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Public Procurement & Government Contracts

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chambers.com

2020

IRELAND

Law and Practice

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1. General

1.1 Legislation Regulating Procurement of Government Contracts

In Ireland, the legislation regulating the award of public contracts is derived from European Union directives. The Public Sector or "Classic" 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) on 5 May 2016 (the "Public Sector Regulations"). These Regulations are deemed to have come into operation on 18 April 2016 (the deadline for transposition) and apply to all procurements by "contracting authorities" commenced on or after that date.

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, however the 2006 Regulations continue to apply to contract award procedures or design contests commenced 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 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). In May 2017, amending legislation transposing Directive 2014/23/EU on the award of concession contracts corrected certain anomalies in the Public Sector Regulations.

As regards procurement 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 later 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.

In the utility sector, the European Union (Award of Contracts by Utility Undertakings) Regulations 2016 (SI No 286 of 2016) (the "Utility Regulations") transpose Directive 2014/25/EU into Irish law. These govern procurement in the water, energy, transport and postal services sectors. The Utility Regulations were made on 5 May 2016, however, they are deemed to have come into effect on 18 April 2016 – the latest date for transposition of the Directive. They apply to procurements by relevant contracting entities commencing on or after 18 April 2016.

The Utility 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 that date.

The Utility 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 Utility Regulations on contract modifications; this applies to contracts or framework agreements concluded prior to 18 April 2016, as well as those concluded after that date. In May 2017, amending legislation was used to correct anomalies in the Utility Regulations, including by aligning the rules on de minimis modifications with the provisions of Directive 2014/25/EU.

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) govern remedies in the utility sector. The 2010 Regulations were further amended in 2017 by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2017 (SI No 328 of 2017).

In May 2017, the Concessions Directive (Directive 2014/23/EU) was transposed into Irish law by the European Union (Award of Concession Contracts) Regulations 2017 (SI No 203 of 2017) (the "Concessions Regulations"). 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, European Union (Award of Concession Contracts) (Review Procedures) Regulations 2017 (SI No 326 of 2017) were published; these implement 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. 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 is transposed into Irish law by the European Union (Award of Contracts Relating to Defence and Security) Regulations 2012 (SI No 62 of 2012).

1.2 Entities Subject to Procurement Regulation

The Public Sector Regulations apply to contracting authorities. A "contracting authority" is defined as:

- a state, regional or local authority;
- a body governed by public law; or
- an association formed by one or more such authorities or one or more such bodies governed by public law.

A "body governed by public law" is a body which is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, has legal personality and has any of the following characteristics:

- it is financed, for the most part, by the State, a regional or local authority, or by another body governed by public law;
- it is subject to management supervision by an authority or body referred to in the first bullet point; or
- it has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, a regional or a local authority, or by another body governed by public law.

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

1.3 Type of Contracts Subject to Procurement Regulation

Procurement legislation will only apply where a contract has a value (net of VAT) that is estimated to be greater than or equal to certain thresholds specified in the relevant Regulations.

In the public sector, the following threshold values apply:

- EUR5.350 million for works contracts;
- EUR139,000 for supply contracts and services contracts awarded by central government authorities and design contests organised by central government authorities;
- EUR214,000 for supply contracts and services contracts awarded by sub-central contracting authorities and design contests organised by sub-central contracting authorities; and
- EUR750,000 for "light touch services" contracts.

In the utilities sector, the following threshold values apply:

- EUR5.350 million for works contracts;
- EUR428,000 for supply contracts, services contracts and design contests; and
- EUR1 million for services contracts for social and other specific "light touch services".

The Concessions Regulations apply to concessions with a value equal to or greater than EUR5.350 million (ex VAT).

If 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. Whether there is a "cross-border interest" will depend on the factual circumstances.

1.4 Openness of Regulated Contract Award Procedure

Regulated contracts are generally open to economic operators (or groups of economic operators) from the European Union.

In addition, Regulation 25 of the Public Sector Regulations makes clear that for contracts covered by Annexes 1, 2, 4 and

5 and the General Notes to the EU's Appendix 1 to the WTO Agreement on Government Procurement (GPA) and by the other international agreements by which the EU is bound, a contracting authority is required to accord to economic operators from states which are signatories to those agreements treatment which is no less favourable than the treatment accorded to economic operators from the European Union.

Similarly, under Regulation 42 of the Utility Regulations, in so far as it is covered by Annexes 3, 4 and 5 and the General Notes to the EU's Appendix 1 to the GPA and by the other international agreements by which the EU is bound, a contracting entity must accord to economic operators from states which are signatories to those agreements treatment which is no less favourable than the treatment accorded to economic operators from the European Union.

