LEXOLOGY
Getting The Deal Through

Public Procurement

in Ireland

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LEGISLATIVE FRAMEWORK

Relevant legislation

What is the relevant legislation regulating the award of public contracts?

In Ireland, the legislation regulating the award of public contracts is derived from the European Union directives that govern this area. On 5 May 2016, Directive 2014/24/EU was transposed into Irish law by the European Union (Award of Public Authority Contracts) Regulations 2016 (SI No. 284 of 2016). Legislation governing the award of contracts by utilities is dealt with separately in question 2.

The European Union (Award of Public Authority Contracts) Regulations 2016 (the Public Sector Regulations) are deemed to have come into operation on 18 April 2016, the deadline for transposition of Directive 2014/24/EU, and they apply to all procurements by 'contracting authorities' commenced on or after 18 April 2016. The Public Sector Regulations revoke the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI No. 329 of 2006), which transposed Directive 2004/18/EC in Ireland, however the 2006 Regulations continue to apply to contract award procedures or design contests commenced by contracting authorities prior to 18 April 2016 and to the award of specific contracts based on framework agreements concluded either before 18 April 2016, or on or after 18 April 2016, following a contract award procedure that commenced before 18 April 2016. The Public Sector Regulations specify the circumstances in which a contract award procedure has been commenced before 18 April 2016.

The principal exception to these rules on application is Regulation 72 of the Public Sector Regulations, which relates to the modification of public contracts, and which will apply to a contract or framework agreement concluded prior to 18 April 2016 (as well as those concluded after that date).

As in the UK, Ireland took a conservative approach when transposing Directive 2014/24/EU; the approach to implementation was essentially a 'copy out' of the provisions of the Directive.

In May 2017, new national legislation transposing Directive 2014/23/EU on the award of concession contracts (see question 2) corrected certain anomalies in the Public Sector Regulations, including aligning the rules on de minimis modifications with the provisions of Directive 2014/24/EU.

In relation to remedies, the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (SI No. 130 of 2010) give effect to Directive 89/665/EEC as amended by Directive 2007/66/EC (the Remedies Directives). The 2010 Regulations were amended by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2015 (SI No. 192 of 2015), principally in order to grant the High Court jurisdiction to lift the automatic suspension of a contract at interim or interlocutory stage. The 2010 Regulations were further amended in July 2017 by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2017 (SI No. 327 of 2017). These amending Regulations are designed to bring the 2010 Regulations into line with the Public Sector Regulations of 2016.

Additionally, the Rules of the Superior Courts (Review of the Award of Public Contracts) 2010 (SI No. 420 of 2010) prescribe the procedure in respect of applications to the High Court pursuant to the above legislation.

Sector-specific legislation

Is there any sector-specific procurement legislation supplementing the general regime?

The European Union (Award of Contracts by Utility Undertakings) Regulations 2016 (SI No. 286 of 2016) (the Utilities Regulations) transpose into Irish law Directive 2014/25/EU, which governs procurement in the water, energy, transport and postal services sectors. The Utilities Regulations were made on 5 May 2016, however, they are deemed to have come into effect on 18 April 2016 - the latest date for the transposition of the Directive - and apply to all procurements

by relevant contracting entities commencing on or after 18 April 2016. The Utilities Regulations revoke the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (SI No. 50 of 2007), which transposed Directive 2004/17/EC in Ireland, however the 2007 Regulations continue to apply to contract award procedures or design contests commenced by contracting entities prior to 18 April 2016 and to the award of specific contracts based on framework agreements concluded either before 18 April 2016, or on or after 18 April 2016 following a contract award procedure that commenced before 18 April 2016. The Utilities Regulations specify the circumstances in which a contract award procedure has been commenced before 18 April 2016.

As with the Public Sector Regulations, the principal exception to these rules on application is Regulation 97 of the Utilities Regulations on contract modifications, which will apply to contracts or framework agreements concluded prior to 18 April 2016 (as well as those concluded after that date).

In May 2017, new national legislation transposing into Irish law Directive 2014/23/EU on the award of concession contracts (see further below) was used to correct certain anomalies in the Utilities Regulations, including by aligning the rules on de minimis modifications with the provisions of Directive 2014/25/EU.

Remedies in the utility sector are governed by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (SI No. 131 of 2010), as amended by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015 (SI No. 193 of 2015). The 2010 Regulations were further amended in July 2017 by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2017 (SI No. 328 of 2017). These amending Regulations are designed to bring the 2010 Regulations into line with the Utilities Regulations of 2016. The Rules of the Superior Courts (Review of the Award of Public Contracts) 2010 (SI No. 420 of 2010) prescribe the procedures in respect of remedies applications to the High Court.

