

**Independent review of the  
Tender Advisory Service**



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# Context for the review

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## Introduction

Public procurement refers to “*the process by which public bodies purchase works, goods or services from suppliers which they have selected for this purpose*” (Office of Government Procurement, 2017a, p.13). This process creates an important market for businesses in Europe and the amount of money spent through the process means that well-governed public procurement plays a very significant role in supporting public sector efficiency and achieving value for money.

This report presents the findings from an independent review of the Tender Advisory Service (the TAS). The service was put in place as part of the Action Plan for Jobs 2014 as one mechanism to support Small and Medium Enterprises (SMEs) in engaging in public procurement processes. The service is provided through the Policy Unit of the Office of Government Procurement (OGP) and its purpose is to provide an informal mechanism for potential suppliers to raise concerns in relation to a particular live tender process being carried out by the OGP or other public sector contracting bodies (Office of Government Procurement, 2016a). The service is available at only one point in the open tendering process, which is post clarification and not less than six days before the closing date for receipt of tenders.

The aim of this review is to conduct an independent evaluation of the TAS and through this provide an assessment of its contribution to the public procurement process, as well as to evaluate whether the current design and operation of the TAS is sufficient, appropriate and proportionate in the context of similar type services elsewhere.

The findings from the review are based on an analysis of data from primary and secondary sources of information and it considers key issues relating to the structure, processes and outcomes from the work of the TAS. The findings are also situated within the context of the broader literature on public procurement (particularly as it pertains to SMEs), current legislation and developments in other jurisdictions, specifically in Scotland, Sweden and Canada. These jurisdictions are included as they were identified by participants in this review as examples of good practice in this area.

## Spending on public procurement

According to the OECD, the total volume of public procurement in 2013 amounted to EUR 4.2 trillion, accounting for 12% of gross domestic product (GDP) and 29% of general government expenditure in OECD countries (OECD, 2016a). Within the European Union (EU), it is estimated that there are over 250,000 public authorities which purchase services, works and supplies each year (European Commission, 2017a). In 2011, the total value of the expenditure by general government and utilities in the EU on public works, goods and

services was estimated to be EUR 2,406 billion, accounting for 19% of the EU's GDP (PWC, 2014). More recently, it is estimated that EU spending in this area is closer to 14% of the EU's GDP, although this masks wide variation at individual country level (European Commission, 2017b). One report (OECD, 2016b) suggests that countries such as Estonia, Korea and Japan spend more than 35% of their GDP in this area, while it is estimated that Ireland spends about 16% (Enterprise Ireland, 2015).

Public procurement spending on goods and services in Ireland each year accounts for about EUR 8.4 billion with a further EUR 3.6 billion spent on works (Office of Government Procurement, 2015a). Key findings from the analysis of 2014 spend data, based on an analysis of EUR 3.931 billion of the spend (Office of Government Procurement, 2016b), are presented in Figure 1.



**Figure 1: Key findings of 2014 public procurement spend data (based on analysis of EUR 3.931 billion spend)**

## Public procurement policy

***“Transparent, fair and competitive public procurement across the EU’s Single Market generates business opportunities, drives economic growth and creates jobs.” (European Commission, 2017b)***

In Ireland, a key element of the public service reform agenda is to realise savings, reduce costs and achieve better value for money through reform of public procurement (Office of Government Procurement, 2014). Such savings have been identified elsewhere, such as in Scotland, where it is estimated that over a ten-year period (2006-2016), public procurement reform generated total savings of almost GBP 2 billion (The Scottish Government, 2016). From 2013 to 2016, in excess of EUR 300 million in savings were made for the Irish tax payer by the OGP and the sector sourcing organisations in health, local government, education and defence.

In 2016, Ireland’s performance in public procurement, based on nine key performance indicators compared across EU countries, was reported to be “average”, a decrease from 2015 when it was considered “satisfactory” (European Commission, 2017a<sup>1</sup>). Ireland was found to be satisfactory in respect of three indicators (i.e. number of calls for bids, cooperative procurement and award criteria) and unsatisfactory in respect of five indicators

(i.e. publication rate, decision speed, missing values, missing calls for bids and missing registration numbers) <sup>1</sup>.

A number of reforms have taken place in public procurement in Ireland in recent years including:

- the establishment of the Office of Government Procurement;
- the appointment of a Chief Procurement Officer;
- the transposition of the new EU procurement Directives;
- development of frameworks;
- creation of template documents (RFTs and contracts) for use in open tendering competitions for goods and services;
- introduction of Circular 10/14;
- issuing of procurement guidelines;
- publication of data on public procurement; and
- introduction of a range of initiatives aimed at supporting SMEs.

(IBEC, 2013; Office of Government Procurement, 2015a; Office of Government Procurement, 2017a)

These reforms have been supported through the publication of several national policy and guidance documents, including a number of key circulars. Following the transposition of new EU directives on public procurement, the OGP issued the revised "*Public Procurement Guidelines for Goods and Services*" (Office of Government Procurement, 2017a). These guidelines aim to promote and support best practice and consistency in the application of the public procurement rules relating to the purchase of goods and services. This guidance is relevant to all public contracting authorities, such as the OGP, the four key sectors of health, local government, education, and defence, individual departments and State bodies, as well as to any private bodies involved in the awarding of contracts for goods and services which are subsidised by 50% or more by a public body. Separate policy and guidance relating to works and works-related services are published on the Construction Procurement Reform ([constructionprocurement.gov.ie](http://constructionprocurement.gov.ie)) website where the Capital Works Management Framework (CWMF) provides a suite of best practice guidance, standard contracts and template documents.

In addition to achieving financial savings, the public procurement process can also be very influential in the implementation of other policy goals. Europe 2020 (European Commission, 2010), the EU's growth strategy, considers public procurement an important mechanism through which the business environment can be improved and innovative performance of firms can be enhanced. The European Commission's guide to "*Taking Account of Social*

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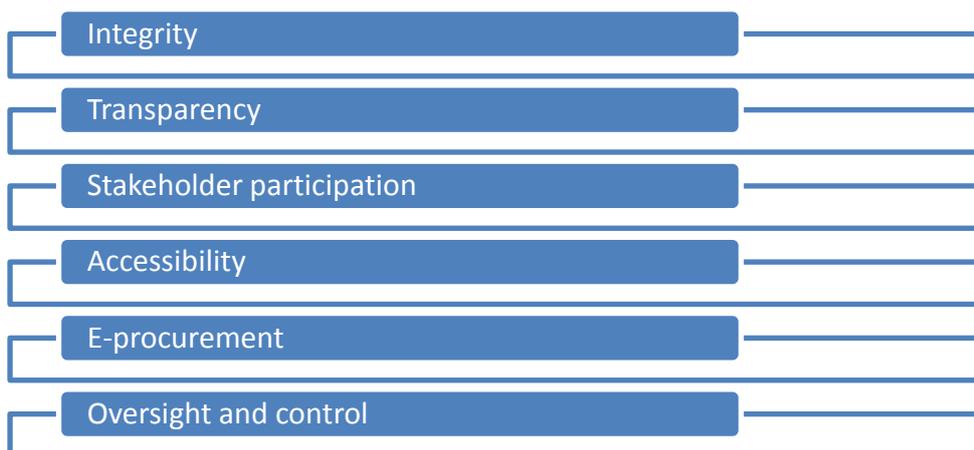
<sup>1</sup> This analysis is based on the EU public procurement website, TED. Approximately 30% of public procurement in Ireland is advertised on this website.

*Considerations in Public Procurement*” (European Commission, 2011) aims to capitalise on public procurement by:

- raising contracting authorities' awareness on the benefits of opting for goods and services delivering good social outcomes, and
- explaining the opportunities offered by the existing EU legal framework to take into account social considerations in public procurement.

Documents such as *“Buying Social”* (European Commission, 2011) and *“Public Procurement as a Driver of Innovation in SMEs and Public Services”* (European Commission, 2014) also support the implementation of these policy imperatives. These are also reflected at national level in documents such as the *“Procurement and Accessibility Guidelines* (National Disability Authority, 2012), *“Green Procurement: Guidance for the Public Sector”* (Environmental Protection Agency, 2014) and *“Buying Innovation: The 10 Step Guide to SMART Procurement and SME Access to Public Contracts”* (Department of Enterprise, Trade and Employment, 2009).

Public procurement processes also influence the level of trust citizens have in their government. Such processes are particularly vulnerable to fraud, corruption and mismanagement of public funds because of the close interaction between public and private sectors, the financial interests at stake and the size of the expenditure. As a consequence, transparency throughout the public procurement process is essential. An open and transparent system is also critical in creating a level playing field for businesses and in promoting competitive tendering (OECD, 2016b). Key principles for preventing corruption and stimulating good governance and accountability across the procurement lifecycle have been set out by the OECD (2015) and are presented in Figure 2.



**Figure 2: Principles set out in the OECD “Recommendation on Public Procurement”**

These principles are reiterated in the OGP guidance document (Office of Government Procurement, 2017a), where issues relating to accountability, separation of duties, risk

assessment, record keeping, training, conflicts of interest, codes of conduct, acceptance of gifts or bribes and collusive tendering are also highlighted.

### **Small and Medium Enterprise (SME) engagement in public procurement**

The TAS was established as part of the “*Action Plan for Jobs*” (Department of Jobs, Enterprise and Innovation, 2014) in response to concerns raised about possible barriers to SMEs taking part in procurement processes. Given the importance of SMEs in this initiative, specific consideration is given to supports for SME engagement in public procurement in the national and international policy environments.

There is agreement that SMEs require special supports and there is substantial research literature regarding this. Challenges for SMEs have been identified at all stages of the public procurement process. While some of these challenges (e.g. poorly defined specifications, a long expensive bidding process, and a concern that tender prices must be low) are concerns for all businesses, research from the UK suggests they can impact disproportionately on SMEs because of their size and limited resources (Loader, 2015). In Ireland, Flynn et al. (2013) identified time demands, the financial costs of tendering and requirements for previous relevant experience as barriers to SME participation in public procurement. A further Irish study conducted by Flynn and Davis (2015, 2016) with 3,010 SMEs, reported negative experiences of SME-friendly public policy measures. In response to a question as to whether, in their experience, four key SME-friendly measures had been implemented, only 22% to 36.2% respondents reported that they had. This is reflected in the following:

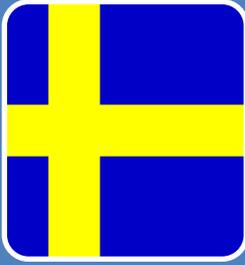
- contracts are split into lots (27% agreed or strongly agreed that this was their experience);
- procurers are flexible in the type of proof of financial capacity sought (25% agreed or strongly agreed that this was their experience);
- pre-qualification criteria are relevant and proportionate (36.5% agreed or strongly agreed that this was their experience); and
- SME consortium bidding is encouraged (22% agreed or strongly agreed that this was their experience).

In a review of international literature, Akenroye and Aju (2013) developed a typology of challenges arising at different stages of the tendering process. These include:

- **pre-bidding phase** (e.g. a lack of clear regulatory framework to influence SMEs participation and lack of adequate enforcement mechanisms);
- **discovering tender opportunities** (e.g. inadequate advertising of contract opportunities and a lack of clarity on tender requirements);

- **applying for tender opportunities** (e.g. a lack of skills for preparing good tender responses, insufficient knowledge of the formal procurement process, and insufficient time to submit bids);
- **winning tenders** (e.g. disproportionate qualification levels and technical criteria, preference for larger bidders, and unfair evaluation of tender); and
- **post-bidding and review of awards** (e.g. lack of capacity to challenge tender results and no feedback on unsuccessful tenders).

Other issues such as a lack of electronic resources, legal expertise and marketing capability have also been identified as problematic for SMEs in the United Kingdom (Loader, 2015). It has also been suggested, however, that while SMEs are underrepresented in bidding in public procurement, they may nevertheless, be hired as subcontractors and in that way are benefiting from public spending (Loader, 2015). There is some evidence that the SME sector is under-represented in public procurement processes both nationally (Flynn & Davis, 2016) and internationally (Mitran, 2013; Nicholas & Fruhmann, 2014; Loader, 2015; Loader & Norton, 2015; Saastanmoinen, et al., 2017). This is reflected in the data for selected jurisdictions where public procurement spend with SMEs ranges from 19% in Sweden to 49% in Scotland and 40% in Canada. In Ireland, analysis of about one-third of annual public procurement expenditure found that 55% of this spend is with SMEs (Figure 3).



### Sweden

- Overall, €64.92 billion spent in 2014 accounting for 20% of GDP.
- Dispersed and decentralised system in place.
- Oversight provided by the Swedish Competition Authority.
- 75% of tenderers were SMEs in 2015/2016.
- 19% of spend to SMEs in 2015/2016. This is in decline since 2008 when it was 47%.
- 99% of public procurement spend is with Swedish companies.