1.5 Key Obligations

The Public Sector Regulations and the Utility Regulations create obligations for contracting authorities and contracting entities which are procuring regulated contracts. The Utility Regulations are more flexible and less onerous in certain respects for contracting entities than the Public Sector Regulations.

Contracts must, generally, be advertised in the Official Journal of the European Union. This is to ensure transparency and give all economic operators the opportunity to consider whether they wish to participate in the competition. Certain minimum information about the contract is required to be published using standard forms.

All candidates and tenderers for regulated contracts must be treated equally by the contracting authority or the contracting entity. There is no possibility of discrimination on the grounds of nationality. In order to demonstrate that there is equal treatment, the rules of the competition must be set out and explained transparently to all economic operators at the same time and using the same documentation. These rules must not be designed to favour any particular operator or group of operators from a particular member state; they must be fair and objectively justifiable.

Contracting authorities and contracting entities must also act in accordance with the principle of proportionality at all times throughout a competition; the principle of mutual recognition (for example, of qualifications and certification) is also important.

There are rules on the different procurement procedures that may be used and obligations in relation to how these procedures are to be conducted. Individual procedures are governed by their own specific provisions. There are particular obligations in relation to the procurement of framework agreements, dynamic purchasing systems, electronic auctions and electronic catalogues. There are obligations in relation to the setting of minimum time limits for candidates and tenderers to respond to requirements; there are also obligations in relation to the electronic availability of procurement documents.

Obligations arise in relation to the preparatory stages of competitions. Rules apply in relation to pre-market consultations which a contracting authority or contracting entity may wish to carry out. Where candidates or tenderers have been previously involved with an awarding body, certain steps must be taken to ensure that this does not give rise to any unfairness and competition is not distorted.

There are specific rules around the criteria that may be used to select candidates and to award contracts. Although contracting authorities and entities have certain discretion when it comes to establishing selection and award criteria to be used in a competition, this is not entirely unfettered. The Regulations restrict the criteria which can be used; the Public Sector Regulations are more prescriptive that the Utility Regulations. A fundamental tenet is that selection and award criteria must always be related to the subject matter of the contract. Criteria must be applied equally to all participants in a competition.

There are obligations to exclude candidates who do not meet certain minimum legal requirements. In certain circumstances, the legislation mandates that candidates be excluded from public procurement competitions (eg, where the candidate has been convicted of certain criminal offences).

Contracting authorities are required to accept an Electronic Single Procurement Document – a self–declaration from an economic operator that it is qualified to perform the contract – as preliminary evidence that the selection criteria are met. Authorities are obliged to accept that candidates can rely on the resources of third parties in order to help them to satisfy selection criteria.

Particular obligations arise in relation to technical specifications that contracting authorities and entities may prescribe in relation to their contracts. These must afford equal access and must not have the effect of creating unjustified obstacles to competition.

Contracting authorities are required to adhere to rules on confidentiality, conflicts of interest, abnormally low tenders, subcontracting, reporting and there are requirements to include specific provisions in contracts (for example, in relation to contract termination).

There are particular rules in relation to the debriefing of unsuccessful candidates and tenderers and the extent of the information that must be furnished in these circumstances.

The Regulations also impose obligations on the extent to which contracting authorities and entities may modify awarded contracts. Substantial amendments are generally prohibited. Certain modifications are expressly permitted provided specific procedural requirements are adhered to.

2. Contract Award Process

2.1 Prior Advertisement of Regulated Contract Award Procedures

In general, regulated contracts (ie, those which have an estimated value in excess of the thresholds referred to above) are required to be published in the Official Journal of the European Union (OJEU).

Only in certain limited circumstances, do regulated contracts not have to be advertised: a negotiated procedure without a prior call for competition may be used in exceptional circumstances specified under the Regulations. For example, this procedure may be used: where no tenders/requests to participate or no suitable tenders/requests to participate have been received in response to a prior competition; where the works, supplies or services may only be provided by a particular operator for certain specified reasons; or for reasons of extreme urgency brought about by events unforeseeable by the contracting authority or contracting entity. As the circumstances in which no contract notice is required are exceptions to the general rule, they will be construed narrowly, and the onus will be on a contracting authority to justify any reliance it places on them.