The Concessions Directive (Directive 2014/23/EU) was finally transposed into Irish law by the European Union (Award of Concession Contracts) Regulations 2017 (SI No. 203 of 2017) (the Concessions Regulations) in May 2017. The Concessions Regulations are deemed to have come into operation on 18 April 2016 and apply to concession contract award procedures commenced by a contracting authority or contracting entity on or after 18 April 2016.

In July 2017, the Irish government published the European Union (Award of Concession Contracts) (Review Procedures) Regulations 2017 (SI No. 326 of 2017). These latter Regulations implement into Irish law those parts of Directive 2014/23/EU providing for remedies for breaches of the rules on concession contracts and which were not transposed by the Concessions Regulations. As such, they are the final piece in the jigsaw of Irish domestic legislation implementing the EU's reform of the public procurement regime and their promulgation aligns the remedies regimes applying to public, utility and concessions contracts.

The Defence Procurement Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security was transposed into Irish law by way of the European Union (Award of Contracts Relating to Defence and Security) Regulations 2012 (SI No. 62 of 2012).

International legislation

In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

In contrast to the UK, where the implementing regulations include obligations relating to public sector procurements with a value below the thresholds for application of the EU procurement rules, the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations do not include any significant additional obligations beyond those laid down in Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU (which are based on the

World Trade Organization's Agreement on Government Procurement (GPA)).

Proposed amendments

Are there proposals to change the legislation?

At the time of writing, we are not aware of any proposals to change or amend Irish procurement legislation.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Irish legislation defines which persons are 'contracting authorities' or 'contracting entities' rather than defining or specifying which persons do not fall under either of those terms.

Under the Public Sector Regulations, a 'contracting authority' is defined as:

In turn, a 'body governed by public law' is defined as a body that has the following characteristics:

The Utilities Regulations apply to procurement by 'contracting entities', which are persons that are either: contracting authorities (see above definition) or public undertakings (ie, undertakings over which contracting authorities exercise directly or indirectly a dominant influence by virtue of ownership, financial participation or rules governing the undertaking) that pursue specified activities in the gas, heat, electricity, water, transport, port, airport, postal services and fuel sectors; or persons that pursue any such specified activities and have been granted special or exclusive rights by a competent authority.

The Concessions Regulations follow the definitions of 'contracting authority' and 'contracting entity' as set out above.

There is a relative paucity of Irish case law that considers the issue of whether an entity constitutes a contracting authority or contracting entity. The Court of Justice of the EU (CJEU) has considered the status of Coillte Teoranta (Irish Forestry Board) in two cases - Commission v Ireland (Case C-353/96) and Connemara Machine Turf v Coillte Teroanta (Case C-306/97) - and determined that it was a contracting authority.

Contract value

Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The procurement legislation will only apply where a procurement has a value (net of VAT) that is estimated to be greater than or equal to the values specified in the relevant regulations.

In the public sector, the following threshold values apply:

- €5.548 million for works contracts;
- €144,000 for supply contracts and services contracts awarded by central government authorities and design contests organised by central government authorities;
- €221,000 for supply contracts and services contracts awarded by sub-central contracting authorities and design contests organised by sub-central contracting authorities; and
- €750,000 for services contracts falling within Annex XIV of Directive 2014/24/EU (ie, 'light touch services').

In the utilities sector, the following threshold values apply:

- €5.548 million for works contracts;
- €443,000 for supply contracts, services contracts and design contests; and
- €1 million for services contracts for social and other specific services listed in Annex XVII of Directive 2014/25/EU (ie, 'light touch services').

The Concessions Regulations apply to concessions with a value equal to or greater than €5.548 million.

Where the value of a contract falls below these thresholds, the procurement process will not be subject to legislation. However, such contracts may still need to be procured in accordance with the fundamental principles of procurement law where there is cross-border interest in a particular contract.

Amendment of concluded contracts

Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The Public Sector Regulations (Regulation 72), the Utilities Regulations (Regulation 97) and the Concessions Regulations (Regulation 43) permit the amendment of a concluded contract without a new procurement procedure in the following circumstances:

- where the contract includes a clear, precise and unequivocal review clause that provides for the proposed modification;
- where the modification involves the provision of additional goods, works or services by the original contractor, and a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the authority. Under the Public Sector Regulations and the Concessions Regulations, but not under the Utilities Regulations, there are limits on the increase in a contract's price or value a modification may entail. In the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations, the modification must be publicised in the Official Journal of the European Union (OJEU);
- where the need for modification is as a result of unforeseeable circumstances (which a diligent authority could not foresee) and the modification does not alter the overall nature of the contract. In the Public Sector Regulations and the Concessions Regulations (but not under the Utilities Regulations), there are, as above, limits on the increase in contract price or value, and in the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations, the modification must be publicised;
- where there is a change to the contractor or concessionaire as a result of an unequivocal review clause or a corporate restructuring; or
- where the value of the modification is minimal (see further below), provided that the modification does not alter the overall nature of the contract.