### Scotland

- Circa €12.19 billion spent annually.
- Centralised procurement system under Scottish Procurement.
- Recent developments include the digital Procurement Journey Platform.
- 14,700 tenders advertised in 2015 - an increase from 3,516 in 2009.
- In 2014, 62% of contracts were awarded to SMEs located in Scotland.
- 49% of public procurement spend in 2015/2016 went to SMEs.



### Canada

- Circa €15 billion (\$23 CAN) annually.
- Decentralised system of procurement.
- 32.7% of Government expenditure on procurement in 2016 compared with OECD average of 29%.
- On average, 40% of the value of contracts and 76% of the number of the contracts goes to SMEs.
- Office of the Procurement Ombudsman oversees procurement.



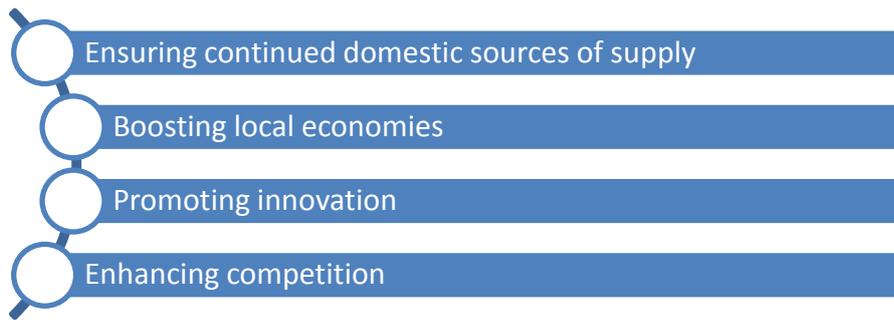
### Ireland

- Centralised process through the Office of Government Procurement.
- Circa €12 billion spent annually.
- Analysis of €3.931 billion spend shows that:
  - 55% of the spend is with SMEs.
  - 95% of expenditure is with firms within the State.
  - 77% of tender notices are below the OJEU tender thresholds.

**Figure 3: Procurement data in respect of selected jurisdictions**

An under-representation of SME engagement in the public procurement process is neither desirable nor tenable as SMEs account for the vast majority of businesses in most jurisdictions. In Ireland, for example, SMEs account for 99.9% of all businesses (Central Statistics Office, 2017) and this is similar to the United Kingdom (UK) where firms with 0-249 employees comprise 99.9% of private businesses (Loader, 2015).

Higher levels of SME engagement in the public procurement has a number of advantages, as outlined in Figure 4.



**Figure 4: Advantages to higher levels of SME engagement in public procurement**

### ***Policy initiatives to support SME engagement***

There have been a number of policy initiatives put in place in different jurisdictions to support SMEs in public procurement.

#### *Ireland*

In Ireland, these developments include:

- The establishment of a ‘High Level Group’ on SME Access to Public Procurement. This group was established in 2013 by the OGP and the Department of Jobs, Enterprise and Innovation. The focus of this Group is to develop policies to support SMEs in accessing public procurement opportunities. The Group consists of representatives from OGP, the Department of Jobs, Enterprise and Innovation (DJEI), Enterprise Ireland (EI) and InterTrade Ireland (ITI) and is chaired by the Government Chief Procurement Officer.
- The establishment of the SME Advisory Group which was created to address issues affecting SME participation in public procurement. Representatives include the OGP, the DJEI, EI, ITI, the Competition and Consumer Protection Commission (CCPC), the Irish Business and Employers’ Confederation (IBEC), the Small Firms Association (SFA), the Construction Industry Federation (CIF), Chambers Ireland and the Irish Small and Medium Enterprises Association (ISME). This Group is chaired by the Minister of State with special responsibility for Public Procurement in accordance with the Programme for Government.
- The re-launch of the national portal eTenders and the campaign to encourage SME registration.
- The development of training events such as: Go-2-Tender training; consortia training and consortia building guidelines; and SME procurement seminars.
- The launch of The Small Business Innovation Research pilot.
- The introduction of ‘Meet the Buyer’ events.

In addition, Circular 10/2014, presented in greater detail in the section on legislation and regulation, provides guidance on supports for SMEs in engaging in public procurement processes.

### *Scotland*

Scotland has put in place a number of initiatives to support SME engagement in public procurement including:

- The development and implementation of a “*Suppliers’ Charter*”, which commits public bodies to improving the way they work with businesses.
- The promotion of the use of Public Contracts Scotland advertising portal which, similar to eTenders (the Irish public procurement website), allows users to:
  - publish their ‘buyer profile’ on the portal, helping suppliers find out quickly and cheaply whether a public body is a potential customer;
  - advertise as many contract opportunities as possible and publish contract award notices, giving suppliers free access to contract opportunities across the Scottish public sector;
  - use the ‘quick quote’ facility for very low value contracts, allowing suppliers to bid for very low value contracts with a minimum level of bureaucracy;
  - review contract award procedures, ensuring that they place the minimum possible burden on suppliers, for example through use of a ‘core supplier questionnaire’;
  - use outcome-based tender specifications wherever possible, allowing businesses to propose innovative and alternative solutions to public sector business needs;
  - include in their terms and conditions a requirement that contractors pay any sub-contractors within 30 days of receipt of a valid invoice, ensuring that sub-contractors, as well as contractors, receive prompt payment; and
  - monitor spend with SMEs, using data from the Scottish Procurement Information Hub. Monitoring spend by way of a Best Practice Indicator (BPI) will enable public bodies to demonstrate the success of the other activities.

### *Canada*

In Canada, the Office of Small and Medium Enterprises (OSME) and the Public Works and Government Services Canada (PWGSC) are engaged in supporting, advocating and encouraging SME participation in federal government procurement.

A number of initiatives have been highlighted, including the following:

- As part of their defence procurement strategy, the Government of Canada requires companies awarded a defence and security contract to undertake business activity in Canada equal to 100% of the value of the contract, 15% of which needs to be assigned to small businesses (OECD, 2017).
- There is a commitment to reduce duplication and the volume and complexity of paperwork required for federal procurement bids.
- They will leverage digital technology to provide tools and information to improve service delivery, while reducing the cost and process burden for clients, suppliers, and the PWGSC procurement workforce.
- They are engaged in continuous development of client and supplier e-tools.
- They support opportunities for SMEs to test their innovations within federal operations which have improved SME's participation in federal procurement activities.
- An evaluation of the government electronic tendering service, currently the Open Bidding Service (MERX), is being conducted in order to develop a single-point-of-entry no-cost option for Government of Canada procurement information before the current arrangements expire.
- A new version of the 'buy and sell' website ([Buyandsell.gc.ca](http://Buyandsell.gc.ca)) has been released, providing single window access to federal procurement information and presenting valuable procurement data in a way that can be easily accessed by users.

Surprisingly, given the reduction in the SME spend on procurement in Sweden, no specific measures appear to have been taken with regard to SME access to public contracts.

## Summary

In summary, national and international policy in respect of procurement is focused on four key areas. These are ensuring value for money, supporting broader social and environmental policy imperatives, ensuring good governance and transparency, and improving SME participation in the system. These goals are reflected in a number of guidance and policy documents as well as special initiatives.

## Legislation and regulation

Irrespective of the size of the contract, all public procurement in Ireland is subject to certain rules, and the recent publication by the OGP provides clarity in this regard (Office of Government Procurement, 2017a). Differentiation, however, is made according to the monetary value of the contract and this is particularly the case in respect of whether it is above or below EU thresholds. Procurement of works, goods and services above a certain monetary threshold is subject to extensive EU and national regulation. These public procurement thresholds are:

**Works:** Contract Notice: EUR 5.225 million threshold applies to Government Departments and Offices, local and regional authorities, and public bodies.

**Supplies and Services:** Contract Notice: EUR 135,000 threshold applies to Government Departments and Offices. Contract Notice: EUR 209,000 threshold applies to local and regional authorities and public bodies outside the utilities sector.

**Utilities:** Works Contracts and Prior Indicative Notice: EUR 5.225 million applies to entities in utilities and sectors covered by GPA (Government Procurement Agreement<sup>2</sup>). Supplies and services contracts: EUR 418,000 applies to entities in utilities sectors (e.g. water, gas, electricity, transport and postal sectors) covered by GPA (Office of Government Procurement, 2017b).

The primary law applicable to public procurement in Europe is found in the “*Treaty on the Functioning of the European Union*”. While the Treaty does not specifically address public procurement, certain articles (including Articles 34, 49, and 55) which enshrine principles such as equality and non-discrimination and free movement of goods and services, are contained in it. Telles and Schooner (2013) also note that even in situations where procurement might not be subject to the full scope of Directives, the EU Commission and the Court of Justice of the European Union (CJEU) have ruled that the treaty principles must be observed.

## EU Principles underpinning procurement

Article 18(1) Directive 2014/24/EU<sup>1</sup> establishes the following principles as the basis on which all procurement rules are implemented:

*“Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner”.*

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<sup>2</sup> The Government Procurement Agreement (GPA) is a plurilateral agreement under the auspices of the World Trade Organization (WTO) that consists of 19 parties covering 47 WTO members (counting the European Union and its 28 member states, all of which are covered by the Agreement, as one party).

Within this Directive there are four key principles and these have been summarised by Georgieva (2017) as follows:

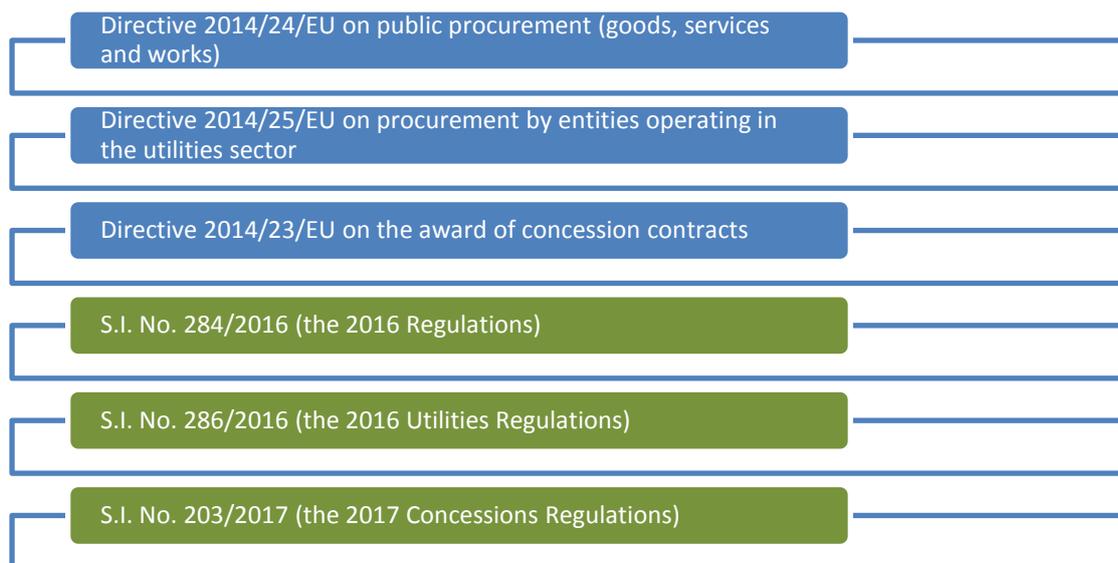
1. The principle of *equality* which ensures that all candidates in public procurement processes are subject to exactly the same conditions for submission and evaluation of tenders and are treated in exactly the same way.
2. The principle of *non-discrimination* which prohibits discrimination based on preferences due to the nationality of the suppliers and producers, e.g. giving preference to local tenderers at the expense of foreign ones.
3. The principle of *proportionality* which expresses the expectation that the required award criteria are proportional and appropriate to the objective of the procurement.
4. The principle of *transparency* which is mainly concerned with the amount of information to be provided on orders and procedures, and the publicity of the actions or inactions of the contracting authorities on selection of a contractor.

Specifically, these principles mean that all businesses registered in the EU have the right to compete for public contracts in other EU countries and EU law sets out minimum harmonised rules that apply to tenders above a certain value. For all tenders, public authorities:

- may not discriminate against businesses registered in another EU country;
- may not refer to specific brands, trademarks or patents when describing the characteristics of products and services they wish to purchase;
- may not refuse to accept supporting documents (certificates, diplomas, etc.) issued by another EU country, as long as they provide the same level of guarantee; and
- must make all information regarding tenders available to all interested companies, regardless of the EU country in which they are registered.

