



**Conducting a lawful procurement process**  
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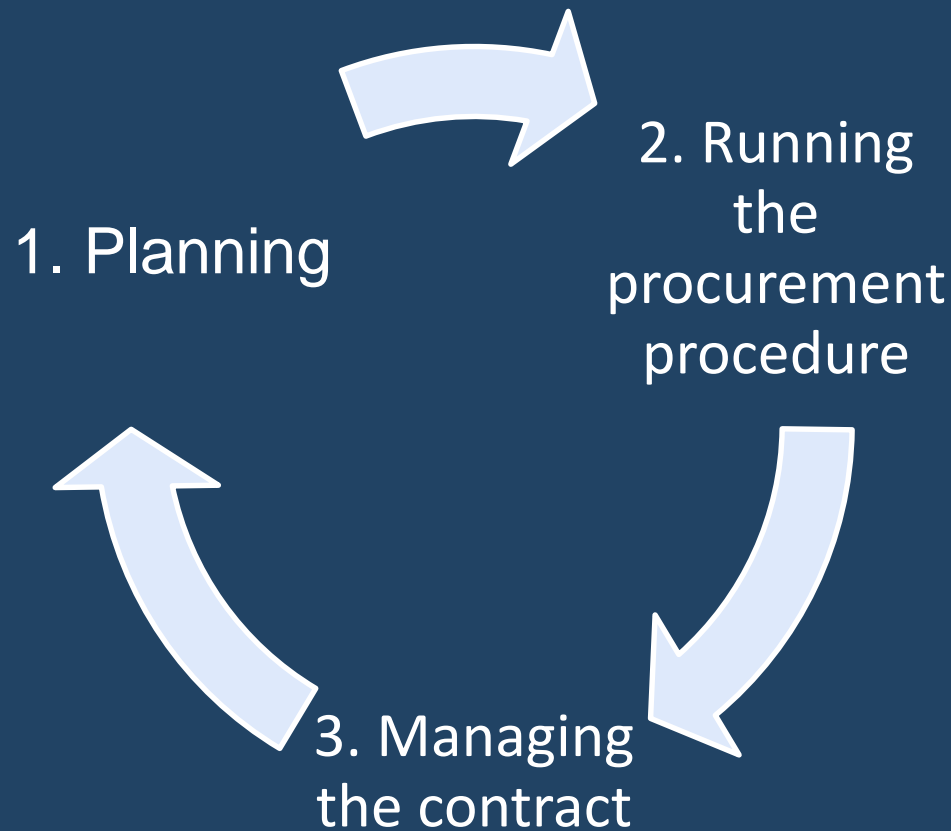
# Agenda

- CSSO overview
- Overview of a procurement process
- Evaluations
- Standstill letters
- Contract modifications

# CSSO overview

- Principal provider of solicitor services to the Attorney General and all Government Departments
- Mission is to provide the highest standard of professional legal services as economically and efficiently as possible and to support adherence to the rule of law
- Commercial Contracts Section
- May assist at all stages of procurement cycle

# The procurement process



# Planning



- Determine your requirements
- What is the estimated value of the contract?
- Is the contract subject to the procurement rules?
- Are there any applicable derogations?
- Is there an existing framework?
- Determine procurement strategy – type of procedure? Framework?
- Develop Specifications and procurement documents

# Running the procurement (*open procedure*)



- Publish notice on eTenders and / or OJEU
- Publish tender documents
- Tenders submitted
- Evaluation of tenders on basis of pre-disclosed selection and award criteria
- Standstill letter
- Contract execution

# Evaluations



- CA has discretion in relation to award criteria BUT
  - (i) must comply with fundamental principles of EU law and be set out in the contract notice or tender documents
  - (ii) must not have the effect of conferring an unrestricted freedom of choice on the CA: Reg. 67 (6)
  - (iii) Must be 'linked to the subject matter of the contract': Reg. 67 (2)
  - (iv) Must not assess the same thing twice – must not overlap with other criteria

# Evaluations



- Criteria must be formulated so that they are capable of being interpreted in the same way by all REWIND tenderers
- ‘Award criteria must be formulated in the documentation in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way’ (SIAC v. Mayo County Council: C-19/00)
- Standard of tenderer – ‘SIAC hypothetical tenderer is a terrestrial, rather than a celestial being, hailing from earth and not heaven...’ (Clinton v Department for Employment and Learning)

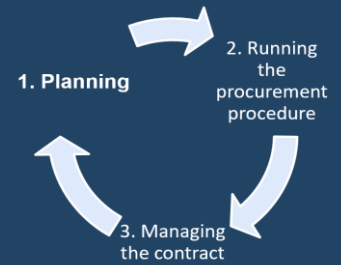


# Evaluations



- High standard of clarity on the part of the CA: importance of clarity throughout
  - consistency within the documentation, including Schedules and Appendices
  - transparency as to the criteria and any sub-criteria
  - once evaluation system has been set out, CA must follow that system
  - clarity in the system and documentation not only facilitates evaluation but also the drawing up of reasons for the award decision and letters to tenderers

# Standstill letters



- CA obliged not to sign contract until 14/16 days has passed from letter informing tenderers of the results
- The obligation to provide reasons is in order to ensure effective review (Remedies Directives): unsuccessful tenderers are to be informed of the ‘characteristics and relative advantages of the successful tenderer’
- Reasons must be sufficient in order to ensure that the unsuccessful tenderer will be given sufficient detail to enable a decision to be made as to whether there is any point in applying to the court

# Standstill letters



- Importance of ensuring the reasons as set out in the standstill letter are adequate from the outset
  - court may extend the standstill period where adequate reasons have not been provided (Veolia v. Fingal County Council)
  - enables greater competition and better tenders in future competitions

# Standstill letters



- Information on the ‘characteristics and relative advantages’ of the successful tenderer will be all the more necessary when the price offered by the unsuccessful tenderer is lower than that offered by the successful tenderer (Sanofi Aventis Ireland Ltd. v. HSE and Glaxosmithkline Ireland Ltd.)
- Importance of meaningful, non-generic, reasons being provided: (RPS v. Kildare County Council)
- Provision of adequate reasons ensures time starts to run and facilitates contract signing

# Contract modifications



- Basic premise is that a contract subject to the procurement rules when procured remains subject to the rules throughout contract performance

# Contract modifications



- Minor changes to contract are permissible but “substantial changes” give rise to a new contract which should be subject to a new procurement process.
- Substantial changes
  - render contract materially different in character
  - had they been present initially would have attracted different field winner
  - extend scope of contract considerably
  - alters economic balance in favour of contractor

# Contract modifications



- Reg 72(1)(a)-(f) list circumstances where changes may be made without a need for a new procurement procedure (no need to consider whether substantial or not)
  - De minimis exception
  - Clear precise and unequivocal review clauses
  - Additional services – economic or technical reasons
  - Unforeseen circumstances
  - New contactor exemption
- Need to publish a modification notice in certain circumstances

# Thank you

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