In certain specified situations modifications will be considered 'substantial' and may not be made without a new procurement procedure. These situations relate to the scenarios outlined by the CJEU in the Pressetext case (Case C-454/06).

It is worth noting that the rules in the Public Sector Regulations and the Utilities Regulations on minor modifications were previously not aligned with the Directives they purported to transpose. The EU directives require the value of the modification to be both below the applicable financial threshold and below a specified percentage of the value of the contract (10 per cent where the contract is for supplies or services and 15 per cent where the contract is for works). In contrast, Ireland's legislation, prior to its amendment, required the value of the change to be below one or other (and

not both) of these values. This inconsistency has now been corrected by Regulation 47 and Regulation 48 of the Concessions Regulations to bring the national legislation into line with the EU directives.

Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

To date, there have been no reported cases in Ireland on the legislation relating to amendments to concluded contracts.

Privatisation

In which circumstances do privatisations require a procurement procedure?

There is no specific guidance in the Irish domestic procurement legislation on the circumstances in which a privatisation might require a procurement procedure; nor is there any reported Irish case law on this subject. However, the European Commission has issued state aid guidance that suggests that when a company is privatised by a trade sale, an open, transparent and competitive tender process must be held (and other conditions must be satisfied) in order to avoid notification to the Commission. When the privatisation is affected by an IPO or sale of shares on the stock exchange, it is generally assumed to be on market conditions (as the price will be the market price) and not to involve state aid.

Public-private partnership

In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The procurement of works, services or supplies by a contracting authority or contracting entity using a PPP contract model will be subject to procurement law where the value of the contract is above the relevant financial threshold and where it is not otherwise excluded from the application of the relevant Regulations. Where the contract to be awarded falls within the definition of a concession as set out in the Concessions Regulations, and has a value equal to or greater than €5.548 million, then it should be procured in accordance with the rules laid down in those Regulations.

ADVERTISEMENT AND SELECTION

Publications

In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the OJEU. The 2014 directives set out in detail the information to be included in the contract notice or concession notice and this is replicated in the domestic legislation.

All public contracts for supplies and services with an estimated value of €25,000 (exclusive of VAT) and above are required to be advertised on the Irish government's eTenders website. For works and works-related services, the threshold for advertising on the eTenders website is €50,000 (exclusive of VAT). Public sector buyers are also encouraged to advertise lower value opportunities on eTenders as part of the drive to facilitate small and medium-sized enterprises' (SMEs) access to government contracts.

Participation criteria

Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

The Public Sector Regulations do place limitations on authorities when setting the conditions for participation in a tender procedure. Such conditions may relate to suitability to pursue a professional activity, economic and financial standing or technical and professional ability. Only specified criteria may be imposed as requirements for participation in a procurement procedure. All conditions imposed must also be appropriate, related and proportionate to the subject matter of the contract concerned. The means of proof of economic or financial standing and of technical ability are also specified in the Regulations.

The Utilities Regulations allow contracting entities to establish objective rules and criteria for participation in a tender procedure but, in contrast to the public sector rules, do not impose any further parameters or restrictions on those criteria. These provisions mirror the provisions in the relevant Directive.

The Concessions Regulations refer to the need for contracting authorities and contracting entities to verify the conditions for participation in a concession award procedure relating to professional and technical ability and financial and economic standing, but do not place any further restrictions on these conditions other than to state that any such requirements must be non-discriminatory and proportionate to the subject matter of the concession contract and related and proportionate to the need to ensure the ability of the concessionaire to perform the contract.

Is it possible to limit the number of bidders that can participate in a tender procedure?

The Public Sector Regulations permit a contracting authority to limit the number of bidders to be invited to tender where the restricted procedure, competitive procedure with negotiation, competitive dialogue or innovation partnership procedures are being used, but it is not permissible to impose such limitations when using the open procedure. In the restricted procedure, the minimum number is five; in competitive procedures with negotiation, competitive dialogues and innovation partnerships, the minimum number is three. Numbers may only be limited on the basis of objective and non-discriminatory criteria and the number invited must be sufficient to ensure genuine competition.

The Utilities Regulations also allow contracting entities using restricted, negotiated, competitive dialogue procedures and innovation partnerships to establish objective rules and criteria to reduce the number of candidates to be invited to tender or to negotiate. The authority must take account of the need to ensure adequate competition when selecting the number of candidates.