## **EU directives**

EU directives are the rules that impose legal obligations on public bodies. In respect of public procurement, there are three current directives which set out minimum harmonised public procurement rules for member states and which require advertisement in the Official Journal of the EU of contracts for works, supplies and services, above certain financial thresholds. These three directives take account of previous directives, as well as case law arising from decisions of CJEU from 2004 onwards. Figure 5 presents the current relevant EU directives (presented in blue), along with the Statutory Instruments through which these have been transposed into Irish law (presented in green).



**Figure 5: EU procurement directives and their transposition into Irish law**

### **Remedies Directives**

The Remedies Directives set minimum national review standards to ensure that rapid and effective means of redress are available in all EU countries when an economic operator that has an interest in a public procurement procedure believes that it has been run without proper application of the EU Public Procurement Directives (European Commission, 2017c). There are two EU Remedies Directives, one for the public sector and one for utilities, and these are implemented in Ireland through the following:

- S.I. No. 192/2015 European Communities (Public Authorities Contracts) (Review Procedures) (Amendment) Regulations 2015;
- S.I. No. 193/2015 European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015;
- S.I. No. 131/2010 The European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2010; and
- S.I. No. 130/2010 The European Communities (Public Authorities Contracts) (Review Procedures) Regulations 2010.

These directives provide for procedures which allow actions to be brought in the pre-contractual period (including, for example, the right of interim measures, a compulsory standstill period between award decision and signing of contract, and a requirement to suspend the award procedure while the appeal is being investigated) and for actions and remedies in the post-contractual period (including rendering an existing contract ineffective and/or to provide compensation to the affected parties after the contract in question has been signed) (European Commission, 2017c).

In addition, the Remedies Directives allow for:

- automatic debrief to tenderers as to why they were unsuccessful;
- regime of time limits for bringing proceedings; and
- alternative penalties (namely the shortening of the duration of the contract or the imposition of fines).

Some differences have arisen in how the Remedies Directives have been implemented. In Ireland, for example, the compulsory standstill period between award decision and signing of contract is a minimum of 14 calendar days if notification is sent by fax or electronic means and 16 days if sent by other means. This compares with other countries such as France (10 days), Denmark (7-10 days) and Italy, which has the longest standstill period of 35 days from the date of the last communication of the contract award decision. In Ireland, similar to some EU member states (Bulgaria, the Czech Republic, Finland, Malta, Slovenia, Slovakia and UK), the period of suspension of the contract can apply until a decision on appeal against the first instance decision or longer. In other EU states, such as the UK, courts may make an interim order bringing to an end the suspension of the contract award procedure (European Commission, 2017c).

### ***Circular 10/14***

The TAS was set up in response to an identified need to support SME participation in public procurement competitions. There are a number of other initiatives in place regarding this issue, and of these, Circular 10/14 from the Department of Public Expenditure and Reform is a key landmark (Department of Public Expenditure and Reform, 2014). This circular pre-dated, and is aligned with, the transposition of the EU procurement directives presented above. Figure 6 presents a summary of the initiatives set out in Circular 10/14 to support SMEs (Office of Government Procurement, 2015b).



***Figure 6: Summary of Circular 10/14 initiatives to assist SMEs in public procurement***

## Review of public procurement

The TAS is an informal, non-binding, structure that provides an outlet for potential suppliers to raise concerns in relation to any live tendering process carried out by the OGP or other public sector contracting body (Office of Government Procurement, 2016b). More formal review in Ireland takes place within the judicial system, post-award of contract, and any proceedings must be commenced in the High Court. Data based on information from the Irish Courts Service on breaches of procedures under the European Communities (Award of Public Authorities Contracts Regulations, 2006) reported that there had been a total of 21 cases in the years 2009 to 2012, although the decisions of these cases were only publicly available in seven of these cases (Europe Economics and Milieu, 2015).

Different approaches to review are adopted in other jurisdictions and SIGMA (2013), an organisation funded through a joint initiative of the OECD and the EU, present an overview of different types of approaches. They note that the main objective of a public procurement complaints review and remedies system is:

*“To enforce the practical application of public procurement legislation by ensuring that violations of this legislation and intentional or unintentional mistakes of contracting authorities / entities can be corrected” (p.2).*

Four core principles which should underpin such a system have been set out by SIGMA (2013) and these are that it should be: (a) rapid, (b) effective, (c) transparent, and (d) non-discriminatory. SIGMA identify three main types of approach, noting that in the majority of EU member states, the model chosen is a combination of various review bodies that are responsible for different aspects of review. The three main approaches identified are: regular courts, specialised administrative bodies, or a combination of the two.

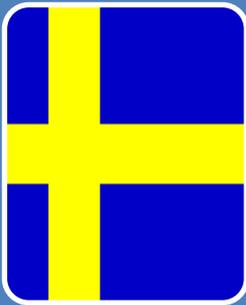
SIGMA details that in 2013, in Belgium, France, Lithuania, the Netherlands, Portugal, Sweden and the UK, the review of public procurement decisions takes place in the regular courts system only. Within this, the level of court of first instance (i.e. where the case is first heard) differs. In some jurisdictions, the court of first instance is the lowest level administrative court, while in others it refers to a higher-level court. SIGMA (2013) asserts that the level of the court of first instance can impact on cost, speed and proximity to the parties. They explain that where a high-level court is used as the court of first instance, factors such as costs, time and distance from the area in which the procurement contract was carried out may deter tenderers from filing complaints. In Ireland, with the exception of the TAS, the only other mechanism in place to independently review the procurement process is the High Court (Figure 7).

SIGMA also note that a specialised public procurement review body was found to exist in approximately half of the EU member states and these bodies are usually of a non-judicial or quasi-judicial nature. With some exceptions, the decisions of these review bodies are

binding but subject to appeal in civil or administrative courts where the decision may be changed or annulled. Advantages of specialised procurement review bodies are that:

- the procedure is usually simpler and quicker than is the case in regular courts and meet the “rapidity” criterion of the Directive;
- the members of the specialised review body deal exclusively with procurement cases and as a result they develop specialised expertise in the area; and
- the costs involved when regular courts review complaints may be much higher than it would be in specialised review bodies.

Figure 7 illustrates the different approaches to procurement review adopted in four different jurisdictions (Sweden, Scotland, Canada and Ireland).



### Sweden

- The Swedish Competition Authority is the state authority responsible for regulation of public procurement.
- Between 2009 and 2014, 6-8% of all public procurements were subject to review.
- Number of cases processed in the courts increased by 10% in 2015.
- 75% of cases were decided in the contracting authorities favour.
- The average processing time was 2.2 months.



### Scotland

- Single point of enquiry.
- Established in 2008.
- Available throughout procurement process.
- 42 requests for assistance 2012-2013.
- Value of procurement over £1 million in 37% of cases.
- Outcomes: 50% procurement process in order.



### Canada

- Office of the Procurement Ombudsman oversees public procurement.
- Available in the post-contract period only.
- Between 2008-2011, 12 procurement practice reviews were undertaken.
- In 2014, 34 requests for formal review were received but only four met the criteria and one of these was withdrawn.
- In 2014, four requests were received for Alternative Dispute Resolution Services, but three were declined by the contracting authority.



### Ireland

In 2011, 10 cases were initiated in the High Court. Seven were struck out or settled (with costs awarded to the contracting authority in two of those cases). Two were pending in 2011. One involved a judgment on a preliminary issue and a costs order in favour of the contracting authority. A review of selected judgements from the Court of Justice of the European Union on Public Procurement from 2006-2014 identified two cases from the Irish situation (Hill, 2014).

**Figure 7: Overview of procurement review in selected jurisdictions**

It should be noted that information relating to the cases in Ireland is based on 2011 data (A&L Goodbody, 2012) and more recent information on the outcomes from High Court cases in Ireland is not readily available. In Sweden, a judicial system is in place and between 6-8% of all public procurement contracts are subject to review in the courts. In Scotland, a non-judicial service is in place that spans the full procurement process from pre-qualification to award of contract. In Canada, a Procurement Ombudsman is in place though this service is only available on completion of the procurement process.

## Summary

In summary, spending on public procurement in Ireland accounted for about €12 billion in 2014. A key purpose of public procurement is to ensure value for money. In addition to achieving financial savings, the public procurement process can also be very influential in maintaining public trust in government and in supporting the implementation of social and environmental policy imperatives. All public procurement in Ireland is subject to rules irrespective of the monetary value of a contract, although the rules vary somewhat on the basis of whether the contract spend is above or below EU thresholds. There is a substantial legislative and regulatory context for public procurement which is underpinned by principles such as equality, non-discrimination, proportionality and transparency, as well as the free movement of goods and services.

It is clear that special measures are required to ensure SME involvement in public procurement as there are many additional challenges for this group of businesses in participating in these processes. In Ireland, key policy initiatives relating to SMEs are set out in Circular 10/14 and it is intended that these initiatives will make it easier for SMEs to compete for public contracts. In addition to initiatives to support SMEs in Ireland, consideration is given in this section to developments in Sweden, Scotland and Canada. Given the role of the TAS in providing an informal review process, some consideration is given to review bodies required under EU directives. The outcomes of different types of review are presented in respect of Ireland, Sweden, Scotland and Canada. The relevance of these different approaches are considered in greater detail in the proposals for the enhancement of the TAS.

# Methodology

This review was commissioned by the Policy Unit of the Office of Government Procurement (OGP) and it took place between June and August 2017. The review is underpinned methodologically by a case study approach and is informed by a logic model, which includes inputs, activities, outputs and outcomes.

## Aim

The overall aim of the research is to conduct an independent review of the Tender Advisory Service (TAS) to meet a commitment in the Programme for a Partnership Government and through that to:

1. provide an assessment of the contribution of the TAS to the public procurement process in the OGP including identifying strengths and weaknesses arising, and
2. evaluate whether the current design and operation of the TAS is sufficient, appropriate and proportionate in the context of similar type services elsewhere.

## Review process

A four-phase approach was adopted to the research, including: 1. a preparatory phase; 2. data collection phase; 3. data analysis and integration phase; and 4. report drafting phase (Figure 8).

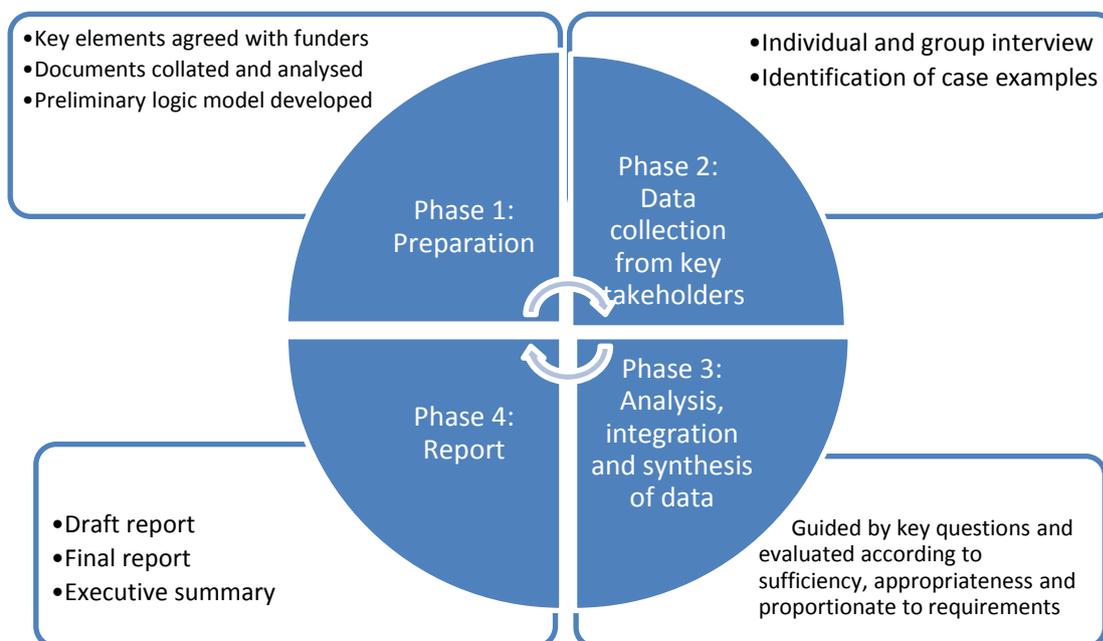


Figure 8: Overview of methodology

## Engagement with stakeholders

A qualitative approach was adopted to engagement with stakeholders and the SME High Level Group, hosted by the OGP, formed the basis for the inclusion of key stakeholders. Interview data were collected from 16 participants across multiple stakeholder organisations including:

- staff members of representative bodies referred to throughout the findings as ‘industry representative’ (n=6);
- staff members of statutory organisations (n=3);
- staff members of contracting authorities (n=2); and
- personnel with responsibility for the TAS (n=5).

