



Oifig um Sholáthar Rialtais
Office of Government Procurement

Information Note

Covid-19 (Coronavirus) and Public Procurement

Update - 22 March 2020



Rialtas na hÉireann
Government of Ireland

National Public Procurement Policy Framework

Public procurement is governed by EU and national rules. The [National Public Procurement Policy Framework](#) sets out the overarching policy framework for public procurement in Ireland and comprises five strands.

1. Legislation (Directives, Regulations)
2. Government Policy (Circulars etc.)
3. Capital Works Management Framework for Public Works
4. General Procurement Guidelines for Goods and Services
5. More detailed technical guidelines, template documentation and information notes as issued periodically by the Policy Unit of the Office of Government Procurement

The framework sets out the procurement procedures to be followed by Government Departments and State Bodies under national and EU rules. The framework supports contracting authorities, including the Office of Government Procurement, the four key sectors (Health, Education, Local Government and Defence), individual Departments, Offices, commercial and non-commercial State bodies, and private entities which are subsidised 50% or more by a public body, when awarding contracts for works, goods and services. It supports and enables public bodies to adopt procedures to meet their public procurement obligations and facilitates compliance with EU and national procurement rules.

This information note is dynamic in nature and will be subject to amendment and review periodically. Therefore, we would encourage officials to check our website www.ogp.gov.ie for the most up-to-date version.

It should be noted that this information note is not intended as legal advice or a legal interpretation of Irish or EU law on public procurement.

Key messages

- OGP is offering support in relation to acquisition of essential goods and/or services and is engaging with suppliers on its frameworks in relation to their business continuity plans.
- This information note covers options that may be considered by contracting authorities in relation to procurements under the S.I. No. 284/2016 – European Union (Award of Public Authority Contracts) Regulations 2016¹ (These Regulations apply to public procurement procedures above certain thresholds²):
 - direct award due to extreme urgency (regulation 32(2)(c),
 - direct award due to absence of competition or protection of exclusive rights,
 - call for competition using a standard procedure with accelerated timescales,
 - Social and other specific services (Light Touch Regime), and
 - extending or modifying a contract during its term.
- Reminder of Prompt Payment Procedures

1. Introduction

The developing situation around the spread, containment and control of Covid-19 (Coronavirus) may mean contracting authorities come under pressure to deliver essential goods and/or services in greater volume or speedier timeframes than otherwise expected.

The Office of Government Procurement (OGP) recognises that contracting authorities need support and assistance in relation to procurement and as a result, OGP has produced this information note to support contracting authorities in managing procurements in such circumstances.

Where the procurement is unaffected by Covid-19 related issues, contracting authorities should ensure their procurements use competitive processes to ensure value for money, transparency and equal treatment, as detailed in our national [public procurement guidelines](#).

¹ <http://www.irishstatutebook.ie/eli/2016/si/284/made/en/print>

² <https://ogp.gov.ie/revised-eu-thresholds-with-effect-from-1st-january-2020/>

Please refer to Q&A at the end of this note that addresses common questions you may have with respect to procurement and Covid-19.

2. Procurement options in cases of unforeseeable events

Direct award due to reasons of extreme urgency

S.I. No. 284/2016 – European Union (Award of Public Authority Contracts) Regulations 2016 has provisions to allow contracting authorities enable the continuation of much needed service at time of extreme urgency such as those brought about by COVID-19.

Regulation 32(2) sets out the following:

“A negotiated procedure without prior publication may only be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

(a) where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, where the initial conditions of the contract are not substantially altered and a report is sent to the Commission where it so requests;

... (c) insofar as is strictly necessary where, for reasons of extreme urgency not attributable to the contracting authority and brought about by events unforeseeable by the contracting authority, the time limits specified for the open procedures or restricted procedures or competitive procedures with negotiation cannot be complied with.”

Therefore, in responding to Covid-19, contracting authorities may enter into contracts without a competitive process or advertising the requirement so long as they are able to demonstrate the tests listed below have all been met.