The Concessions Regulations allow authorities to design their own award procedures and to limit the number of candidates or tenderers to an appropriate level, provided this is done in a transparent manner and on the basis of objective criteria. The number invited must be sufficient to ensure genuine competition.

Regaining status following exclusion

How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of ‘self-cleaning’ an established and recognised way of regaining suitability and reliability?

‘Self-cleaning’ - the taking of measures to demonstrate reliability, despite the existence of a relevant ground for exclusion - is a concept that Ireland has inherited from the EU directives. The Public Sector Regulations specify that a

bidder can regain the status of a reliable bidder in certain circumstances by providing evidence that it has paid or undertaken to pay compensation in respect of any damage caused by its criminal activity or misconduct; clarified facts and circumstances in a comprehensive manner by collaborating with the authorities investigating the matter; and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The same regime applies in the Utilities Regulations and the Concessions Regulations. The Public Sector Regulations, the Utilities Regulations and the Concessions Regulations also allow for the rules on exclusion to be relaxed in other circumstances, for example, where it would be disproportionate to exclude or where there are overriding reasons relating to the public interest.

THE PROCUREMENT PROCEDURES

Fundamental principles

Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes, the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations all reiterate the general principles of equal treatment, non-discrimination, transparency and proportionality.

Independence and impartiality

Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

There are no express provisions in the Public Sector Regulations or the Utilities Regulations that require a contracting authority or contracting entity to be independent or impartial although independence and impartiality would be implied by the general principles of equal treatment, non-discrimination and transparency. In the Concessions Regulations, contracting authorities and contracting entities are required to take appropriate measures to combat fraud, favouritism and corruption. See also question 17.

Conflicts of interest

How are conflicts of interest dealt with?

The Public Sector Regulations, the Utilities Regulations and the Concessions Regulations require contracting authorities to take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. ‘Conflicts of interest’ include any situation where a relevant staff member has, directly or indirectly, a financial, economic or other personal interest that might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure. Where a conflict of interest cannot be resolved by other less intrusive measures, it will constitute a ground for discretionary exclusion of an economic operator.

Bidder involvement in preparation

How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The participation in a tender process of a bidder that has been involved in the preparation of the procedure is not prohibited per se. The Public Sector Regulations and the Utilities Regulations allow authorities to consult with the

market prior to commencing a procurement procedure and to seek or accept advice from market participants (who may later submit bids) in the planning and conduct of a procedure, subject to the proviso that this must not distort competition or breach the principles of non-discrimination and transparency. The legislation specifies the steps that shall be taken by an authority to ensure a level playing field for all bidders in these circumstances. These include providing other bidders with all relevant information exchanged with the consulted bidder and fixing appropriate time limits for tender return.

A bidder with prior involvement should only be excluded from the process where there are no other less draconian means to ensure compliance with the duty to treat economic operators equally. Prior to excluding such a bidder, the bidder must be given the opportunity to prove that its involvement is not capable of distorting competition. Measures taken to deal with the situation must be documented. The Concessions Regulations do not explicitly deal with the prior involvement of bidders in the preparation of a tender procedure.

Procedure

What is the prevailing type of procurement procedure used by contracting authorities?

The choice of procurement procedure is generally made on a case-by-case basis and very much depends on the nature and complexity of the goods, works or services being procured. The open procedure is used most frequently in Ireland, and it is the policy of the Irish government to promote the use of this procedure as much as possible in order to encourage SME participation in public procurement.

Separate bids in one procedure

Can related bidders submit separate bids in one procurement procedure?

There are no statutory rules in Ireland that would prevent the submission of bids by related bidders in a procurement procedure. This is generally left to contracting authorities to determine in accordance with EU law. The procuring body will generally specify in its published procurement documentation whether it is permitting tenders from related bidders.

Negotiations with bidders

Is the use of procedures involving negotiations with bidders subject to any special conditions?

Under the Public Sector Regulations, the competitive dialogue and the competitive procedure with negotiation procedures are only available for use in certain specified circumstances. The grounds for use of these procedures are now identical, and are much broader than was previously the case. Both procedures are now available for use where:

- the authority's needs cannot be met by adapting readily available solutions;
- the requirements include design or innovative solutions;
- the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them;
- technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference; or
- where following an open or restricted procedure only irregular or unacceptable tenders are submitted.

Under the Utilities Regulations, competitive dialogue and the competitive procedure with negotiation are generally available without the need to satisfy any such conditions.

In contrast to the Public Sector and the Utilities Regulations, the Concessions Regulations do not prescribe the use of particular procurement procedures, but leave it to the contracting authority or contracting entity to design its own concession award procedure. Where negotiations are held with candidates or tenderers, the Regulations state that the subject matter of the concession contract, the award criteria and the minimum requirements may not be changed during the course of any negotiations.