In most cases, individual interviews took place. In one case, three people were interviewed together and in another, two people were interviewed together. Despite a number of requests, no supplier agreed to take part in the interview process.

## Methods

A preliminary logic model was used to focus data collection and took account of:

- **inputs** (e.g. resources and contributions that are made to the TAS including, for example, time, personnel, money, partnerships and collaborations);
- **activities and outputs** (e.g. number of clients, range of services provided and types of interventions made);
- **outcomes** (e.g. direct results or benefits for those who received the service); and
- **impact** (to take account of the ultimate consequence or effects of the TAS, e.g., changes in knowledge, processes, and outcomes or impact on the tendering process).

## Interviews

Prior to the interviews taking place, interview schedules were developed which took account of key issues arising from the logic model. In two cases, more than one person took part in the interview and all best practices in conducting group interviews were adhered to by the researcher. This included ensuring good moderation, providing opportunities for each member to contribute, and concentrating on the key areas to be addressed while ensuring new issues could be raised. With the prior consent of the participants, all interviews were audio-recorded and transcribed verbatim. This ensured that the information received could be systematically analysed.

## Other sources of data

Two broad types of secondary data were used. These were:

- **administrative data** from the TAS on the number of queries, size of contracts involved, time from receipt of query and outcomes, and
- **publicly available data about procurement in selected jurisdictions** (Sweden, Scotland, Canada) sourced from the OECD, European Commission and national reports.

## Data analysis

In terms of analysis of the qualitative interview data, all audio recordings were first transcribed verbatim. Next, a process of thematic analysis was undertaken, assisted by the qualitative software package NVivo. The analytic process was iterative and complementary, employing a process of triangulation for comprehensiveness. Findings are presented by theme, with supporting quotes included.

## Principles underpinning the evaluation

This review has been underpinned by principles of good evaluation (Gardner, et al., 2013) and these include:

- involvement of a broad range of stakeholders;
- measuring what matters most;
- ensuring that the information collected is relevant and not burdensome; and
- all information collected is used.

## Ethical issues

Ethical issues were considered and addressed throughout the process, particularly in areas of confidentiality, anonymity and data protection. Confidentiality implies that any research data which includes identifiable information about participants is not disclosed to others without the explicit consent of the participants. Only the minimum amount of personal data required was sought and personal data was not used for any purpose other than that specified at the time of the collection. All data was anonymised and all research outputs checked carefully to ensure no individual was identifiable. In addition, all appropriate steps were taken to ensure data were held in a secure way. This included the removal of direct identifiers, the use of pseudonyms and the use of technical means to break the link between data and identifiable individuals. Both system and physical security safeguards were put in place to ensure the data were protected, complying with Data Protection (Amendment) Act 2003 (Government of Ireland, 2003).

Informed written consent was sought and received from all participants in the review. This consent related to both taking part in the interview and to being audio-recorded. Prior to interviews, participants were provided with an information sheet outlining the purpose of the study, their rights as participants and contact details of the research team should they have any questions.

### **Accuracy and validity of the findings**

Accuracy and validity in any evaluation are affected by a number of factors, including the appropriateness of the focus of the research, the research approach and methods, the availability of data and by the capacity of the data to support valid findings (Bamberger, et al., 2011). Two main strengths can be identified in respect of this review. First, the identification and collection of data from multiple stakeholders allowed for multiple perspectives to be taken into account. Second, the collection of new data, together with the review of administrative and international data, allowed for the consistency of findings to be tested.

### **Limitations**

While the approach to this evaluation has allowed for a detailed and comprehensive understanding of the TAS, the number of eligible queries arising is relatively small. While this is a finding, it also limits the extent to which transferrable knowledge can be generated. Secondly, despite a number of attempts, it was not possible to interview any individual supplier and this is an important voice that is absent from the review. In addition, data were not available about the use of the eTenders' website to access information about supplier behaviour.

# Findings

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## Context of procurement in Ireland

Throughout this review, participants drew attention to the overall procurement process in Ireland, which it was noted is highly regulated. It was also noted that although this is welcome, it can be very challenging for both contracting authorities and suppliers. Issues relating to the broader procurement process were raised by many participants and consideration of these as they impact on SMEs and, consequently, on the overall implementation of the TAS is set out below. Four key issues are highlighted and these are:

1. impact of recent public procurement developments in Ireland on SMEs;
2. complexity of the overall procurement process;
3. specific challenges in respect of the tender process; and
4. knowledge and expertise of the contracting authorities.

## Impact of recent public procurement developments in Ireland on SMEs

A number of positive developments in public procurement that have taken place recently were highlighted, including: the updated guidelines on goods and services published in July 2017; update of template RFT and contract documents; and what was perceived to be a more professionalised approach to procurement within the public sector. It was noted that the decision to centralise procurement with a preference for framework agreements and the establishment of the OGP have both been very substantial changes in the way in which business in this area is carried out.

Some concerns were raised about the centralised approach being adopted through the OGP, particularly the use of national framework agreements, which it was suggested creates difficulties for SMEs. The three main issues for SMEs relating to national frameworks were identified as: 1. the requirement to provide a service over a wide geographic area; 2. a shift in relationships between buyers and local suppliers; and 3. the scale and size of contracts which may be too large for small businesses. One participant in the review noted:

*“To set up the OGP, and really that has been the big change in this area that has impacted most on our members. Preference for framework agreements, all of that side of things...” (industry representative).*

In respect of framework agreements, it was suggested that in contrast with this development, the private sector has moved towards a *“diversity of suppliers”*. Attention was also drawn to some inflexibility in the standardised Request for Tender (RFT) templates and it was noted that that these might also require a more nuanced approach.

## Complexity of the overall process

In general, there was agreement that the process of public procurement from the perspective of the supplier can be “overwhelming”, “arduous”, “complex” and “complicated” and that despite a number of initiatives, such as the Go-2-Tender training programmes, many SMEs find it difficult to engage in the process. It was suggested that this is not a problem limited to Ireland and that similar issues arise for Irish SMEs when competing at a European level. It was also highlighted, however that a “simplification agenda” at European and Irish level is being advanced over the next couple of years, which aims to make it easier for both suppliers and public sector buyers to engage in the process. This includes a range of initiatives, such as “guidelines”, “template documents”, “digitalisation” and “e-procurement”, some of which are already in place.

Some attention was drawn to the lack of knowledge about procurement held by SMEs and particularly sole traders, who it was suggested are unlikely to have internal experts available to assist them in submitting a response to tender. It was also suggested that sufficient time and energy is not invested by SMEs in the procurement process, which has consequences for the quality of the proposals submitted and the likelihood of success in a competition. One participant noted:

*“A lot of the SMEs have difficulty. They’re not as adept as we would like them to be through the eTenders’ system. They need a helping hand” (industry representative).*

It was also suggested, however, that the eTenders’ registration process itself can be off-putting for some potential tenderers resulting in them being “out of the loop” in knowing about and responding to tenders.

## Specific challenges arising in respect of the tender process

Concerns were also raised about three main aspects of the tender process itself and these were:

- the preparation of the tender documentation;
- the absence of a formal but non-legal appeal system; and
- a perception that tendering processes are not always fair and equitable.

Issues were raised about the preparation of tenders and, within this, there was a particular focus on the requirement to meet certain criteria in order to be eligible to take part in a competition. Attention was drawn by a number of participants to misinformation and unnecessary requirements in relation to “turnover levels, insurance, breaking contracts into lots”. While it was stated that these issues are dealt with under Circular 10/14 (which, as noted earlier, focuses on supports for increasing SME access to public procurement), it was suggested that some contracting authorities did not always adhere to the guidelines in this

circular. One example given related to “self-certification”, where it was noted many contracting authorities required the SME to attach a letter from their bank to confirm solvency with their tender submission. This, it was noted, is not self-certification and is not in accordance with the Circular 10/14 guidance in this area.

A second issue relating to the absence of an appeal mechanism was raised in the context of the role played by the TAS. While one participant suggested that Irish suppliers are not litigious as evidenced by the small number of cases that are taken through the courts systems, a more commonly held view was that the costs of legal cases “really turn people off, just in terms of cost, in terms of time” and “going the legal route can be a very costly and time consuming exercise”. The impact of going the legal route, it was noted, can be “huge”. One participant highlighted the problems of this for both supplier and contracting authority:

*“...the vast majority of people will not go to the Remedies Directive. Too expensive, gives you a filthy name and all that...But when it does happen, it causes absolute havoc to the public policy of building the swimming pool, doing the library, stops dead. And (it could take) two years to get back to it” (industry representative).*

It was also suggested that raising concerns might lead to you being “blacklisted” as “Ireland is a small country...and everyone knows everybody else”. It was also highlighted, however, that blacklisting a company is illegal and is clearly in contravention of the policy and legislation in this area.

A third issue arising in respect of the tendering process itself relates to perceptions that the system is not fair, that it militates against small businesses and that public bodies could purchase more from SMEs in Ireland. One participant drew attention to the perceived need to support SMEs, noting however, that the practice does not reflect the consensus and that “our own government does not buy from SMEs”.

While it was accepted that these types of views did exist, there was no consensus amongst participants that any of the above perceptions were accurate, although it is clear that there is no formal yet non-legal appeal system in existence other than the TAS. Several participants drew attention to the role of Circular 10/14 in providing a basis for clarification and challenge. The absence of comprehensive data on procurement practices in Ireland was identified as compounding this problem. Participants, mainly industry representatives, stated they had examples of different problems arising, such as where the development of the tender, the pre-qualification criteria set out, the request for specific items in the RFT, or the evaluation criteria could have been interpreted as favouring one supplier over all others.

There was agreement that an open and transparent system benefits everybody including the buyer.

## Knowledge and expertise of the buyer

Some questions were raised about the level of knowledge and expertise of the buyers who are running competitions and it was suggested that some RFTs contain incorrect and inaccurate information. It was noted that while some large public organisations which regularly undertake procurement exercises do have substantial expertise, many buyers are not “*procurement professionals in the true sense of the word*”. Further, it was suggested that a public employee could end up being a procurement manager despite never having been “*trained in either prequalification law or procurement law or good practice*”. One industry representative suggested that while the procurement information in Circular 10/14 is not complicated or difficult, some buyers are not aware of the circular itself or are not familiar with its content.

It was also suggested that there is limited expertise in procurement in some contracting authorities with one person noting:

*“...you learn yourself basically, so I’ve no formal training in RFTs and all this kind of stuff. I just learned it myself. If I make a mistake, I put my hands up and apologise and correct it and move on, make sure it doesn’t happen again” (staff member of contracting authority).*

It was also stated by an industry representative that there is “*no training budget in the OGP for training public authorities*”, although it was also noted that the OGP has provided training on the EU directives and other areas of relevance. However, even in situations where a training budget may be available, the lack of regular involvement in this area may mean that expertise does not develop to the level that is required as evidenced by the participant below:

*“You may go a training course and then you don’t get anything for another year, so...and that’s the difficulty, in terms of how we do, I suppose, with how we do business across the civil service in particular is that we don’t tend to specialise” (staff member of a statutory organisation).*

A lack of expertise can result in incorrect information being included in some RFTs. Opinions differed as to whether feedback to buyers on potential problems with an RFT was welcomed and acted on or not.

## Summary

In summary, throughout this review, participants drew attention to issues relating to the broader public procurement environment and highlighted their impact on SMEs’ engagement in the process. These issues related to the impact of recent public procurement developments in Ireland on SMEs, the complexity of the overall procurement process,

specific challenges in respect of the tender process, and the knowledge and expertise of the contracting authorities

## The TAS structure and inputs

The TAS is situated within the Policy Division of the OGP. The service was launched in December 2014 and became operational in February 2015 for all tenders published after that date which met certain criteria. The purpose of the TAS is to provide an informal outlet for potential suppliers to raise concerns in relation to a particular live tender process carried out by the OGP or other public sector contracting body (Office of Government Procurement, 2016b). Key objectives of the initiative are to improve communications with suppliers and to increase professionalism and consistency in how procurement processes are carried out across the public service. There is some agreement that the TAS is part of the response:

*“To what the SME representative bodies were looking for in terms of their needs and that it provides additional support / resources and a way of responding to issues that those going for tender needed beyond what the contracting authorities might be offering them” (member of the TAS).*

In the course of this review, one person described it as *“a pre-judicial clearing house for problems”*.

