropriate guidance for stakeholders.

Stakeholders are asked to give views, if any, on the optimum approach – administrative or regulatory – to take that would be consistent with the principles underpinning the transposition.

Question 5: Procedures¹⁵

There are five main procedures rather than the four in the existing Directives – the open, restricted, competitive procedure with negotiation, the competitive dialogue and the new innovation partnerships. All these procedures must be implemented into national law. Under article 26(6), the choice is whether to provide in national law that contracting authorities may use the negotiated procedure without a call for competition in circumstances specified in article 32 of the Directive¹⁶.

(a) Stakeholders are asked to state whether Ireland should avail of this choice, and why.

Under article 28(4) Member States can provide that all or specific categories of sub central authorities¹⁷ can set the time limit for receipt of tenders by mutual agreement or if this isn't possible, then a minimum 10 day time limit applies.

(b) Stakeholder are asked to state whether they favour having the flexibility provided for in 28(4) and if not, why.

The means of calling for competition for all the procedures are a contract notice (Annex V, Part C); and PIN (prior information notice) (Annex V, Part B section I & II). The use of a PIN rather than a contract notice for contracts awarded by either the restricted procedure or the competitive procedure with negotiation is only available for use by sub-central authorities and Member States have a choice under article 48(2) to transpose this option into national law.

(c) Stakeholders are asked to state whether they favour permitting sub-central authorities to use a PIN as a call for competition and why.

¹⁵ Articles 26&32; 28; 48; of the Public Procurement Directive

¹⁶ Article 32(2) and (5): circumstances include no tenders or suitable tenders or requests to participate received (2)(a); contract can be supplied by only one operator (unique work of art or artistic performance); technical reasons, exclusive rights including IP (2)(b) ; extreme urgency unforeseeable by contracting authority 32 (2)(c) plus sub article 32(5) repetition of a contract by operator for the same contracting authority that is clearly flagged in the basic project and within a three year period from conclusion of the original contract.

¹⁷ Term under the General Procurement Agreement (GPA) that is a construct akin in Ireland to local authority sector.

Question 6: Central Purchasing Bodies (CPBs)¹⁸

There is provision in S.I. No. 329/2006 (that transposed Directive 2004/18/EC on public procurement) for contracting authorities to purchase through a central purchasing body¹⁹ so the concept is not new to the public procurement regime. This flexibility to allow contracting authorities to use central purchasing bodies to procure their requirements is maintained in article 37(1) first and second sub paragraphs.

The main choice for Member States in article 37(1) last sub paragraph is to provide that “certain procurements are to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.” A possible current example of a CPB in the Irish context is the Office of Government Procurement. This is intended to give power to mandate that certain procurements must be made using specific central purchasing bodies. The power would be vested in the Minister in the normal course and would be exercised having regard to agreed public procurement policy objectives.

Stakeholders are asked to state whether they agree that this provision be implemented into national law as envisaged. If not, please set out the reason for your position.

Question 7: SME access and division of contracts into Lots²⁰

Much of the change in the new Directive related to SME access have been foreshadowed by Circular 10/14²¹ including scope to divide public contracts into lots to enable smaller businesses to better compete for manageable public contracts. The policy is clear that the division of public contracts into lots should not compromise efficiency and value for money outcomes in public procurement.

Under Article 46(4) Member States have the choice to make it obligatory to award public contracts in the form of separate lots.

Stakeholders are asked to state if they favour leaving the decision to divide contracts into lots to contracting authorities or to require compulsory division of public contracts into lots.

Under article 46(1) second sub paragraph, contracting authorities who opt not to divide public contracts into lots are now required to give reasons for their decision in the procurement documents.

¹⁸ Article 37(1) of the Public Procurement Directive; article 55(1) of the Utilities Directive.

¹⁹ Under regulation 8(1) of SI no 329/2006 a contracting authority may enter into a contract or framework agreement for works, products or a service with or through a central purchasing body

²⁰ Article 46 of the Public Procurement Directive; article 65 of the Utilities Directive; not applicable to the Concessions Directive.

²¹ Circular 10/14: *Initiatives to assist SMEs in Public Procurement*, 16 April 2014, Department of Public Expenditure and Reform

Question 8: Exclusions of economic operators from public procurement for various offences, failures and transgressions

8.1 Mandatory Exclusions²²

Under existing rules, suppliers must be excluded from contracts if convicted of offences related to organised crime, corruption, fraud, money laundering. Under article 57(1) mandatory exclusion of economic operators has been extended to conviction for terrorist, child labour and human trafficking-related offences.