If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Negotiation is permitted when using the competitive procedure with negotiation, the competitive dialogue, the innovation partnership and the negotiated procedure without prior publication of a contract notice. Authorities in Ireland rarely used the negotiated procedure without publication process, as they are increasingly aware of the significant negative consequences of using this procedure without satisfying the strict grounds for its use. Innovation partnerships are used very rarely. In the future, it is possible that authorities will elect to use the competitive dialogue procedure more than the competitive procedure with negotiation as the former permits certain negotiations with the successful tenderer.

Framework agreements

What are the requirements for the conclusion of a framework agreement?

Under the Public Sector Regulations the term of framework agreements is limited to four years and under the Utilities Regulations, the term is limited to eight years, although in both cases, there is a possibility to extend the term 'in exceptional cases duly justified, in particular by the subject of the framework agreement'. Frameworks and call-off contracts must be procured in accordance with the procedures specified in the legislation, although the Public Sector Regulations (Regulation 33) are more prescriptive than the Utilities Regulations (Regulation 50). Frameworks may be multi-supplier or single supplier and may or may not involve the re-opening of competition. In general, the terms of any call-off contract and the procedures for procuring the same must be consistent with the terms of the framework agreement.

Centralised framework agreements are a commonly used mechanism for purchasing by the public sector in Ireland, and the Office of Government Procurement (OGP) has been successful in establishing a significant number of framework agreements across a number of sectors for use by public bodies in Ireland. A summary of the available frameworks can be found on the OGP's website.

May a framework agreement with several suppliers be concluded?

Framework agreements may be set up with one or several suppliers. Under the Public Sector Regulations, where there are multiple suppliers, a call-off contract can be awarded either:

- directly to a framework supplier where all of the contract terms and the objective conditions for determining which supplier shall be awarded the contract are set out in the framework agreement;
- by re-opening competition in part (where the framework specifies the contract terms and this procedure has been provided for in the framework documents); or
- by re-opening competition among framework suppliers where not all of the contract terms are laid out in the framework agreement.

Changing members of a bidding consortium

Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There are no explicit statutory rules on changes to consortia members although authorities will often include in their tender documents conditions prohibiting changes without the authority's prior consent and reserving the right, where there is a change, to check that this change does not affect the fairness of the selection or tender process.

In the case of MT Hojgaard A/S, Zublin A/S v Banedanmark (C-396/14), the CJEU ruled there was no breach of the principle of equal treatment where one of two entities was permitted to continue by itself in a negotiated procedure, provided the single entity, by itself, met the requirements for participation and its continued participation did not place the other tenderers at a competitive disadvantage.

Participation of small and medium-sized enterprises

Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

In April 2014, the Department of Public Expenditure and Reform in Ireland published Circular 10/14 on initiatives to assist SMEs competing for public contracts. This Circular includes a number of measures aimed at promoting SME involvement in public sector procurement, including the requirement for public sector buyers to give consideration to splitting contracts into lots, thereby enabling smaller businesses to compete for opportunities more relevant to their size and capabilities. Other measures include:

- encouraging buyers to engage in market analysis prior to commencing a tender process in order to understand the specific capabilities of SMEs;
- the promotion of electronic tendering;
- greater use of the open procedure;
- encouraging the use of relevant and proportionate requirements for financial and technical capacity, together with the ability for candidates and tenderers to self-declare compliance with the requirements; and
- guidance on appropriate insurance requirements.

Neither the Public Sector Regulations nor the Utilities Regulations mandate the division of contracts into lots; rather, contracting authorities and contracting entities may elect to split their requirements into lots. Under the Public Sector Regulations an authority must indicate in the procurement documents the main reasons why it has not subdivided its requirement into lots. Contracting authorities and contracting entities are required to indicate whether tenders may be submitted for one, for several or for all lots and they may impose limits as to the number of lots that can be awarded to any one tenderer. In such cases, objective and non-discriminatory rules for determining which lots will be awarded to a tenderer who wins more than the maximum number of lots permitted must be included in the procurement documents. The Concessions Regulations acknowledge the possibility of awarding concessions contracts in the form of separate lots, but do not mandate the use of lots and do not otherwise include express rules in relation to lots.

Variant bids

What are the requirements for the admissibility of variant bids?

Variant bids are permitted under the Public Sector Regulations and the Utilities Regulations provided they meet the minimum requirements specified by the authority. Contracting authorities must indicate, in the contract notice or, where a prior information notice is used as a means for calling for competition, in the invitation to confirm interest, whether or not variants are authorised or required. If they are not permitted by the authority they may not be submitted by the bidders. The authority shall ensure that the chosen award criteria can be applied to variants meeting the specified minimum requirements as well as to conforming tenders that are not variants. There are no express rules in the Concessions Regulations relating to variant bids (although see further in question 28).

