

Information note:

## General Data Protection Regulation (GDPR)

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**PLEASE NOTE THAT THIS INFORMATION NOTE IS PROVIDED FOR GUIDANCE AND INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE.**

## Executive Summary

Public procurement is governed by EU legislation and National rules and guidelines. The aim of these rules is to promote an open, competitive and non-discriminatory public procurement regime which delivers best value for money. The Office of Government Procurement (OGP) has responsibility for developing and setting out the overarching policy framework for public procurement in Ireland. In this regard, the OGP has developed the National Public Procurement Policy Framework which enables a more consistent approach to public procurement across the public sector by setting out the procurement procedures to be followed by public bodies. Further information is available by following this link [National Public Procurement Policy Framework](#).

The purpose of this information note is to provide guidance to contracting authorities on the implications of the new General Data Protection Regulation (GDPR) for public contracts based on the OGP template documents and the actions they need to take in respect of existing and future contracts in this regard.

GDPR will apply from 25 May 2018. It aims to protect the privacy of all EU citizens and prevent data breaches. It will apply to any public or private organisation processing personal data. Established key principles of data privacy remain relevant under this new data protection legislation but there are also a number of changes that will affect commercial arrangements, both new and existing, with suppliers. Further information on GDPR can be found by following this link [GDPRandYou](#)

### Obligations in complying with GDPR

Compliance with the provisions of the GDPR is the responsibility of each contracting authority. This Information Note sets out general guidance on how contracting authorities can adapt existing contracts based on the OGP template documents and prepare future contracts to comply with certain key provisions of the GDPR.

Given the range of different scenarios which may apply under data protection law it is not possible to provide guidance for all cases. In addition, this Information Note does not apply to contracts entered into on a contractor's own terms and conditions or which do not incorporate the standard OGP template terms. A different approach will be required for these contracts. Where there is any doubt about whether the general approach in this Information Note is suitable for the contract in question, the contracting authority should consult with its legal advisor or Data Protection Officer.

## General Data Protection Regulation

Data protection law is a legal regime which regulates the seeking and giving of information about an identifiable individual person (referred to as "personal data"). Data protection law sets out the rights of individuals regarding their personal data and the responsibilities of those who seek and use this information. The current data protection law in Ireland is set out in the Data Protection Acts 1998 – 2003, which are based on EU Directives. From 25 May 2018, a new Europe wide data protection regime will come into place under the GDPR. The GDPR significantly increases the obligations and responsibilities for organisations and businesses on how they collect, use and protect personal data. Under data protection law, a "data controller" is a person (or business) who determines the purposes for which it seeks personal data and the way in which that personal data is then stored and used (referred to as "processing" of the data). A "data processor" is anyone who processes personal data

on behalf of and on the instructions of a data controller and their role can be, for example, to use the personal data in the course of carrying out a service for the data controller.

## Key Terms of GDPR

The following terms are defined in the GDPR and used throughout this Information Note:

**Personal Data** means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

**Processing** means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

**A Data Controller** means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.

**A Joint Data Controller** is where two or more data controllers jointly determine the purposes and means of the processing.

**A Data Processor** means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

Where a contracting authority shares personal data with its goods or services providers, the contractor is likely processing the data it receives on behalf of the contracting authority in the course of providing services. Generally in such cases, the contracting authority will be the data controller and the contractor will be the data processor.

Under the GDPR, the activities of a data processor must be governed by a binding contract between the data controller and the data processor which must set out the types of personal data to be processed, the duration, nature and purpose of the processing and which must contain certain specific contractual provisions, set out in the GDPR. It should be noted, however, in some cases, the contractor may be acting as a data controller in its own right or (less commonly) as a joint data controller with the contracting authority. In these cases, different contractual provisions are required and the contracting authority should consult with its legal advisor or Data Protection Officer.

## 1. Summary of Actions Required

### 1.1 Compliance with GDPR

Compliance with the provisions of the GDPR is the responsibility of each contracting authority. This Information Note sets out general guidance on how contracting authorities can adapt existing contracts based on the OGP template documents and prepare future contracts, based on the OGP template documents, to comply with certain key provisions of the GDPR.