1. There are genuine reasons for extreme urgency, for example:
 - the need to respond to the Covid-19 consequences immediately because of public health risks, loss of existing provision of goods and/or services at short notice etc., and
 - it is necessary to react to the current situation which is a genuine emergency.

2. The events that have led to the need for extreme urgency were unforeseeable, for example:
 - the Covid-19 situation is so novel that the consequences are not something that could have been predicted.
3. It is not feasible to comply with the usual timescales in the 2016 Regulations, for example:
 - there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation, and
 - there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.
4. The situation is not attributable to the contracting authority, for example:
 - the contracting authority has not done anything that could have led to or contributed to the need for extreme urgency.

Contracting authorities should keep a written justification that satisfies the above tests. A separate assessment of the tests should be carried out before undertaking any subsequent or additional procurement to ensure that the conditions still apply, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future.

The requirements should be limited to only what is absolutely necessary both in terms of what is being procured and the length of contract.

Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the contracting authority. This is because:

- the Regulations expect a contracting authority to plan its time efficiently so that it is able to use a competitive procedure,
- competitive alternatives (for example, an accelerated open procedure) can be completed quickly, and
- it is worth noting that case law has held that knowing that something needs to be done means that it is foreseeable; Therefore, a contracting authority's delay or failure to do something is likely to mean that the situation is attributable to the contracting authority.

Contracting authorities should document the reasons for choosing a non-competitive procedure and these should be retained for audit purposes. If a Government Department or a body under its aegis makes a direct award above €25,000 (ex. VAT), this should be reported in line with [Circular 40/02](#) at the appropriate time.

Direct award due to absence of competition or protection of exclusive rights

Regulation 32(2) of the Regulations also sets out that the negotiated procedure without prior publication may be used:

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:

(i) the purpose of the procurement is the creation or acquisition of a unique work of art or artistic performance;

(ii) competition is absent for technical reasons;

(iii) the protection of exclusive rights, including intellectual property rights;

... only where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

Therefore, a contracting authority may make a direct award where the works, goods or services needed to respond to Covid-19 can only be supplied by a particular supplier because:

- competition is absent for technical reasons, for example, there is only one supplier with the expertise to carry out the work, produce the product or with capacity to complete on the scale required, or
- the protection of exclusive rights, including intellectual property rights, for example,
 - the supplier owns those rights (including intellectual property rights), and
 - it has the exclusive right to exploit intellectual property rights.

But this is only when:

- there is no reasonable alternative or substitute available, and

- the contracting authority is not doing something which artificially narrows down the scope of the procurement, for example, by over-specifying the requirement.

Contracting authorities should keep a written justification that satisfies these tests. A separate assessment should be carried out before undertaking any repeat procurement to ensure these tests have been met. Similarly if a Government Department or a body under its aegis makes a direct award above €25,000 (ex. VAT), this should be reported in line with [Circular 40/02](#) at the appropriate time.

Using a standard procedure with accelerated timescales due to urgency

Contracting authorities can reduce the minimum timescales for the open procedure, the restricted procedure and the competitive procedure with negotiation if a state of urgency renders the standard timescales impracticable. The minimum time limits vary (see Regulations 27(4), 28 and 29 respectively). For procurements under the open procedure, timescales can be reduced to 15 days for receipt of tenders plus the minimum 10 days for the standstill period.

There is no express requirement for the situation to be unforeseeable or not attributable to the contracting authority but the OJEU notice should set out a clear justification, along the following lines:

“The COVID-19 outbreak has given rise to an urgent need for the supply of [description of what is being procured] because [explanation of urgency]. This does not give [name of contracting authority] sufficient time to comply with the standard [open procedure / restricted procedure / competitive procedure with negotiation] timescales for this procurement. [Contracting authority] considers this to be a state of urgency which it has duly substantiated. Accordingly, [contracting authority] is using the accelerated time limits permitted under the Public Contract Regulations 2015 (regulation [27(5) for the open procedure / 28(10) for the restricted procedure / 29(10) for the competitive procedure with negotiation]) in respect of this procurement”.