Under article 57(2) there is an obligation to exclude an economic operator that has been subject to a binding and final legal or administrative decision which found breach of obligations to pay tax or social security obligations. Even where no binding decision has been made, the authority may use its discretion to exclude a supplier where it can demonstrate (“by any appropriate means”) supplier non-payment of taxes/social security contributions. These can be remedied by full payment or “entering into a binding arrangement with a view to paying the taxes or social security contributions due”.

Under 57(3) there is a choice for Member States to provide for derogation from the application of mandatory exclusions above:

- in the case of exclusions at article 57(1) where there are public interest considerations involved, for example the provision of vaccines in emergency public health scenario;
- in cases covered by article 57(2) where the exclusion is disproportionate - where only minor non-payment amounts are involved.

Stakeholders are asked to consider whether Ireland wants to allow for derogation permitted under article 57(3) in the circumstances set out in article 57(1) and article 57(2) to maintain flexibility for contracting authorities. If not, can you please give cogent reasons for not availing of the derogation permitted in the Directives?

8.2 Discretionary exclusions²³

While the Directives requires the exclusion of economic operators in the specific circumstances set out above, the Directives leave it to the discretion of contracting authorities to exclude economic operators in the various circumstances set out in article 57(4) (a)-(i). Member States have a choice to mandate some or all of these discretionary exclusions²⁴.

²² Articles 57(1) & (2) of the Public Procurement Directive; article 80(1) of the Utilities Directive which refers to the relevant Part of article 57 in the Public Procurement Directive; articles 38(4) & (5) of the Concessions Directive.

²³ Article 57(4) of the Public Procurement Directive; article 80(1) of the Utilities Directive; article 38(7) of the Concessions Directive

²⁴ Article 57(4) of the Public Procurement Directive above refers to: article 18(2) obligations (see Footnote 5) as well as bankruptcy/ insolvency; grave professional misconduct; distortion of competition; conflicts of interest; prior involvement in preparation of procurement documents; past performance; serious misrepresentation; misleading information/false declaration. See also article 80(1) of Utilities Directive which refers to the relevant parts of article 57 of the Public Procurement Directive. See also 38(7) of the Concessions Directive.

To maintain flexibility in implementation of the Directives it may be preferable to maximise the discretion afforded to contracting authorities in the decision to exclude, or not to exclude, an economic operator in all the circumstances of the particular case. To support the decision-making process by contracting authorities, guidance could be provided on the various categories of discretionary exclusion.

Stakeholders are asked to provide views/comments on whether it is desirable under article 57(4) to mandate contracting authorities to exclude economic operators for certain transgressions deemed appropriate for discretionary exclusion under the Directive.

8.3 *Period of exclusion*²⁵

The maximum period of exclusion allowed is 5 years from the exclusion event in the case of mandatory exclusions or 3 years if exclusion is discretionary. Member States can decide the period of exclusion at or below these maxima. The exception is in cases where a term of exclusion forms part of a final judgement.

Stakeholders are asked to consider what the actual period of exclusion should be for (i) mandatory and (ii) discretionary exclusion and the reason for the decision.

*Question 9: Tender Assessment*²⁶

In the open procedure under article 56(2) first sub paragraph of the Public Procurement Directive and the respective article in the Utilities Directive, contracting authorities may examine tenders before checking to see if any of the grounds for exclusion apply or if the tender meets the selection criteria (articles 57-64 refer of the Public Procurement Directive refers information and equivalent Articles in the Utilities Directive). However, Member States have the choice to exclude the use of this procedure for, or restrict it to, certain types of procurement or specific circumstances under article 56(2) second sub paragraph. There is an option not to transpose second sub paragraph of article 56(2).

Stakeholders are asked to comment on whether they want to maintain the flexibility offered in article 56(2) first sub paragraph or to introduce the restriction in article 56(2) second sub paragraph and equivalent provisions in the Utilities Directive²⁷

In line with current practice, under article 56(3) and Utilities Directive equivalent provisions²⁸ there is provision to allow contracting authorities to ask for incomplete or incorrect information to be supplemented by economic operators.

(a) Do stakeholders have any difficulty with this provision and, if so, why?

²⁵ Article 57(7) of the Public Procurement Directive; article 80(1) of the Utilities Directive; article 38(10) of the Concessions Directive

²⁶ Articles 56(2) & (3) and article 67(2) of the Public Procurement Directive; see also articles 76(7) & (4) and article 82(2) of the Utilities Directive respectively.

²⁷ Footnote 25 refers.