Given the range of different scenarios which may apply under data protection law it is not possible to provide guidance for all cases. In addition, this Information Note does not apply to contracts entered into on a contractor's own terms and conditions or which do not incorporate the standard OGP template terms. A different approach will be required for these contracts. Where there is any doubt about whether the general approach in this Information Note is suitable for the contract in question, or where a contract has not been based on an OGP template, the contracting authority should consult with its legal advisor or Data Protection Officer.

## 1.2 Review all existing ongoing contracts

The OGP recommends that contracting authorities review all of their existing contracts to identify those contracts where personal data is being processed by the contractor. If the contract does not involve the processing of any personal data by the contractor, then no further action is required.

If the contractor is processing personal data, the contracting authority should assess which party (the contracting authority and/or the contractor) is determining the purpose and means of processing (i.e., acting as "Data Controller").

## 1.3 Consider issuing Directions where appropriate for existing contracts

Where a contracting authority is using an OGP template goods or services contract, or a contract awarded under an OGP framework, it is entitled to issue directions to contractors which could be used to meet the requirements of the GDPR. This is explained further below. If a contracting authority is not using an OGP template or an OGP framework then they are likely to need to amend the contract terms and should seek their own legal advice in this regard.

Contracting authorities should note that the OGP template directions are suitable for contracts where the contractor is acting as a "Data Processor" on behalf of the contracting authority. Where a contracting authority considers that the contractor is, or might be, a data controller in its own right or a joint data controller with the contracting authority, the OGP template directions either will not be suitable or may need to be adapted.

## 1.4 Use revised OGP templates for all new contracts

Where a contracting authority uses OGP template documents for any future contracts, the revised templates which incorporate the GDPR related amendments should be used. When a contracting authority is not using OGP template documents for any future contracts they need to ensure that those contracts comply with GDPR.

Again, contracting authorities should note that the revised templates are suitable for contracts where the contractor is acting as a "Data Processor" on behalf of the contracting authority. Where a contracting authority considers that the contractor is or might be a data controller in its own right or a joint data controller with the contracting authority, the templates either will not be suitable or may need to be adapted.

## 2. Existing contracts based on the OGP Template Documents

The data protection provisions in the goods and services template contracts that were available on the OGP website had been suitable for use under the pre-GDPR data protection regime. The changes brought about by the GDPR, particularly with regard to the specific contractual obligations which must be imposed on data processors, mean that the provisions in those contracts are no longer adequate.

This means that any existing ongoing contracts which are based on those template goods and services contracts and which involve the processing of personal data by the contractor as part of the contract will need to be updated to ensure their compliance with the GDPR.

It is important to note that not all contracts involve the processing of personal data by the contractor. Where personal data is not relevant to the contract in question, then no further action needs to be taken.

The OGP template goods and services contracts provide a mechanism whereby contracting authorities can impose binding directions on contractors in relation to the use of personal data. Clause 7B of the services template and clause 8B of the goods template state that:

*“The Contractor undertakes to comply with all reasonable directions of the Client with regard to the use and application of all and any of its Confidential Information and shall comply with the confidentiality agreement as exhibited at Appendix 7 to the RFT (“the Confidentiality Agreement”). “*

Clause 5.1 of the template Confidentiality Agreement also provides as follows:

*“The Contractor undertakes:*

*5.1 to comply with all directions of the Contracting Authority with regard to the use and application of all and any Confidential Information or data (including personal data as defined in the Data Protection Acts, 1988 and 2003)”. “*

Under both of these provisions, contracting authorities are entitled to issue binding directions to contractors which could be used to meet the requirements of the GDPR.

## 2.1 OGP Template Directions

The OGP has drafted template directions which may be issued by contracting authorities to their contractors where the contract involves the processing of personal data and the contractor is acting as a “Data Processor” on behalf of the contracting authority. These template directions are available by following this link [Template Directions](#).

Where a contracting authority considers that the contractor is or might be a data controller in its own right or a joint data controller with the contracting authority, the template directions either will not be suitable or may need to be adapted and the contracting authority should seek legal advice.

It should be noted that the template directions are not a passive document and will require both the contracting authority and the contractor to take some form of action in order to comply with and implement their provisions. For example, the directions require the data processor to process personal data only on the “written instructions” of the contracting authority. In practice, this means that the contracting authority must provide instructions in writing to the contractor on what it wants the contractor to do. The directions also require the contracting authority to provide written instructions to the contractor on whether to amend, delete or return personal data to it on termination of the contract. This creates a positive obligation on the contracting authority to give such instructions prior to the expiry or termination of the contract.