Social and other specific service (Light Touch Regime)

Contracting authorities can also consider the use of the Light Touch Regime for specific health and social care related services (see Regulation 74-7). While contracting authorities are required to advertise contracts in OJEU and publish contract award notices, there is flexibility to use any process or procedure to run the procurement. There is no requirement to use the standard EU procurement procedures (open, restricted and so on). This flexibility

also extends to timelines as long as they are reasonable and proportionate. **It is important to note that the use of the light regime is limited to specific goods and services.**

Extending or modifying a contract during its term

Regulation 72 sets out the following:

72. (1) Contracts and framework agreements, including contracts awarded in accordance with Regulation 74, may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases:

(c) where the following conditions are fulfilled:

(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;

(ii) the modification does not alter the overall nature of the contract;

2(b) Notwithstanding paragraph (1)(c)—

(i) any increase in price shall not exceed 50% of the value of the original contract or framework agreement,

(ii) where several successive modifications are made, that limitation shall apply to the value of each modification, and

(iii) consecutive modifications referred to in clause (ii) shall not be aimed at circumventing these Regulations.

Contracting authorities should keep a written justification that satisfies these conditions, including limiting any extension or other modification to what is absolutely necessary to address the unforeseeable circumstance. This justification should demonstrate that your decision to extend or modify the particular contract(s) was related to the Covid-19 outbreak with reference to specific facts, for example, staff maybe procuring urgent requirements to deal with Covid-19 consequences and cannot engage in a new procedure, or your staff are off sick so they cannot complete a new procurement exercise. You should publish the modification by way of an OJEU notice to say you have relied on the above regulation.

Multiple modifications in this context are permissible, however each one should not exceed the 50% of the original contract value. You should also consider limiting the duration and/or scope of the modification and running a procurement for longer-term/wider scope requirements alongside it.

There are other grounds available under regulation 72 for extending contracts, including: if the proposed variation has been specifically provided for in the contract; where a change of contractor cannot be made for economic or technical reasons, and where the modifications are not substantial.

If more than one ground is applicable this should be included in your written justification.

3. Office of Government Procurement Advice

OGP are advising contracting authorities to examine their supplier bases to assess their exposure to supply chain disruption as a result of Covid-19. This information-gathering exercise should identify the extent to which contracting authorities are relying on each and any market hit by restrictions as result of Covid-19.

The potential impact on their ability to provide services if there is a disruption to these markets should also be considered. Contracting authorities should then consider and implement mitigation steps to ensure the continuation of services.

Accordingly, OGP advises contracting authorities to manage their risks and to develop a clear understanding of how any supply chain disruption will impact on the contracts that underpin them. Each contracting authority is best placed to gauge its level of exposure either directly or indirectly. While it is acknowledged that each organisation will have different supply needs, the following are some areas that should be considered when carrying out new procurement procedures and managing current contracts:

- Consult the Government's information sources for updates on Covid-19 including www.gov.ie and [HSE](http://www.hse.ie).
- Consult OGP website for the latest information on public procurement rules.
- Check what public procurement frameworks are in place through the five central purchasing bodies, [OGP](http://www.ogp.gov.ie), [Education Procurement Service](http://www.educationprocurement.gov.ie), [Defence](http://www.defenceprocurement.gov.ie), [Health Business Service](http://www.healthbusinessservice.gov.ie) and [Local Government Operational Procurement Centre](http://www.localgovernmentprocurement.gov.ie).
- Examine all categories and sub-categories for the following:
 - location of suppliers and sub-suppliers,
 - current delivery time and the transport route of the goods or supplies concerned,

- if there is the possibility of inconsistent or delayed delivery of goods, how might this impact on your organisation's ability to deliver public services,
- if necessary you may need to plan or develop your organisations capacity to buy in bulk (cash-flow implications) and hold stock (warehousing options should be examined) or manage supply to take account of possible delays in delivery, and
- examine the market to gain knowledge of alternative sources or routes of supply.