## Overall view of the TAS

It was noted that the TAS arose from discussions with the SME representative bodies and that it is meant to be a service *“where they don’t get satisfaction from the contracting authority that they can go to a party removed from the process who’ll actually look at it objectively”*. Views about having the TAS in place are mainly positive, although a small number of challenges were also identified. Participants stated that *“it’s a good principle”, “a good idea”, “a very good service”, “fantastic”, “brilliant”* and is *“very, very valuable”*. It was also suggested that *“the potential of the TAS is enormous”* and that it can act as *“an insurance policy”* around procurement. Specific benefits highlighted include:

- provision of an additional avenue to get questions resolved and an additional step to address issues arising;
- opening up an opportunity to be heard in the middle of a tendering process;
- availability of a *“third party”, “honest broker”* or *“independent arbiter”*;
- an alternative to the *“pressing the nuclear button of the Remedies Directive”*;
- provision of information for contracting authorities to ensure that what they are doing is correct;
- facilitating an informal resolution process; and
- referral of queries to appropriate bodies when deemed ineligible for the TAS.

One participant noted:

*“If the existence of the Tender Advisory Service makes people feel like they have a point of access, that’s positive in the small business community in terms of increasing the perception of being accessible and responsive...” (industry representative).*

It was also suggested, however, that the need to set up the TAS pointed to a “*lack of communication, knowledge, understanding what the directives were all about*” and that:

*“[In a] perfect world, we don’t need the TAS because we’d have trained, professional procurers who understood or understand how the procurement process should work. So, there’s obviously a deficit” (industry representative).*

One participant stated that “*the current Tender Advisory Service is at best an hors d’oeuvres. It’s a step but it’s so limited. It’s so poorly marketed*”. Another pointed out that it “*is only the tip of an iceberg*”.

### **Issues arising in respect of the TAS structure**

In the course of the discussions, four main issues were raised in respect of the structure of the TAS and these are:

1. the scope of the TAS;
2. timing of queries;
3. the situation of the TAS within the OGP; and
4. lack of clarity about the TAS.

#### ***Scope of the TAS***

The TAS Frequently Asked Questions (FAQs) document (Office of Government Procurement, 2017c) sets out the broad scope of the service and notes that the service can only be used by suppliers with an interest in a specific tender process and only in the following circumstances:

- their enquiry is in respect of a RFT that has been published;
- the supplier has a registered interest in the specific tender process;
- the supplier has already availed of the clarification process set out in the RFT documentation but is not satisfied with the response received from the contracting authority; and
- the supplier has completed a Standard Enquiry Form and forwarded it, and accompanying documentation, to the TAS at least six days prior to the tender closing date.

In addition to the above boundaries, financial and sectoral limitations are also set out and the TAS excludes “major works (defined for the purpose of the TAS as works contracts with a value in excess of €500,000) and defence/security tenders (regulated under Statutory Instrument 62/2012)” (Office of Government Procurement, 2016a). In general, there was agreement that the scope of the service was very narrow and this had implications for how useful and helpful the service could be in the context of a very complex procurement process.

The current eligibility criteria for raising a query with the TAS include the need for the supplier to have registered an interest in the specific tender process and to have already availed of the clarification process set out in the RFT documentation. It was suggested, however, that some representative bodies would have a much greater knowledge of the procurement process and could be a better judge of whether “Circular 10/14 has been adhered to” than perhaps a micro business or SME. It was suggested that industry representatives should be able to raise a query with the TAS regarding a specific tender in a more general way rather than “make the case for a certain company” as this would reduce the risk of discrimination for an individual supplier.

It was also suggested that people should not have unrealistic expectations of the TAS and “what it should be is, just if it’s needed, it’s an emergency, and it’s dealt with speedily and efficiently, for both the buyer and the seller”. While one person suggested further limiting the work of the TAS to deal only with “the financial criteria, the liability, the insurance, guidance around this, stuff that was in 10/14” and not the “technical requirements”, in general, there was some agreement that the “scope is quite limited in terms of the timeframe, in terms of the range of questions that can be addressed there” and there is a “bigger picture” to be considered around the overall procurement process. One person suggested that the parameters of the service should be extended to include the pre-qualification period stating that “if you get the ‘prequal’ wrong, you’re gonna get the tendering wrong”.

In respect of works contracts, the TAS only accepts queries on works contracts that are under EUR 500,000. It was suggested that the size of the contract should not matter with one person stating:

*“So if somebody has been trained in European procurement law, the value doesn’t matter. Well, to a large degree. Slight difference when we get up on five billion, but the principles are the same” (industry representative).*

### **Timing of queries**

The timing during which queries can be raised is both specific and short. Queries can only be raised following the close of the clarification period, but six days or more before the closing date for the tender submission. This short timeframe was identified as causing some problems for suppliers. First, it was noted that if clarifications have not been received early on in the process, there may not be sufficient time to consider the response. This may arise

because a supplier, particularly a micro-business, “*may leave it to the last minute to apply*”. As a consequence, by the time the clarification is received and a decision taken about raising a query with the TAS, there is “*really no room to avail of the service*”. It was also noted that some clarifications can give rise to further questions, which is particularly problematic for the timing requirement for accessing the TAS. One individual noted about the completion of tender documentation:

*“Then questions emerge and more questions might emerge or someone else has asked a question that’s opened another question....and suddenly, you realize that that window gets shorter and shorter to ask questions and suddenly you’re left with that situation that it doesn’t...you either bid and cross your fingers to say that hopefully that’s been sorted” (industry representative).*

A problem may also arise as a result of the way in which the contracting authority deals with clarifications and different approaches are taken:

*“...some buyers either will respond automatically to each clarification and inform everybody that has downloaded those documents and everybody gets an email to say that they’re there. Otherwise, they answer that they will bundle them” (industry representative).*

If clarifications are bundled, it can create difficulties, particularly if the query raised is not responded to until very late in the process. In those situations, it may be difficult or even impossible to meet the timeline for accessing the TAS service. The short time period from the close of clarification process to closing date for tender submission can also create some challenges for the personnel in the TAS. It was noted that if a query comes in with only six days to the close of tender, it can be difficult to ensure that the supplier can get a fair and reasonable response. It was suggested that in those circumstances, if a clarification needs to go out from the TAS, the contracting authority would be requested to extend the deadline for the submission of tenders.

### ***Situation of the TAS within the OGP***

As noted above, the TAS is situated within the Policy Division of the OGP and there were two broad views expressed about this. On the one hand, it was suggested that the TAS is “*an honest broker*” acting on behalf of suppliers because it sits “*in the middle between the buyer and the provider*” and because of the role of the TAS “*the OGP is essential*” to the overall process. The contrary view was that the TAS could not be perceived as providing a “*confidential*”, “*unbiased*”, “*safe space*” for suppliers to raise issues because of its base within the OGP.

## Challenges

Two primary challenges relating to the positioning of the TAS were raised. Firstly, participants described a lack of independence in how a query might be managed. It was suggested that because of the positioning of the TAS, personnel may not be independent in how they deal with queries and that *“they are not going to question their own staff”*. In the course of discussions, however, it was also noted that *“there has not been any difficulty with how it has operated so far”*. It was also pointed out that for most queries arising, *“the principles are clear”* and that there is no requirement for any *“legal interpretation”*. There was not agreement about the need for interpretation, however, and it was stated that *“the European regulations are brilliant. They are fantastic because they’re so vague”*.

Secondly, participants described perceptions by suppliers that they might be discriminated against by the contracting authority in the overall procurement process because of their contact with the TAS. It was noted by the TAS, and confirmed by the contracting authorities who took part in this review, that the TAS does not inform the buyer of the source of a query when they make contact. While this may help allay fears, it was also noted, however, that this may not be sufficient since *“... you could be identified, because if you’ve already asked that question, you’re identifiable”*. This was noted as a particular concern where the queries to the TAS were in respect of OGP tenders although it was suggested that the policy section of the OGP is separate from the operations side of the organisation and that there is, *“in effect, a Chinese wall”* in operation in respect of the TAS.

There was not complete agreement on this and one member of a representative body noted that:

*“They see the threat of being locked out of the contract as much more damaging than any potential reputational damage of being seen as a troublemaker or anything like that” (industry representative).*

## Benefits

A number of benefits of positioning the TAS within the OGP were identified. Firstly, participants felt there was expert knowledge available because of the situation of the TAS within the OGP. There was strong agreement by participants in this review that the OGP is a source of expertise in the area of procurement and that *“since the OGP came into existence in 2013, we’ve seen huge progress”*. Arising from this, it was suggested that situating the TAS within this structure gave it a *“strong credibility”* in dealing with procurement issues. One member of a representative body noted that:

*“OGP is a leader in best practice, the issuing of circulars, the influence of statutory instruments...They’re seen as a leader in procurement, and putting their stamp on it” (industry representative).*

There was also some agreement that the availability of this expertise enabled staff working in the TAS, who it was stated were “*experienced*” and “*very knowledgeable*”, to have a “*better understanding of how the actual tenders are put together*”, as well as of the “*guidelines, policies, procedures, legislation*” and “*up-to-date practices*”. This, it was suggested, put them in a unique position to deal with issues arising. Personnel from the TAS noted that where relevant expertise was not available within the TAS section, that there was access to the broader range of experts in relevant areas, including legal and procurement, as well as subject matter experts in areas like health, education, and defence or within local authorities. It was noted that:

*“I think it being positioned in the OGP, with so many people in procurement, there’s a huge amount of procurement knowledge there. Some people who’ve worked in procurement for 20, 30 years” (staff member of the TAS).*

Attention was drawn to the availability of an Expert Panel which was set up at the formation of the TAS. The Expert Panel are staff who have wide experience in public procurement who are working in either the OGP or the sectors of health, local government, education or defence. The Expert Panel may be called on by the TAS to review complicated enquiries arising in areas other than their own. It was also noted that “*they can be brought in to give a view when it’s an OGP project as well*”. In general, however, the Expert Panel were not involved in the small number of queries dealt with by the TAS since its inception.

A further benefit of the TAS’ position within the OGP was described as its potential to influence contracting authorities. It was stated that by being positioned within the OGP, the TAS could exert a good deal of influence on buyers in the public sector. Specifically, it was noted that because the OGP itself is part of the Department of Public Expenditure and Reform, it has some control over the “*purse-strings*”, which in turn, “*has a way of influencing policy and of influencing behaviour as well*”. The way in which being under the mandate of the OGP, also allows the TAS the opportunity to say “*This is policy...and these are the guidelines*” was also highlighted. The position of the TAS within the OGP also ensures access to the eTenders’ website (where live tenders are advertised) and it was noted that this avenue of communication could be very beneficial.

### *Alternatives to the TAS*

Some consideration was given to whether there were alternatives to the OGP, and examples such as the Credit Review Body, the Competition and Consumer Protection Commission, and the Workplace Relations Commission were presented as prototypes. The appointment of a Procurement Ombudsman was also suggested and it was noted that such a position “*would be independent and would be able to call out the OGP if it saw that it was acting incorrectly*”. In addition, it was suggested that the role of the Ombudsman could be extended to “*pre-award...in terms of reviewing published documentation*”, “*post-award*” and “*could be a real trouble-shooter*” with “*the authority to examine whether or not due*

*process had been followed*". There was not a consensus about this, however, and it was also stated by a member of one representative body that:

*"Where other countries have established an ombudsman, it ends up being a room full of lawyers, and that doesn't suit our industry. We don't think that our industry is necessarily better led by the law profession because they have vested interests" (industry representative).*

### **Lack of clarity about the TAS**

Lack of clarity about the purpose of the TAS and knowledge about its operation were identified as key issues in how the service is used and valued. Several participants drew attention to the title of the TAS suggesting it was *"a misnomer"* which could lead to *"some misunderstanding"* because people *"think that it's an advisory service for people who are putting a tender together"*. It was also suggested that the title leads to *"ambiguity about what the service does and provides"*.

There was also some consensus that many suppliers and contracting authorities did not know about the service. It was noted that people do not *"go searching the OGP website"*, *"that there is no standard point in the documentation where it tells people what the Tender Advisory Service is"* and that there is a lack of awareness about the service. It was suggested that *"it comes back to market engagement"*. A staff member of a contracting authority confirmed a lack of knowledge about the service prior to engagement, and noted how when he received a telephone call from the TAS, he *"straightaway then I went to procurement.ie and just to kind of have a look...and see what was in there...what the process was...and what they were doing."*

One industry representative was particularly critical of the marketing strategy currently employed by the OGP which it was suggested *"is weak"* and involves *"things like banner campaigns, bulk buying ad space in newspapers who are internal circulation compliant"*. This individual suggested that the market has changed and that there are significant differences in how marketing needs to take place depending on the demographic characteristics of the target market.