### 3. Existing Contracts awarded under Framework Agreements

While it is the responsibility of each contracting authority to carry out an assessment of each of its contracts, the OGP considers it less likely that personal data is being processed in contracts awarded under Framework Agreements (FWAs) solely for the supply of goods (e.g. contracts for stationery, food products or equipment). The OGP considers it more likely that the contractor may be processing personal data in contracts awarded under FWAs for the supply of services (e.g. contracts for IT services).

#### 3.1 OGP Framework Directions

The OGP has drafted template directions for contracts awarded under OGP FWAs which may be issued by contracting authorities to their contractors which are similar to the previously mentioned template directions. They may be issued by contracting authorities under existing contracts awarded pursuant to OGP FWAs where the contract involves the processing of personal data and the contractor is acting as a “Data Processor” on behalf of the contracting authority. These template directions are available by following this link [Framework Agreement Directions](#)

Again, contracting authorities are reminded that the template directions are suitable for contracts where the contractor is acting as a “Data Processor” on behalf of the contracting authority. Where a contracting authority considers that the contractor is or might be a data controller in its own right or a joint data controller with the contracting authority, the template directions either will not be suitable or may need to be adapted and the contracting authority should seek legal advice.

### 4. Future Procurement Competitions

The OGP has updated its standard suite of templates and upcoming framework documents to reflect the GDPR which are available on [ogp.gov.ie](http://ogp.gov.ie). New Data Protection and Security clauses have been added to provide for the specific obligations which must be included where the contractor is acting as a “Data Processor” on behalf of the contracting authority.

Where a contracting authority considers that the contractor is or might be a data controller in its own right or a joint data controller with the contracting authority, the new Data Protection and Security clauses will not be suitable and/or may need to be adapted. The contracting authority should seek legal advice before issuing a request for tender or entering into the contract in this case.

As with the template directions for existing contracts, the new Data Protection and Security clauses are not passive clauses. They require the contracting authority to take some form of action in order to comply with the provisions of this clause in a number of respects - examples of these actions are set out in Appendix 2. There have also been a number of other changes to the templates. A full explanation of amendments to the updated template documents is available in Appendix 2.

### 5. Conclusion

The OGP reminds contracting authorities that compliance is a matter for each individual contracting authority. This Information Note provides guidance on mechanisms that can be used under existing and future templates to ensure compliance and in particular the steps to follow as outlined:

### 5.1 Review all existing ongoing contracts

The OGP recommends that contracting authorities review all of their existing contracts to identify those contracts where personal data is being processed by the contractor. If the contract does not involve the processing of any personal data by the contractor, then no further action is required.

If the contractor is processing personal data, action is required along the lines as set out in 5.2 below.

### 5.2 Consider issuing Directions where appropriate for existing contracts

Where a contracting authority is using an OGP template for a goods or services contract, or an OGP FWA, it is entitled to issue directions to contractors which could be used to meet the requirements of the GDPR. If a contracting authority is not using an OGP template or an OGP framework a different approach will be required for these contracts and they should seek separate legal advice.

### 5.3 Use revised OGP templates for all new contracts going forward

Where a contracting authority uses OGP template documents for any future contracts, the revised templates which incorporate the GDPR related amendments should be used where the contractor is acting as a “Data Processor” on behalf of the contracting authority.

Where a contracting authority considers that the contractor is or might be a data controller in its own right or a joint data controller with the contracting authority, the new Data Protection and Security clauses either will not be suitable or may need to be adapted.

When a contracting authority is not using OGP template documents for any future contracts they need to ensure that those contracts comply with the GDPR.



## Appendix 1: Template Documentation on OGP Website

The Office of Government Procurement (OGP) publishes a standard suite of templates to reflect the new EU Procurement Directives which can be found by following this link [OGP Templates](#). The templates, which are designed for above EU threshold tenders, are to be used by contracting authorities (Government Departments and State Bodies) for low to medium risk goods and services. Contracting authorities are advised to read the revised templates carefully and to seek legal advice if required. The suite of documentation includes:

- Goods Request for Tender
- Services Request for Tender
- Goods Contract
- Services Contract
- Goods Confidentiality Agreement
- Services Confidentiality Agreement
- European Single Procurement Document

Contracting authorities are advised to read the accompanying User Guide for each template. Please note that at the time of publishing this Information Note the User Guides have not been updated to reflect GDPR changes but they will be amended in due course.