In short, contracting authorities should assess each supplier's relative importance and take appropriate action to ensure continuity of essential services. OGP will also be considering the medium-term implications of the crisis and it may be necessary to introduce interim arrangements for public procurement as matters develop. This will be communicated on the OGP website.

4. Reminder of prompt payment procedures

The Government committed to making every effort to pay its suppliers promptly. In this regard, the Government extended the non-statutory requirement applicable to Central Government Departments to all public bodies from July 2011, to reduce the payment period by Public Bodies to their suppliers from 30 to 15 days. Every effort, consistent with proper financial procedures, is being made to ensure that all suppliers are paid within this timeframe. In this regard suppliers can help by ensuring that:

- correct invoices are sent in the manner that has been instructed by the contracting authority, and
- accurate bank account details are provided.

(In the case of all public sector contracts of a value of €10,000 (inclusive of VAT) or more within any 12-month period, the contractor will be required to produce a valid tax clearance certificate. This is a mandatory requirement. Full details on tax clearance procedures may be found on the [Revenue Commissioners](#) website).

Outline of prompt payment of accounts legislation

Payment of invoices is governed by the Prompt Payment of Accounts Act, 1997 as amended by the European Communities (Late Payment in Commercial Transactions) Regulations 2012 - S.I. 580 of 2012. The Regulations, which apply equally to the public and private

sectors, provide an automatic entitlement to interest and compensation if payment for commercial transactions is late (valid invoices which are unpaid after 30 days from the date of receipt).

Payment of interest and compensation cannot be waived by the supplier and must be included with the amount payable for the goods or services without demand for its payment being made by the supplier.

From 1 January 2020 the late payment interest rate is 8% per annum (based on the ECB rate of 0.00% plus the margin of 8%). That rate equates to a daily rate of 0.022%. Penalty interest due for late payments should be calculated on a daily basis. The ECB rate can be checked on the [Central Bank](#) and Financial Services Authority of Ireland website or on the [European Central Bank](#) website.

It should be noted that the legislation does not oblige payment to be made to a supplier who has failed or refused to comply with a request to produce a tax clearance certificate and it expressly extends the statutory time limit for payment where there are delays in furnishing a tax clearance certificate. Also, the Act does not affect the deduction of withholding tax from any payment to a supplier.

5. Actions taken by OGP

OGP, as part of the Department of Public Expenditure and Reform, has been addressing the implications of Covid-19 as part of the Government's overall response.

OGP is and will continue to engage with our public sector clients and, in particular, the HSE to forecast additional demands for key goods. We are also working closely with the suppliers on our frameworks to understand any potential supply chain implications and to manage their impact. This includes framework members that supply critical goods/services, such as, food, cleaning, hygiene supplies and fuel, to assess and advise on any likely supply disruptions. We are also in close and ongoing contact with the HSE to assist in any exceptional procurement requirements that they may have, and have already provided support in this regard.

In order to ensure the continuity of services contracting authorities should assess their supply chains to prepare for any possible impact that Covid-19 related events might have on a given supply.

It is important to recognise that there may be no one single solution and each contract and solution needs to be tailored for each individual business need.

OGP can offer support in terms of operational management and supply chain expertise. Please contact our helpdesk at support@ogp.gov.ie.

OGP published an information note on 19 March 2020, **Note on procurement and contractual matters associated with the Covid-19 Response Measures**³. The purpose of this note is to provide guidance to contracting authorities who are required to procure emergency professional services or works as a result of the Covid-19 response measures; and/or are currently a party to a public works contract or conditions of engagement.

6. Further information in relation to Covid-19

For regular updates on Government contingency planning in relation to Covid-19, please visit www.gov.ie.

The European Commission has called for solidarity and a Europe-wide coordinated solution, to effectively manage this public health emergency. This is so as to ensure that essential goods, necessary to mitigate the health risks of the outbreak, can reach all those in need. It is essential to act together to secure production, stocking, availability and rational use of medical protective equipment and medicines in the EU, openly and transparently, rather than taking unilateral measures that restrict the free movement of essential healthcare goods.