Must a contracting authority take variant bids into account?

If the authority has indicated that variant bids are authorised or required, it must take into account any variant bids submitted, provided those bids comply with any minimum requirements specified and are not otherwise disqualified or excluded. Where an unauthorised variant bid is submitted, it should not be considered or evaluated.

Under the Concessions Regulations, it is worth noting that there is more flexibility in relation to the submission of what are termed 'innovative solutions'. Where the authority receives a tender that 'proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent contracting authority or contracting entity', the ranking order of the award criteria can, exceptionally, be modified to take into account that innovative solution.

Changes to tender specifications

What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

There is generally no scope for bidders to change the tender specifications or submit their own terms of business as it is necessary to ensure equal treatment and transparency in the process. Usually, a failure to accept the published specifications or terms will lead to exclusion. There is some flexibility to negotiate the authority's contract terms under the competitive procedure with negotiation and the competitive dialogue procedure, subject always to the application of the fundamental principles.

Award criteria

What are the award criteria provided for in the relevant legislation?

The Public Sector Regulations and the Utilities Regulations require contracts to be awarded on the basis of the most economically advantageous tender. The award may be on the basis of price or cost alone or on the basis of price together with quality. Contracting authorities and contracting entities do not have unfettered discretion when it comes to devising award criteria. Award criteria must always be related to the subject matter of the contract in question. The Public Sector Regulations and the Utilities Regulations suggest that award criteria may be comprised of (among other things) criteria relating to:

- technical merit;
- aesthetic and functional characteristics;

- accessibility;
- design;
- social and environmental characteristics; and
- the qualifications and experience of staff, where the quality of staff assigned can have a significant impact on contract performance.

Life-cycle costing can now also be assessed as part of the award criteria.

Award criteria must ensure the possibility of effective competition and must be accompanied by specifications that allow the information provided by tenderers to be effectively verified. Concessions must be awarded on the basis of 'objective criteria' that are linked to the subject matter of the concession contract and are listed in descending order of importance in the procurement documents. As indicated in question 28, there is some flexibility, subject to certain safeguards, to adjust the ranking order of the award criteria where a tenderer proposes an 'innovative solution'.

Abnormally low bids

What constitutes an 'abnormally low' bid?

There is no statutory definition of an 'abnormally low' bid in Ireland. This is generally a matter for each contracting authority or contracting entity to determine based on the circumstances of the tender in question.

What is the required process for dealing with abnormally low bids?

Contracting authorities and contracting entities must require economic operators to explain costs or prices that appear to be abnormally low and must assess the information provided by consulting with the operator in question. An authority may reject a tender where the evidence provided does not satisfactorily account for the low price or costs. Where the low price is due to a failure by the tenderer to comply with applicable obligations in the fields of environmental, social and labour law, an authority must reject the tender.

REVIEW PROCEEDINGS

Relevant authorities

Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In Ireland, the courts deal with review applications. There is no specific court or tribunal that is specialised to handle procurement cases exclusively. Judicial review proceedings are generally commenced in the High Court and decisions of the High Court are ordinarily appealed to the Court of Appeal. Appeals to the Supreme Court are now only permitted in exceptional circumstances.

If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Not applicable.

Timeframe and admissibility requirements

How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The length of judicial proceedings can vary significantly depending on the complexity of the case and the attitude of the parties to the litigation. The Irish courts are mindful of the need to progress procurement cases expeditiously; however, judicial reviews will often take between 12 and 18 months to reach full hearing and final judgment. Interlocutory hearings (eg, applications to lift award suspensions) are typically held within two to three months of the legal proceedings commencing.

What are the admissibility requirements?

Judicial remedies are available to a person who has, or has had, an interest in obtaining a reviewable contract and who alleges harm, or the risk of harm, as a result of an infringement, in relation to that reviewable contract, of Irish or EU procurement law. Generally, this means that bidders or potential bidders are entitled to bring review proceedings. Other parties have no entitlement to bring proceedings under the procurement legislation, but those with sufficient interest in the outcome of the procurement (eg, trade unions) may be able to bring judicial review proceedings.

What are the time limits in which applications for review of a procurement decision must be made?

The time limits for application to a court depend on the nature of the application. Where the application is for an order to correct an alleged infringement or prevent further damage to the applicant's interests or for review of the contract award decision, the application must be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the alleged infringement.