## Appendix 2: GDPR and other Template Amendments

The OGP has updated its standard suite of templates to aid compliance with the GDPR. We have added a new Data Protection and Security clause to the template services contract and the template goods contract to provide for the specific obligations which must be included where the contractor is acting as a “Data Processor” on behalf of the contracting authority.

Where a contracting authority considers that the contractor is or might be a data controller in its own right or a joint data controller with the contracting authority, the new Data Protection and Security clause will not be suitable and/or may need to be adapted and the contracting authority should seek legal advice before issuing an RFT/entering into the contract.

The new Data Protection and Security clause are not passive clauses. They require the contracting authority to take some form of action in order to comply with the provisions of this clause in a number of respects.

The new Data Protection and Security clause (D) (1) requires the processor to process the data on the “written instructions” of the contracting authority. In practice this means that the contracting authority must provide instructions in writing to the contractor on what it wants the contractor to do. These instructions could, for example, be set out in the Specification (incorporated at Schedule B of the Contract).

The new Data Protection and Security clause (D) (2) requires that the contractor has in place appropriate technical and organisational measures, reviewed and approved by the Client. This clause places a positive obligation on the contracting authority to ask the contractor to provide details of these measures (ideally prior to entering the contract, unless these measures have already been considered as part of the tender process) and to review them in order to satisfy itself that those measures provide sufficient guarantees to ensure Processing meets the GDPR Requirements.

The new Data Protection and Security clause (H) requires the contracting authority to provide written instructions to the contractor on whether to amend, delete or return Personal Data to it on termination of the contract. This creates a positive obligation on the contracting authority to give such instructions prior to the expiry or termination of the contract.

Schedule E of the Contract must also be completed by the Parties before the contract can be executed and it must provide details of the nature of the Processing to be undertaken.

### Treatment of non-personal confidential data under the new templates

The new Data Protection and Security clause is drafted to ensure that any personal data processed in the course of a contract is done so in accordance with the GDPR. The new Data Protection and Security clause (N) extends the scope of this clause (subject to certain exceptions) to apply to all data provided by the contracting authority to the contractor under the contract.

## Changes to the template Request for Tender (“RFT”)

The template RFT has also been updated at the Instructions to Tenderers Section (Section 2.1.4 of RFT) to set out the roles of the contracting authority and tenderer under data protection law with respect to any Personal Data (such as CVs) which may be requested or used as part of the tender competition.

Tenderers will also be asked to confirm in their Tenderer’s Statement (Appendix 3 of the RFT) that they can demonstrate the legal basis for the Processing of Personal Data which is provided by them during the course of the tender competition.

## Other (non-GDPR) changes to the templates

The OGP has also taken the opportunity to make some other changes to the templates in order to amend or clarify certain provisions. In addition to minor drafting changes made to the templates you should note the following in particular:

- [Freedom of Information](#)

The template RFT has been amended to require tenderers to specifically identify any parts or sections of their tender which it considers confidential.

- [Aggregate Insurance](#)

The template RFT is updated to inform tenderers that where their Insurance premiums offer cover on an aggregate basis (rather than a per claim basis) they will be required to provide a declaration to the contracting authority at Contract Stage that they are not aware of any material reason why sufficient insurance cover would not be available to protect the contracting authority’s interests under the contract.

- [Up to date evidence of compliance with Selection Criteria and Exclusion Grounds](#)

The template RFT and Framework Agreement have been updated to inform tenderers that they will be required to provide up to date evidence at preferred tenderer stage of a mini competition in order to demonstrate their continued compliance with Selection and Exclusionary Grounds. Where a tenderer cannot provide such evidence the contracting authority may offer the Services Contract to the next highest ranked tenderer.

- [New Recital to the Contract](#)

We have added a new recital (Recital 10) to the Contract to clarify that the Contract shall be read as if it were drafted by both parties to it.