Some inconsistencies were also identified in the way in which the TAS is presented in the available documentation about the service and its purpose. Information on the eTenders' website, for example, may overstate the role of the TAS and may lead to the impression that all aspects of the procurement process will be considered. Specifically, it states that the aim is:

*"To assist suppliers who have issues or concerns with a procurement process carried out by the Office of Government Procurement (OGP) or other public sector contracting body (excluding the commercial semi-state bodies)".*

This stated aim also differs from the aim set out in the TAS document (Office of Government Procurement, 2015c) which notes it is “*designed to give an informal outlet for potential suppliers to raise concerns in relation to a particular live tender process*” (p.1). This document further states that “*the objectives of the initiative are to improve communications with suppliers and increase professionalism and consistency in how procurement processes are carried out across the public service*” (p.2). This is inconsistent with the aim presented on the eTenders’ website and, coupled with the lack of clarity about the operation of the TAS, may create challenges for users. While additional information is presented in the detail of these documents, many people inevitably rely on the summary information provided. It is important, therefore, that this information be consistent across all platforms.

### Summary

In summary, the TAS is generally considered to be a positive development in the overall procurement process. In the course of this review, four main issues were raised in respect of the structure of the TAS and these relate to the scope of the service, the timing of queries, the situation of the TAS within the OGP, and a lack of clarity, knowledge and information about the TAS.

### Processes that take place within the TAS

This section considers the number of requests for assistance to the TAS and the steps of the process undertaken by personnel in the TAS on receipt of a query.

### Number of requests to the TAS

The processes that take place within the TAS are strongly influenced by the number of queries that are raised for their attention and the total number of queries is presented in Figure 9.

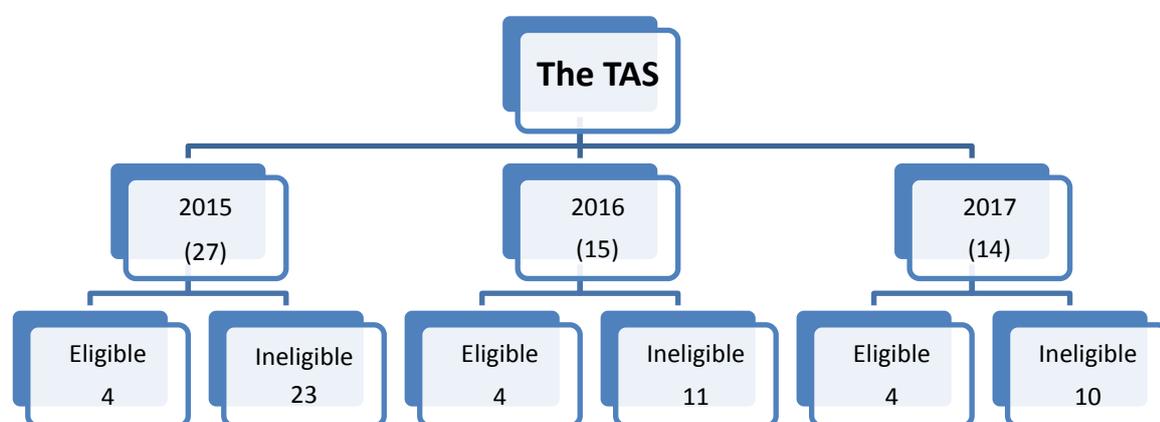


Figure 9: Number of the TAS queries received from Feb 2015-July 2017

The total number of queries across the period of review was 56 and, of these, only 12 were eligible for review by the TAS. There was some agreement amongst participants that the number of queries received by the TAS was “disappointing”, represents a “relatively low uptake”, “is miniscule”, “very tiny for the amount of contracts that come through” and participants commented that they were “surprised how small they were”. Reasons participants provided as to why the numbers were so low were as follows:

- It is not required as the procurement is running well.
- There is a misunderstanding and miscommunication around what the TAS is and what it is going to do.
- The scope of the TAS is too limited.
- The timing for engagement with the TAS is “not right”, with one individual suggesting that “there were people who would come post tender if they weren’t happy with the outcome of the tender”.
- Contractors are reluctant to raise their head above the parapet.
- People do not have a full understanding of the TAS.
- There is a filtration system in place that is run by membership organisations which is resulting in a reduced need for the TAS: “If they’re asking a question and they don’t think they’re getting a response that’s correct, they’ll come to us with that information and we’re telling them, ‘Look, you’ve been given the answer. It’s not subjective.’ And...you know...‘That’s actually okay’”.
- One organisation reported they have a telephone helpline service and in 2016, about 80% of 416 phone calls they received were “related to this stuff”.
- There is a branding problem with the TAS due to where it sits within the OGP.

### Queries raised by sector

The highest number of queries raised were by suppliers providing services (n=15), followed by those providing goods (n=13), with one query relating to both. Only five queries were received in respect of construction. These findings are presented in Table 1.

	2015	2016	2017
Construction	1	2	2
Goods	7	4	2
Services	7	4	4
Goods and services	1	-	-
Data not available	11	5	5

**Table 1: the TAS Queries raised by sector from Feb 2015-July 2017**

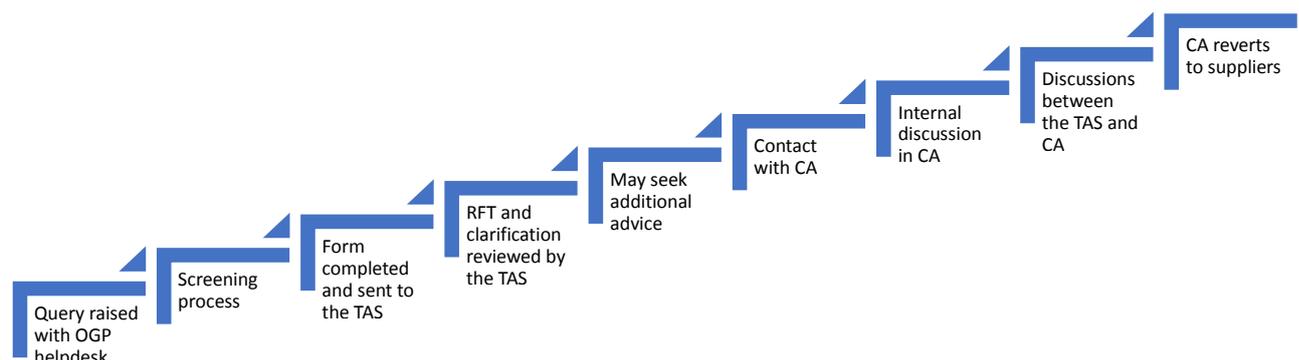
The lower level of queries raised by the construction sector may reflect the scope of the TAS which explicitly excludes major works (defined for the purpose of the TAS as works contracts with a value in excess of EUR 500,000) and defence/security tenders (regulated under Statutory Instrument 62/20122 ) (Office of Government Procurement, 2016a). This

exclusion, it was suggested leads to an impression that the TAS does not provide a service for larger contracts. It was also suggested that “the principles are the same irrespective of whether the contract is for €500,000 or €5 million or €12.5 million” and there should not be financial limit on eligible tenders.

## Response to requests for the TAS

The overall process commences when a query is raised by a supplier with the OGP Customer Services Department. This is done by the supplier ringing the OGP Helpdesk where the Customer Services Team will direct the supplier to where they can complete a Standard Enquiry Form. This was explained as follows:

*“The first point of contact would generally be with the Customer Service team. It’s on the website... ‘Fill in this form, send it into Customer Service’, but I think a lot of the time people generally ring for it. They ring. Customer Service will give them the details of the TAS query. They’ll fill out that form. So, when they ring, first Customer Service will usually ask a few questions to see whether it is the TAS query or not” (staff member of the TAS).*



**Figure 10: Steps in the TAS process**

The steps taken by the TAS depend on whether the query is deemed to be eligible for the service (see Figure 10 for more details). In order to be eligible to avail of the TAS service, the supplier must have already availed of the clarification process set out in the RFT documentation. When a request is submitted, a screening process takes place, mainly by personnel working at the OGP helpdesk, and that process results in a large proportion of queries raised being deemed ineligible for the TAS.

*“I don’t even think I’ve ever even got to a point where I’ve considered an ineligible (query), it’s usually done before I ever even see it. There was one that came in actually that the deadline was the day following...so officially that probably should have been considered ineligible, but I didn’t see the point in sending it back for it to come in the next day.” (staff member of the TAS)*

### **Data on ineligible queries**

Over the period of the review, 44 queries (78.5%) were deemed ineligible (Table 2). The most common reasons for this were because they were focused on general queries about the overall procurement processes (n=15) (e.g. how to register an interest on eTenders) or queries about the TAS more generally (n=5) (e.g. is the TAS still in operation, how does it work). Queries can only be raised with the TAS during the post-clarification period and prior to the close of the tendering period. These criteria were responsible for the ineligibility of 18 queries which included those:

- that were not within six days of the tender closing (n=3);
- where the clarification process was still open (n=6);
- where the tender deadline was closed (n=7);
- during the pre-qualification period (n=1); and
- where the clarification period was closed but the tender was still open (n=1).

Reasons	2015	2016	2017	Total
Clarification not sought	3	0	1	4
Clarification period closed but tender still open	0	0	1	1
Clarification process still open	2	3	1	6
General query about procurement	8	2	5	15
General the TAS query	3	2	0	5
Not within six days of tender closing	3	0	0	3
Organisation not under the remit of the TAS	1	0	0	1
Pre-qualification period	1	0	0	1
Pre-the TAS	1	0	0	1
Tender deadline closed	1	4	2	7
	<b>23</b>	<b>11</b>	<b>10</b>	<b>44</b>

**Table 2: Reasons for query being deemed ineligible by the TAS**

Even in situations where the query is deemed ineligible, however, some consideration may be given to the substance of the issue raised. In two cases recorded, queries that were deemed ineligible, resulted, nevertheless, in contact with the contracting authority for the purposes of providing greater clarity about key areas in the RFTs.

### **Data on eligible queries**

Following the screening process and acceptance of a query as eligible, the information is sent to a staff member of the TAS. At this point, the query is prioritised within the Policy Division and the person who receives the query reviews the RFT and any clarifications issued by the contracting authority. If the query is straightforward, the TAS personnel will, having reviewed the documentation, make direct contact with the contracting authority “to discuss what point came in and our response to it”. In other cases, particularly where the query is very technical, the personnel at the TAS would “best sum up what the query is, go through

the documentation”, and then contact the contracting authority with the “issues that have been established”. This required an iterative process as outlined below:

*“You get the documentation in. You make sure that the supplier’s given you everything that you need. You go back and you have a look at the RFT. You may, depending on the nature of the query...go and do...research before you go and talk to the contracting authority” (staff member of the TAS).*

An example of this was given where a product was being tendered and it was suggested by the supplier raising the TAS query that there was only one supplier in the country could meet the specification. The staff member of the TAS noted:

*“...I did all my...research, and...I could only find one supplier, so, at least then you’re informed when you go and you speak to the contracting authority” (staff member of the TAS).*

In complex cases, either from a supplier (in one query, for example, there were over 20 points raised) or in a situation where additional expertise is required, the personnel at the TAS may seek advice from their TAS colleagues, from other procurement personnel or from the Expert Panel. One individual noted:

*“You’re kind of setting the scene and where we’re coming from. So, really, that’s it then, you’ll have a conversation with them, and there’ll be a bit of back and forth, you try and understand it, and then we would kind of confer with each other as to, okay, this is the situation...Because there’s an awful lot of experience within the team...and then you’d come to a point where you’d have a recommendation and you’d go back to the contracting authority” (staff member of the TAS).*

When the issues have been identified, a discussion takes place with the contracting authority. When the query is received by the contracting authority, they may need to discuss the issue arising with other technical personnel within their own organisation and then make a decision about what is required. Following that process, the supplier receives a response from the contracting authority or alternatively from the TAS that indicates they will receive a response from the contracting authority.

## **Summary**

This section has presented qualitative and quantitative data on the number of requests for assistance from the TAS and the steps in the process undertaken by personnel in the TAS on receipt of a query.

## Outcomes

Over the period of the review there were 12 eligible queries (Table 3). Information on the size of the contract is available for six cases and the size ranged from less than EUR 25,000 to EUR 10 million. Response times to queries ranged from one day to 36 days and all but one query was resolved within 10 days of the query being raised. The eligible queries raised focused on the following main areas:

- lotting strategies;
- perceptions of bias or anti-competitiveness in the tender requirements;
- clarifications sought (in two cases) that did not receive a response from the contracting authorities; and
- unnecessary burden in completing the tender documentation.