²⁸ Footnote 25 refers

Under article 67(2) last sub paragraph and equivalent²⁹ there is a choice for Member States to prohibit contracting authorities from using cost only or price only as the sole award criteria or to restrict use of these criteria to certain categories of contracting authorities or to certain types of contracts. In coming to a view on this issue, stakeholders should consider the need to maintain flexibility in the operation of the procurement rules.

(b) Stakeholders are asked to comment on whether to prohibit the use of price only or cost only as the sole award criterion and if so please to explain the reasons for this view/position.

Question 10: Sub-contracting³⁰

There are a number of choices for Member States to consider under this heading including:

- (a)** Whether it should be compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and the details of any proposed subcontractors.
- (b)** Whether the main contractor should be directly obliged to provide information about its subcontractors and supply chain.
- (c)** Whether contracting authorities should be required to verify whether there are mandatory or discretionary grounds for exclusion of any subcontractors and, if such verification is undertaken and the response shows that there are discretionary grounds for exclusion, whether contracting authorities should be obliged to require that the main contractor find a replacement subcontractor.
- (d)** Whether or not to provide for direct payments to contractors.

Stakeholders are asked to indicate a preference for each or any of the choices set out at (a)-(d) above. If you have other comments on any aspect of this article please include them in your submission.

Question 11: Termination of contracts³¹

Under article 73(b) of the Public Procurement Directives and equivalent provisions in the Utilities and Concessions Directives³², Member States have to ensure that a public contract can be terminated during its term, if it turns out that the contractor was subject, at the time of the contract award, to (i) a mandatory exclusion under article 57(1); (ii) for substantial modification within the meaning of article 72(4) or (iii) for an adverse Court of Justice ruling³³.

Member States must ensure that contracting authorities are able to terminate contracts in certain circumstances “under conditions determined by the applicable national law”. The

²⁹ Footnote 26 refers

³⁰ Article 71 of the Public Procurement Directive; Article 81 of the Utilities Directive; Article 42 of the Concessions Directive.

³¹ Article 73 of the Public Procurement Directive; article 90 of the Utilities Directive; article 44 of the Concessions Directive.

³² Footnote 31 refers.

³³ Footnote 31 refers

main issue is likely to be how this should be ensured and under what conditions. It may be preferable in the S.I. to state that contracting authorities must include in all their public service contracts a condition that allows them to terminate if any of the three grounds for termination is found to apply. This is in the nature of a right to cancellation rather than automatic termination.

Stakeholders are asked to indicate if they disagree with this proposed approach and if so, why and to offer an alternative approach to implementing this article.

Question 12: Light Touch Regime ^{34 35}

The current distinction between Part A and Part B services is abolished and, as a result, the normal rules will apply to many former Part B services formerly subject to a very light regime. Therefore the starting point for the new system is that all services are subject to the full set of rules unless (i) the service concerned is explicitly excluded under article 10³⁶ (ii) the services concerned are explicitly listed in the exhaustive list in Annex XIV (but mainly social, health and educational services: “services to the person”). The contracts will only be covered by the Directive if their value exceeds €750,000 in the Public Procurement Directive and €1million in the case of the Utilities Directive.

12.1 Scope of the regime

Under Article 75 of the Public Procurement Directive contracting authorities are required to award contracts for these services by (i) publication in the OJEU of a call for competition or a prior information notice - PIN) (ii) publication in the OJEU of a contract notice or quarterly submission of batches of contract award notices (iii) Member States are required to establish their own national rules for the award of these contracts – within the framework of Treaty obligations, (iv) Member States also have a choice to require contracting authorities to apply MEAT (best price/quality ratio) only. Both (i) and (ii) are intended to meet an obligation of transparency underpinned by the principles of equal treatment and non- discrimination³⁷.

The main issue is establishing national rules to underpin the light regime. It would be important that a balance is struck between importing provisions from the main regime and maintaining the desire for flexibility and simplicity in the operation of the light regime.

Stakeholders are asked to give views on the “national rules” to put in place to operationalise the new light-touch regime.

³⁴ Articles 74-76 and Annex XIV of the Public Procurement Directive: social, health and other specific services: viz. hotel and restaurant services; certain legal services; rescue, firefighting and prison services; investigation and security services (e.g. alarm monitoring services, guard services).

³⁵ Articles 91-94 of the Utilities Directive

³⁶ For example acquisition or rental of land existing buildings; audio visual media services; arbitration and conciliation services; certain legal services ; certain financial services etc.

³⁷ ECJ : Telaustria case- paragraph 62 and Parking Brixen case , paragraph 49