Where the application is for a declaration of ineffectiveness, this must be made within six months after the conclusion of the relevant contract. However, where a contract award notice has been published, the time limit for commencing proceedings seeking a declaration of ineffectiveness is reduced to 30 days, beginning on the day after the notice is published in the OJEU. Similarly, where the authority notifies candidates or tenderers of the outcome of the tender process and includes a summary of the reasons for the candidate's or tenderer's rejection, the period for commencing proceedings is 30 days beginning on the day after the authority has provided the notice.

The courts do have discretion to extend the statutory time limits for making an application where the court considers there is good reason to do so. In the case of Forum Connemara Limited v Galway County Local Community Development Committee ([2015] IEHC 369), the High Court considered that good reasons existed and permitted the applicant to pursue a challenge outside of the statutory 30-day time limit. The decision to extend the time limit was subsequently appealed to the Court of Appeal, which restored the strict approach in Ireland to time limits in procurement cases. The Court of Appeal held that enabling such an action to proceed would constitute a 'gross impairment of the effectiveness of the implementation of the Community Directives on the award of public contracts' ([2016] IEHC 493).

More recently, in the case of Newbridge Tyre and Battery Co Ltd v Commissioner of An Garda Síochána ([2018] IEHC 365), the High Court considered at what point in time the clock began to run against an applicant. The Authority alleged that the proceedings in this case had not been brought within 30 days of the applicant being notified of the decision to award the contract. However, based on the factual situation, which involved the exchange of correspondence between

the applicant and the Authority following notification of the award decision, the Court came to the view that time ran not from the date of notification of the award decision but from the date of knowledge of the alleged infringement, which was only revealed to the applicant in the correspondence which followed notification of the award decision. Accordingly, the applicant was not out of time to bring proceedings.

Suspensive effect

Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Yes, if legal proceedings are commenced in the High Court, the contracting authority shall not conclude the contract until the Court has determined the matter or the Court gives leave to lift any suspension of the award procedure or the legal proceedings are discontinued or otherwise disposed of.

According to the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 as amended by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2015 (and equivalent provisions in the legislation governing utility undertakings and the award of concession contracts), the contracting authority may apply to the High Court to have the automatic suspension lifted. When deciding whether to lift the suspension, the Court is required to consider whether it would be appropriate to grant an injunction preventing the authority from entering into the contract and only if the Court considers that it would not be appropriate to grant an injunction may it make an order permitting the authority to conclude the contract.

In the case of Powerteam Electrical Services Limited v Electricity Supply Board ([2016] IEHC 87), the Irish High Court confirmed that in determining whether it is appropriate to grant an injunction, the principles to be applied were those set out in Campus Oil Limited v Minister for Industry and Energy (No 2) ([1983] IR 88).

Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Since the law in this area changed in 2015, the courts have tended to permit the lifting of automatic suspensions by contracting authorities (approximately 75 per cent of cases) but it is possible that this could change following the Irish Court of Appeal decision in WordPerfect Translation Services v Minister for Public Expenditure and Reform (see question 43).

Notification of unsuccessful bidders

Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Yes. There is a requirement under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (and the equivalent legislation applying to concession contracts and utilities contracts (see question 2)) to notify unsuccessful candidates and tenderers of the outcome of above-threshold procurements before concluding a contract and to observe a standstill period following such a notification.

The award of a contract during the standstill period is prohibited. The length of the standstill period depends on the method used to transmit the notice: where fax or electronic means are used to despatch the notice, the standstill is 14 calendar days beginning on the day after the notice is sent; where the notice is sent by any other method, the standstill period is 16 calendar days beginning on the day after the notice is sent.

In RPS Consulting Engineers Limited v Kildare County Council ([2016] IEHC 113) the High Court clarified the debriefing obligations of contracting authorities under Irish Law. More recent cases relating to debriefing include: Sanofi Aventis Ireland Ltd trading as Sanofi Pasteur v Health Service Executive and Glaxosmithkline Ireland Limited (Notice party) ([2018] IEHC 566) and Transcore LP v National Roads Authority operating under the name of Transport Infrastructure Ireland [2018] IEHC 569.

Access to procurement file

Is access to the procurement file granted to an applicant?

Under Regulation 84 of the Public Sector Regulations, contracting authorities are required to prepare a written report containing various information relating to each contract or framework agreement covered by the Regulations. Authorities are also required to maintain documentation to record the progress of procurement procedures. Similar (but not identical) provisions are contained in Regulation 108 of the Utilities Regulations. However, there is no automatic right for a tenderer to have access to any such file or records. There is no requirement in the Concessions Regulations to prepare a written report, although authorities are required to provide for appropriate recording of the stages of the procurement procedure.

Litigants can seek to access the authority's procurement file and records during the course of legal proceedings via the discovery procedures. Members of the public may also seek to obtain information about procurement procedures by means of a request under the Freedom of Information Act 2014 if the contracting authority is subject to this legislation.