Query No.	Details of query	No. days	Size of tender	Response	In favour of
1.	A tender that appeared to favour the incumbent.	3	EU	Contracting authority agreed to change the specification. Tender closing data extended.	Supplier
2.	Query about whether T & C would be negotiable after the contract.	9	EU	The TAS found T & C to be fair and reasonable in line with standard template documents.	Contracting authority
3.	Perception that tender process is anti-competitive as companies can only bid for one lot.	36	EU	In examining lot B the C.A. decided that, factoring in value for money and efficiency considerations, the best course of action was to change the requirements in one lot.	Supplier
4.	Request for a sample of work from the bidder considered to be free creative service at a cost to the tenderer.	1	€25,000	Contracting authority felt the request would not provide an undue burden on the tenderer.	Contracting authority
5.	Insufficient information provided about specification of service.	2	€4 million	Further clarification issued and timeline extended	Supplier
6.	Details not recorded on system.	1	N/A	Contracting authority agreed to cancel the RFT and revise taking account of the tenderers query.	Supplier

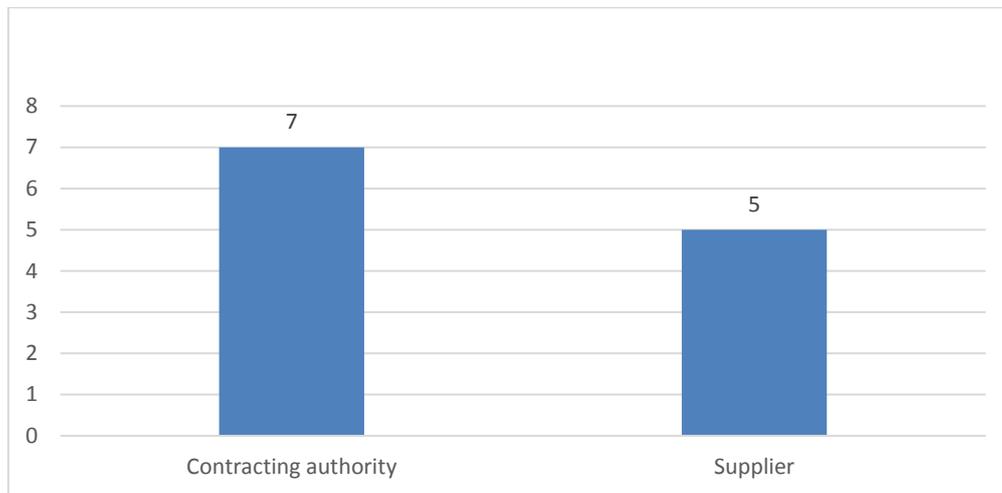
Query No.	Details of query	No. days	Size of tender	Response	In favour of
7.	Response not received to clarification sought.	1	€40,000	Contracting authority unaware that a clarification had been received. Immediately responded to the query, extended the closing date for receipt of tenders and took account of the tenderer's query.	Supplier
8.	Response to clarification received did not deal with substantive issue raised in the questions.	2	EU	Review by the TAS found that response given by contracting authority was detailed and sufficient.	Contracting authority
9.	Unfair to adopt a national tendering process.	N/A	EU	The TAS found that strategy chosen was a matter for contracting authority. The contracting authority had been in contact with the supplier to clarify issues arising.	Contracting authority
10.	Service required too broad due to combining all services in to one contract.	6	€300,000	Contracting authority within their rights to decide to adopt this type of process.	Contracting authority
11.	Strategy for tendering discriminatory against supplier.	8	€10,000,000	Contracting authority confirmed process abided by procurement rules. Submission times extended.	Contracting authority
12.	Not breaking the tender into lots is discriminatory and contravenes the EU procurement rules.	2	€25,000	Contracting authority not aware of queries. Have clarified this is not an EU procurement process but extended the submission time.	Contracting Authority

\*N/A refers to information "not available"

**Table 3: Outcomes from eligible queries**

## Overview of outcomes

Two types of outcome were identified and these were a finding in favour of the supplier (n=5) or a finding in favour of the contracting authority (n=7) (Figure 11).



*Figure 11: Outcomes of queries*

The findings show that in seven cases, the contracting authority was assessed by the TAS as having adopted the correct approach. In five cases, the supplier was considered by the TAS to be correct and the contracting authority were requested to make changes to their tender which they did in all cases.

## Summary

In summary, this section has presented data on outcomes from queries raised with the TAS. More than three-quarters of all queries raised were found to be ineligible, mainly because they were more suited to a general query or because of the timing of the query. All queries deemed eligible were followed up with the contracting authority and in seven cases where information was available, the contracting authority was not requested to make any change. In five cases, the contracting authority was requested to make changes.

# Consideration of the extent to which the TAS is appropriate, sufficient and proportionate

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Throughout the review, the extent to which the TAS is considered appropriate, sufficient and proportionate has been taken into account. The findings are now considered in light of three key issues emerging and these are:

- knowledge and awareness of the service;
- the scope of the service; and
- the situation of the service within the OGP.

## **Knowledge and awareness of the TAS**

Knowledge and information about the TAS, specifically a lack thereof, featured strongly in this review. Almost without exception, individuals interviewed as part of this review believed that the vast majority of suppliers and contracting authorities were unaware of the service. It was further suggested that this was evident in the low numbers of suppliers accessing the service, where over the two-and-a-half-year period under review (from Feb 2015 to July 2017), there were 56 queries raised with the TAS and, of these, 12 were deemed eligible. Most individuals interviewed in this review considered this a low number of queries and suggested it was a consequence of a lack of knowledge and potential confusion about the service, as well as the very limited scope of the service. A small number of participants suggested, however, that it may be due to a lack of problems with the public procurement system.

The extent to which issues might be expected to arise in the process is not clear since little information is available about the clarification process within procurement in Ireland. In Scotland, data available from the Single Point of Enquiry (SPoE) for the period 2008 to 2012, shows between 26 and 59 cases were dealt with annually. An analysis of the main issues arising show that 26% of these referred to general procurement advice, but the remainder related to specific issues arising throughout the procurement process.

Some information is available about the situation in Canada where the Office of the Procurement Ombudsman (OPO, 2015) reported receiving 577 contacts in the 2014 period. Annual spend over the same period of time amounted to CAN 23 billion (EUR 15 billion), which is not dissimilar to the annual Irish public procurement spend of EUR 12 billion. The OPO aims to educate, facilitate and investigate queries in respect of the procurement process. Examples of queries raised within the OPO included: a supplier who was concerned that the bidding period was insufficient and a lack of transparency of the bidding process; a supplier who had not received payment post contract; and a supplier having difficulty getting in touch with a Department with which it had a contract. In the Irish situation, many

of these queries would be dealt with by the OGP Customer Services personnel and would not be raised as a TAS query. The OGP, however, do not deal with contract issues.

Knowledge about the rules governing the operation of the TAS, however, does appear to be relatively scant and this is evidenced by the number of queries submitted that are deemed ineligible (77%). About one-third of queries deemed to be ineligible were general queries about procurement and were therefore not considered to be relevant to the TAS. It is noted, however, that in the document relating to the setting up of the TAS (Office of Government Procurement, 2015c), one way in which the service would achieve its aim was stated to be by *“answering general queries made by potential tenderers”* (p.2).

A second issue relating to knowledge about the rules governing the operation of the service was also highlighted by the number of queries that were ineligible due to the timing of the query, which accounted for four out of ten of all ineligible queries (41.0%; n=18). These queries took place throughout the tendering process, but not in the circumstances or at the specific time during which the TAS was open to them. This highlights the short time period the service is available and also suggests that suppliers raising queries are not aware of the limited window of opportunity to engage with the TAS. In contrast, the SPoE in place in Scotland is available throughout the procurement process.

A lack of clarity about the rules governing the operation of the service is compounded by inconsistencies in the information available about the service, which was highlighted in the findings section of this report. Examples were given in the findings about the number of different ways in which the aim and objectives of the TAS are presented depending on the source of information.

In summary, different structures in other jurisdictions and an absence of information about the clarification process in Ireland, means that it is not clear what level of engagement with the TAS might be expected if it were to reflect international norms. Nevertheless, it is clear from the findings of this review that knowledge and information about the service is limited, that the information available can lack clarity, and that there is conflicting messaging, particularly about the aim and objectives of the TAS. All of these factors are likely to have an impact on the uptake of the service.

### **Scope of the service**

The TAS was introduced to complement existing avenues that are available to suppliers to raise queries (i.e. RFT query/clarification process, the standstill period and recourse to a legal avenue). Nevertheless, the findings from this review suggest that the scope of the TAS, as the only non-judicial external review available to suppliers, is limited. Specifically, the TAS is only available for a very short period in the overall tendering process, that is, the time between close of clarifications and six days before the close of tender. The focus of the TAS is on the extent to which the issues raised in the clarifications have been adequately addressed.

In the course of this review, two competing views about the scope of the TAS were identified. First, it was suggested that the availability of an informal mechanism accessible by suppliers during an open tender process is in its own right an important contribution to the overall procurement process and, while limited, is therefore warranted. The alternative view, mainly expressed by participants from the non-statutory sector, is that the narrow timeframe of the service, the limited scope to address issues other than those around which clarifications had been sought and the informal and non-binding nature of the TAS renders it very limited and less useful than it might be.

### *Scope of service in other jurisdictions*

#### *Scotland*

The SPoE was established in 2008 and it provides support, information and advice on the procurement rules which must be followed by public bodies in Scotland on how contracts are advertised and awarded. The service does not have formal powers to overturn decisions made by buying organisations but works with the supplier and the buying organisation to try to resolve concerns about any particular procurement exercise (Scottish Government, 2013, p.2). The service is available throughout the overall procurement process.

The outcomes from 42 cases considered in 2012-2013 showed that the procurement process was found to be in order in half of all cases. In a further eight queries (19%), the concern was not pursued by the supplier. In six cases (14%), the procurement process was either modified or re-started. In four (10%) cases, it was not possible to reach a satisfactory conclusion, and in a further two (5%) cases, legal remedies were pursued. More recent information about outcomes arising from this service is not publicly available.

#### *Canada*

Data from the Canadian OPO Annual Report (2015) noted that in addition to the education role adopted by the OPO, there were 577 contacts with the service and that, of these, 315 resulted in either a facilitation contact with the contracting authority (n=281) or in a formal complaint (n=34) (Office of the Procurement Ombudsman, 2015). As noted earlier, the OPO service can only be invoked following the award of a contract. In addition, the examples given of the types of “*facilitation queries*” means that the service deals with many issues that would, in the Irish context, be dealt with by the Customer Service division of the OGP, although only general queries (which do not involve the facilitation of an outcome on behalf of a supplier) are dealt with by that body. There are, however, two other formalised, but non-judicial approaches, within the OPO. While these services are not available during the procurement process, they may nevertheless, provide guidance for a more enhanced service.

- First, in their facilitation role, the OPO works with both sides in an attempt to find an informal solution to a dispute and where this is not achieved an Alternative Dispute Resolution Service<sup>3</sup> (ADRS) is offered. In 2014, however, only four offers were received for an ADRS and three of these offers were declined by the contracting authority involved. These figures are lower than previous years. Between 2008 and 2011, for example, the OPO dealt with 21 ADRS requests for contractual disputes (OECD, 2106c).
- The second approach requires a formal request for review. In 2014, the OPO received 34 written complaints from suppliers “*making allegations regarding some aspect of the contract award process*” (Office of the Procurement Ombudsman, Canada, 2015, p.29). However, 94% of these complaints did not meet the OPO’s regulatory criteria (e.g. contract value exceeded dollar thresholds, contract related to a Crown corporation, or the complaint pertained to the establishment of a standing off), so a review could not be launched or the complaint was withdrawn. In total, only three reviews were carried out by the OPO in Canada in 2014 and an additional two reviews that had been initiated in the previous year were completed during that time. These numbers are similar to the 2008 to 2011 data which shows that the OPO conducted 12 procurement practice reviews, which involved 26 different Federal Government departments and agencies.

The number of ADRS requests and the number of reviews undertaken does not suggest a high uptake of these processes. Similar to the TAS, the reasons for this may be that the service is not required (particularly in the context of a facilitation process by the OPO that already exists) or alternatively, the service is not known about. In that regard, the OPO notes in its Annual Report that it is currently trying to raise awareness about the availability of this service using a number of different mechanisms.

### Sweden

In contrast to Canada, in Sweden in 2014, 6-7% of all public procurements published were subject to judicial review in the Administrative Courts (The National Agency for Public Procurement & The Swedish Competition Authority, 2015). This reflected an increase over the previous year. The processing time in the administrative courts takes approximately 2.2 months and during that time the procurement process is put on hold.

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<sup>3</sup> This service is provided by “*a certified and experienced mediator*” and seeks to resolve disputes relating to the interpretation or application of the terms and conditions of a contract. The process is “*without prejudice*” and “*risk-free*” (meaning no decision is imposed and either party can end their participation at any time if they are unable to reach a mutually satisfactory agreement) (Office of the Procurement Ombudsman, 2015, p.27).