The Commission is therefore taking all necessary steps to that end including by providing guidance for Member States on how to put in place adequate control mechanisms to ensure security of supply, and by launching an accelerated joint procurement procedure for these goods and issuing a recommendation on non CE-marked protective equipment. OGP will update this information note as appropriate on receipt of guidance from the Commission.

Further information is also available from:

- [Health Service Executive](#) (HSE)
- [Health Protection Surveillance Centre](#) (HPSC)
- [World Health Organization](#) (WHO)

³ <https://constructionprocurement.gov.ie/category/news/>

- [European Centre for Disease Prevention and Control](#) (ECDC)
- https://ec.europa.eu/commission/presscorner/detail/en/IP_20_459 (EU Commission package of measures in relation to Covid-19)

Note: Please check the OGP website to ensure that this is the most recent information note published on this issue.

General Questions and Answers relating to issues that may arise in relation to Covid-19

Q. What should contracting authorities do if they are currently running a tender procedure that could be impacted by restrictions imposed as a result of Covid-19?

A. There are a number of important considerations.

- A contracting authority may at its own discretion decide not to award any contract and to cancel the entire contract award procedure at any time during the procurement process. This may be necessary where resources are to be reallocated or diverted from the original procurement including for reasons related to Covid-19.
- Depending on the nature of the supply chain and exposure to international markets, contracting authorities should assess the market to determine whether delaying the procurement procedure would make sense. Contracting authorities may also assess whether extensions of tender procedures/deadlines are required in ongoing competitions are necessary, to allow sufficient time for economic operators to respond etc.
- Contracting authorities need to keep communicating with suppliers to understand their supply chain.
- Location – the contracting authority should identify as far as possible its contractor's supply chain to determine any potential issues.
- Delivery, risk and payment – contracting authorities may need to consider purchasing items in bulk or alternatively requiring the contractor to hold a certain level of stock within Ireland for the contracting authority. This could be construed as a change to the contract and as such contracting authorities may also need to amend the tender documents and possibly the contract notice to reflect this.

Q. What are the options for contracting authorities in the event of supply chain disruption because of restrictions or requirements imposed because of Covid-19?

The options in relation to modifying a contract are outlined above

- **Terminate a contract**

Procurement legislation requires contracting authorities to include provisions in all above EU threshold contracts that allow them to terminate the contract where the contract has been subject to substantial modification that would have required a new procurement procedure. Contracting authorities should consider other short-term arrangements, rather than termination, where contracted suppliers may not be in a position to supply goods or services at this time through no fault of their own. The important issue in the short term is to ensure the continued provision of public services. Such 'arrangements' ought to only be utilised for as long as strictly necessary.

- **Utilisation of centralised procurement arrangements**

Contracting authorities which have been impacted by Covid-19 are urged to consider, where appropriate, if there are any current sectoral⁴ arrangements in place, that is, framework agreements that could meet requirements and have 'direct award' call-off contracts which may be utilised in a short space of time. In such cases, all procedures of the framework agreement would have to be followed, including the scope of any call-off contract.

Q. Will OGP standard template documents change to take account of Covid-19?

A. No. However, OGP constantly reviews all guidance and template documentation and will be considering any appropriate amendments necessary as a result of Covid-19 contingency measures.

⁴ OGP, Education Procurement Service, Defence, Health Business Service, and Local Government Operational Procurement Centre

Q. What services fall under the Light Touch Regime?

A. Services that fall within this category are explicitly listed (with CPV codes) in Annex XIV of Directive 2014/24/EU. There are 14 categories of services and these are listed below.

- Health, social and related services
- Administrative social, educational, healthcare and cultural
- Compulsory social security services
- Benefit services
- Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
- Religious services
- Hotel and restaurant services
- Legal services not excluded by Article 10(d) of Directive 2014/24/EU
- Other administrative services and Government services
- Provision of services to the community
- Prison related services, public security and rescue services not excluded by Article 10(b) of Directive 2014/24/EU
- Investigation and security services
- International services
- Postal service
- Miscellaneous services