Standstill notices are required to contain specified information including, in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of the tender and a description of the 'characteristics and relative advantages of the tender selected'.

Disadvantaged bidders

Is it customary for disadvantaged bidders to file review applications?

Increasing numbers of unsuccessful bidders are seeking legal advice on their options following notification of the outcome of a competition, but it is not the custom for unsuccessful bidders to file court proceedings and the decision to do so is generally not taken lightly, particularly given the costs involved in bringing review proceedings. There are approximately five to 10 reported procurement decisions of the courts each year.

Violations of procurement law

If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes. An unsuccessful bidder can make a claim for damages and the court has the power to award damages as compensation for loss resulting from an infringement of procurement law. In the recent WordPerfect Translation Services case, the Irish Court of Appeal determined that damages can only be awarded where there has been a 'sufficiently serious' breach (ie, the Francovich test).

May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes. A concluded contract may be cancelled, or more precisely, the obligations that remain to be fulfilled may be cancelled by the courts in certain limited circumstances - for example, where a contract has been concluded without a requisite contract notice first being published or where there has been a breach of the standstill procedures combined with an infringement of the substantive procurement rules that has affected a tenderer's chances of applying for a review.

Legal protection

Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

The remedy of ineffectiveness is available where a contract is awarded directly by an authority and there is no lawful basis for such an award. Where the court declares a contract ineffective, all unperformed obligations are cancelled. Obligations already performed are unaffected. No decision of the Irish Courts has yet declared a concluded contract to be ineffective.

In cases where the court declines to make a declaration of ineffectiveness (because, for example, there are overriding reasons in the public interest that require the contract to be maintained), it must impose an alternative penalty. This can be one or both of the following: the imposition on the authority of a civil financial penalty (of up to 10 per cent of the value of the contract) or the termination or shortening of the duration of the contract.

Typical costs

What are the typical costs of making an application for the review of a procurement decision?

The costs of a judicial review will vary greatly, depending on the complexity of the case and the time that it takes to conclude matters. Broadly, applicants can expect to pay professional legal fees of at least €200,000 to €300,000 if a case proceeds to full hearing. Should a party lose a case, it may also be liable to pay the costs of the other party to the proceedings.

In the recent case of KPW Business Forms Ltd t/a KPW Print Management v State Examinations Commission [2019] IEHC 141 legal proceedings were brought challenging an award decision. The contracting authority subsequently abandoned the competition, rendering the legal proceedings moot. The High Court awarded costs to the applicant as a result of the unilateral decision of the authority to discontinue the competition as a result of the procurement challenge.

UPDATE AND TRENDS

Recent developments

Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

There has been a steady flow of procurement challenges during the past 12 months, a number of which have resulted in full trials. Large infrastructure projects appear to be particularly susceptible to challenge.

Public procurement has featured prominently in the mainstream press and media during this period as a result of significant cost overruns on certain major capital projects (eg, National Children's Hospital). There is currently much public focus on the way in which the public sector procures contracts and establishes pricing in the construction context in particular.

A number of projects have also run into difficulties following reports of bidders liaising inappropriately with the representatives of awarding authorities.

The Office of Government Procurement (OGP) published updated guidance in January 2019 on 'Public Procurement Guidelines for Goods and Services'. Aimed at demystifying some of the more complex rules and procedures around public procurement and making the rules more accessible to contracting authorities and suppliers, the revised guidelines are intended to support contracting authorities when awarding goods and services contracts. The OGP has also published a number of new information notes, including on incorporating social considerations into public procurement and on Brexit and public procurement. All of the above can be found on the OGP's website.

In the recent case of Sanofi Aventis Ireland Ltd trading as Sanofi Pasteur v Health Service Executive and Glaxosmithkline Ireland Limited (Notice party) ([2018] IEHC 566), the Irish High Court considered the adequacy of reasons provided by the contracting authority in a competition for a contract under a framework agreement for the supply of various vaccine products. The judgment is interesting in that it shows the Court following the decision in RPS Consulting Engineers Limited v Kildare County Council ([2016] IEHC 113) in which the High Court expounded the debriefing obligations of contracting authorities under Irish law. In Sanofi, while the Court ruled in favour of the contracting authority on most of the grounds of challenge, the applicant did obtain a declaration that the contracting authority had infringed its rights in relation to the obligation to give reasons in respect of certain sub-criteria. The Court directed the contracting authority to provide full reasons including the characteristics and relative advantages of the successful tender, but stopped short of quashing the decision of the contracting authority on the basis that to do so would be plainly disproportionate - the breach, if remedied, would be insufficient to alter the outcome of the competition.