### *Learning from other jurisdictions*

A clear direction for enhancing the TAS does not emerge from the information available on the Scottish, Canadian and Swedish systems, which is included in this review. In 2012 to 2013, almost all cases (95%) dealt with through the Scottish SPoE were resolved without recourse to the judicial system. More recent information is not publicly available on the Scottish situation. The role of the Procurement Ombudsman in Canada is limited to the post-procurement period and the number of cases dealt with through their facilitation and mediation service is low. The high proportion of cases (6-7%) presented were dealt with in the administrative court system in Sweden. This, coupled with a substantial decrease in recent years in the proportion of the spend on public procurement going to SMEs (in 2008 this was 47% compared with 19% in 2015-2016), suggests however, that a non-judicial approach has advantages over and above a court system.

### *Financial scope of the TAS*

An additional issue relating to the financial limits of the TAS, particularly as they relate to the construction industry, was highlighted in respect of the scope of the TAS. Questions were raised about why works contracts with a value of greater than EUR 500,000 as set out in the FAQs are not considered (Office of Government Procurement, 2017c). It was also highlighted that the internal review of the TAS identified processes with contract values of EUR 4 million and EUR 10 million which were included in eligible queries since they related to the goods and services industries (Office of Government Procurement, 2016a). It was suggested during the course of interviews with key personnel, that this limited the opportunities for suppliers from the construction area to access the service. This is also reflected in the smaller number of queries raised with the TAS by suppliers from the construction industry (n=5) relative to the goods (n=13) and services (n=15) sectors. It is also noted, however, that in Sweden, the percentage of reviews undertaken by the suppliers from the construction industry at 6% was also lower than that for goods and services at 8%.

### *Role of representative bodies*

One final issue is related to the role of representative bodies. It was suggested by one industry representative that they could play a role in raising general issues about specific tenders and some consideration is given to this in the suggestions for enhancing the TAS service.

In terms of the scope of the service, the main issue raised relates to the limited period of time the service is available, the informal nature of the engagement and, to a lesser extent, the financial cap on contracts pertaining to construction and the role of representative bodies.

## The situation of the service within the OGP

Some concerns were raised about the extent to which the TAS could conduct its work given that it is situated within the organisation which has overall responsibility for national procurement. Again, two broad views were expressed in this regard. On the one hand, it was suggested that the OGP was the most appropriate environment for the service. Reasons given included: immediate access to knowledge available within the OGP, including legal and technical expertise; the rapidly changing environment of public procurement in Ireland which requires up-to-date and accurate information; and the potential to influence contracting authorities by virtue of being within the OGP. It was also suggested that the issues raised are generally black and white and that this does not require any interpretation. On the other hand, it was suggested that the TAS could not be perceived as providing a confidential, unbiased, safe space for suppliers to raise procurement issues when it was effectively part of the system.

### Criteria and approaches to structures in other jurisdictions

#### EU

SIGMA (2013), an organisation funded through a joint initiative of the OECD and the EU to promote the establishment of procurement review bodies within the EU, note that the principles underpinning a public procurement complaints review and remedies system are that it should be rapid, effective, transparent and non-discriminatory.

#### Scotland

In Scotland, the SPoE was set up in 2008 to provide an “*independent, impartial and confidential service*” for suppliers to the public sector in Scotland (Scottish Government, 2013, p.2).

#### Canada

In Canada, the OPO (Office of the Procurement Ombudsman, 2017) state that they are committed to being:

- **independent** (autonomous and operating at arm’s-length from other federal organisations);
- **neutral** (approaching all issues that are brought to our attention objectively while acting as neither a lobbyist for suppliers nor an apologist for federal organisations);
- **knowledgeable** (developing and maintaining a high level of understanding and expertise of procurement policies, procedures, trends, and good practices);
- **responsive** (reacting appropriately and promptly to supplier and federal procurement issues);

- **helpful** (sharing best practices and demystifying the federal procurement process); and
- **part of the solution** (identifying systemic concerns, and making recommendations to strengthen federal procurement activities).

### *Sweden*

Sweden have recently separated the procurement oversight function (based within the Swedish Competition Authority) from all other procurement functions through the establishment of a new National Agency for Public Procurement.

A key question to be considered in this review is whether the TAS needs to be independent from the OGP in order to provide a service that is perceived as being non-discriminatory by potential users. During the course of this review, personnel from the TAS reported that there was, in effect, “*a Chinese wall*” between them and the broader OGP personnel in respect of queries submitted to the TAS. It was also stated that where the OGP are the contracting authority, special care is taken to ensure that any advice sought does not involve the personnel engaged in the particular tendering process. It is not clear, however, whether these measures are overt and explicit and whether on their own they are sufficient to mitigate a potential perception that the TAS may be biased in its dealings with suppliers. Some consideration is given to this in the recommendations made below.

### **Impact of the TAS**

The absence of direct information from suppliers who engaged with the TAS is a limitation of this review. There is however, some evidence that the service has had an impact in its dealings with the suppliers and the contracting authorities. In about 40% of cases, an intervention by the TAS resulted in a change to the procurement process in favour of the supplier. This suggests that the service is effective in being able to facilitate a positive outcome for suppliers. While the numbers are too small to draw any conclusions, in other jurisdictions the proportion of findings in favour of suppliers varies from 25% of cases in Sweden to 50% in Scotland.

In addition to facilitating a positive outcome for suppliers, members of contracting authorities who engaged in this review welcomed the involvement of the TAS and highlighted changes in their own knowledge base as a positive consequence of it. The mere existence of the TAS may act as an influence for good practice on contracting authorities.

### **Assessment of the extent to which the TAS is appropriate, sufficient and proportionate**

It is concluded that while the numbers engaging with the TAS are small, the service’s approach to dealing with queries arising within its limited remit have been successful and

they have had a positive impact. The availability of a service during the course of the open tendering period offers a mechanism to prevent SMEs being exposed to unfair or prejudicial terms. In the absence of the TAS, the only recourse available to suppliers is the High Court system following the awarding of a contract. This would involve considerable expense and resource issues for the supplier. For those reasons, the service is considered appropriate to its purpose, meets the aims and objectives set out for it, is effective and is beneficial in the overall procurement process.

There are, however, limitations in terms of the service, including: the sufficiency of the service in the context of the overall procurement life-cycle; needs of suppliers and contracting authorities; and the need for a broader range of approaches to increasing the participation of SMEs in public tendering.

One important limitation is that the service is available for only a short period of time and is not available in the post-contract period where it is likely many more queries might arise. In addition, the short timeframe from the end of the clarification period to the close of tender resulted in the exclusion of many suppliers who raised queries. Greater awareness about the operation of the service would reduce this number, but additional steps may also be required. It is suggested that with a greater knowledge and awareness about the service, more suppliers are likely to use it, although given the experiences of the OPO in Canada, the extent of the increase in use may be less than some might expect.

With regard to enhancing the role of the TAS, there is strong agreement that the overall procurement process is complex for both suppliers and contracting authorities and it was strongly suggested that there is a requirement for a service similar to the TAS but that is broader in scope. It is, therefore, concluded that the role of the TAS service is not proportionate in the context of the needs of the overall procurement process.

It is noted that specialised administrative bodies to deal with procurement issues exist in about half of EU member states and there is a forthcoming EU requirement for individual jurisdictions to consider this issue. In the course of this review, a number of different options were identified by industry representatives (including, for example, structures similar to the Credit Review Body, the Consumer Protection Commission, the Workplace Relations Commission and a Procurement Ombudsman) but there was no consensus emerging. Other jurisdictions have adopted different approaches. In Sweden, for example, the approach is based on the courts system post-contract, but as noted, 6-7% of all procurement contracts are reviewed there. In Canada, there is a Procurement Ombudsman, but the number of formal reviews, as well as those who avail of the mediation services, are very low. This contrasts with Scotland where the service is available throughout the procurement process and which has higher numbers of suppliers using the services. Other alternatives may also be available, such as the mystery shopper service in England which has statutory powers, recently enhanced, to investigate procurement at all stages of the process (Cabinet Office, 2012).

While the evidence from this report suggests there is a need for a service that is broader in scope and which provides support for both contracting authorities and suppliers, the findings do not provide any clear consensus regarding the type or nature of a special administrative body which might be established to deal with procurement issues.

## Proposals for enhancing the service

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The overall indications from this review are that the TAS is seen as performing a useful service despite its limited role. There are, however, ways in which its effectiveness might be enhanced and these are set out below. Some of these steps are relatively straightforward and can be undertaken without undue difficulty. Other, however, are more fundamental, affecting the nature of the service provided and will require time and reflection not just on the TAS service but on the totality of the service provided by the OGP and the role of the TAS within that. Proposals for enhancing the TAS include:

1. **At a strategic level, consider the role of the TAS in the context of a need for a broader administrative process to support suppliers and contracting authorities and to enhance the overall process.** While the TAS meets the current aim and objectives set out for it and is effective in dealing with eligible queries, it is also evident from this review, that the service is very limited and plays only a very small part in the overall procurement process. In the medium to longer term, there is a need for consideration to be given to how a more comprehensive service with a broader scope that takes account of the lifecycle of procurement and that meets the needs of both suppliers and contracting authorities can be put in place. Such a service would need to be properly resourced and supported and could not be established within the current resources of the TAS. The vision, mission, objectives and activities of such a service will need to be identified and made explicit. Within this, consideration needs to be given to whether the TAS forms a small part of the overall service or whether the TAS service, with the requisite resources, has the capacity to expand into a service that meets these various broader needs as expressed by participants. Whatever body is given this remit should then, in addition to resolving issues arising across the lifecycle of procurement:
  - a. **Build the capacity of personnel in contracting authorities** to undertake procurement processes. This can be informed by the findings of this review. In the longer term, greater consideration needs to be given to a more comprehensive approach to meeting knowledge needs in this area. While Circulars and Guidance documentation is freely available on the OGP's and eTenders' websites, it is suggested that a more comprehensive, proactive approach is required.
  - b. **Adopt a more proactive approach to identifying problems** arising in the procurement process. Examples of how this may be done include: having a peer review structure in place to review RFTs; taking account, in a systematic way, of the views of industry representatives; and conducting a review of a random selection of RFTs placed on the eTenders' website. A similar type approach is adopted in England where 20 sets of procurement documents across a range of contracting authorities are checked each month on Contracts Finder and any

issues found are highlighted with the relevant department (Cabinet Office Efficiency and Reform Group, 2014).

- c. **Adopt an educative role to increase awareness** about problems arising in the tendering phase of procurement. This includes the provision of relevant information to inform workshops and seminars such as Go-2-Tender training. This may also include the development of relevant educational resources (such as fact sheets and video presentations from service users) and the utilisation of social media to support the process.

**Improve data capture and analysis** to inform the service by adopting a strategic and informed approach to data collection, data analysis and reporting on queries received. Information also needs to be made available about clarifications, including the extent to which suppliers are satisfied with the information provided, as well as suppliers' views on their experiences of the TAS itself. This data should be collected on an ongoing basis as this would facilitate ongoing review of the service. This data gathering needs to take place in the broader context of a more strategic approach to creating data resources for the overall procurement process.

2. In the short-term and pending the outcome of the strategic review outlined, as well as a consultation on the development of an appropriate administrative body across the lifecycle of procurement, the following steps should be taken to enhance the work of the TAS within its current remit:

- a. **Improve knowledge and awareness about the service** through the development of a communications and promotion plan that includes clear, consistent and easily accessible information. This communications and promotion plan should consider the use of digital communication formats. Recommendations previously made in the internal review of the TAS should be taken into account.
- b. **Change the title of the TAS to more accurately reflect the timing and the type of service provided.** The service is more than an advisory service in that it facilitates resolution of issues and this should be highlighted. In addition, the TAS is not a general advisory service as the name might imply but is only available in respect of clarifications. Again, rather than potentially leading suppliers to think it is available for the overall tendering process, this should be clearly highlighted in its title. Potentially, the service might be better named as a facilitation service for clarifications.
- c. **Consider the timing of access to the service.** The period of time during which suppliers can access the TAS is very limited for both suppliers and personnel at the TAS. Some consideration should be given to this in the context of the provision of a service that supports the overall procurement lifecycle. In the short-term, consideration should be given to ensuring the timelines issued by

contracting authorities take account of the TAS timelines, particular by ensuring there is a wider knowledge about timeframe requirements.

- d. **Reduce the dangers of perceptions arising of bias and discrimination** by the TAS by ensuring that all mechanisms to protect against bias or discrimination currently in use are explicit and made clear and transparent. It is also recommended that every eligible query is formally reviewed by a member the Expert Panel which was set up to assist the operation of the TAS but which is not currently widely used. In the longer term, consideration should be given to this in the context of a broader and more comprehensive service to support procurement.
- e. **The forthcoming evaluation of the review arrangements** currently in place for public tenders should take account of the findings from this review.

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