Under national guidelines, public contracts for supplies and services with an estimated value of EUR25,000 (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 EUR50,000 (exclusive of VAT). Public sector buyers are also encouraged to advertise lower value opportunities on eTenders as part of the drive to facilitate access by small and medium-sized enterprises (SMEs) to government contracts

Regulated procurement contracts must generally be advertised in the Official Journal of the European Union. In practice, contracting authorities publish all regulated Irish contracts through www.etenders.gov.ie. This is a central platform for all public sector contracting authorities and entities to advertise procurement opportunities and award notices. The site is managed by the Office of Government Procurement. It displays, on a daily basis, all Irish procurement opportunities currently being advertised in the OJEU, as well as other lower-value contracts uploaded to the site from awarding authorities. The site has the functionality to allow contracting authorities to publish notices on the site which will then be sent to the OJEU automatically.

The legislation sets out in detail the information to be included in a contract notice. Notices are required to include the name of the contracting authority/entity, the estimated total value of the proposed contract, CPV and NUTS codes, a description of the contract requirement, the duration of the contract, the procurement procedure to be used and certain timelines for responding. Information is also provided on whether variants will be accepted, the conditions for participating in the competition and particular conditions to which performance of the contract is subject. Award criteria are also required to be published. Often, in practice, certain information is set out in detail in the procurement documents and contracting authorities refer interested parties to those documents in the contract notice.

2.2 Preliminary Market Consultations by Awarding Authority

Before commencing a procurement procedure, an awarding authority may conduct market consultations with a view to preparing the procurement and informing economic operators of the authority's plans and requirements. A contracting authority may seek or accept advice from independent experts or authorities or from market participants. The advice provided may be used in the planning and conduct of the procurement procedure, where the use of such advice does not have the effect of distorting competition or result in a violation of the principles of non-discrimination and transparency. This is governed by Regulation 40 in the Public Sector Regulations and Regulation 65 of the Utility Regulations.

Market consultations are used increasingly, particularly when the contracting authority wishes to understand better what the market has to offer before it advertises the contract. They provide a good opportunity for prospective bidders to engage with the authority and find out more about its plans. Consultations often take the form of written questionnaires although sometimes, authorities are prepared to meet formally with prospective tenderers to discuss upcoming procurements.

2.3 Tender Procedure for Award of Contract

There are a number of different award procedures available under the Public Sector Regulations and the Utility Regulations – open, restricted, competitive dialogue, competitive procedure with negotiation (with prior notice of competition), innovation partnership and negotiated procedure without prior notice.

The open procedure is the most commonly used procedure in Ireland for public sector bodies. Open and restricted procedures involve no dialogue or negotiations with tenderers; the former is a one-step procedure, the latter involves two steps – a selection stage followed by a tender stage. The negotiated procedure and competitive dialogue are more flexible, permitting discussions with tenderers.

Under the Public Sector Regulations, contracting authorities are at liberty to use the open and restricted procedures as they wish, however the competitive procedure with negotiation and the competitive dialogue are available only in the following prescribed circumstances:

- where the authority's needs cannot be met without adapting readily available solutions;
- where the requirements include design or innovative solutions;
- where 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;
- where technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard; or
- where following an open or restricted procedure, only irregular or unacceptable tenders have been submitted.

Under the Utility Regulations, open, restricted, negotiated (with prior notice) and competitive dialogue procedures can be used freely in appropriate circumstances. Contracting entities have a relatively free choice of procedure and the negotiated procedure (with prior notice) has traditionally been the most popular. Under the Utility Regulations, competitive dialogue and the negotiated procedure are generally available without the need to satisfy the conditions that apply under the Public Sector Regulations.

Under the Public Sector Regulations, when the competitive procedure with negotiation is being used, negotiations may only occur in relation to the initial and subsequent tenders submitted, but not in relation to the final tender. Negotiations can be with a view to improving the content of tenders. As a general principle, any negotiations, where they are permitted, must be conducted in a transparent manner and according to the principle of equal treatment. No economic operator may be afforded any unfair advantage during the course of such negotiations. Information must not be provided in a discriminatory manner which may give one tenderer an advantage over others; any changes to technical specifications or other procurement documents must be notified to all tenderers, and in this case sufficient time must be afforded to all tenderers to amend their tenders where appropriate.

In general, confidential information of one tenderer must not be shared with other tenderers. Negotiations are also permitted under the competitive dialogue procedure. Similar considerations would apply. One advantage of the competitive dialogue procedure is that negotiations may be carried on with the preferred bidder in order to confirm commitments and other terms contained in the tender by finalising the contract, provided such negotiations do not have the effect of materially modifying essential aspects of the tender or the public procurement exercise and do not risk distorting competition or causing discrimination.

Under the Utility Regulations, the above restrictions on the conduct of negotiations under the negotiated procedure do not apply, however, the restrictions in relation to competitive dialogue do apply.

2.4 Choice/Conditions of Tender Procedure

Please see **2.3 Tender Procedure for Award of Contract**.

2.5 Timing for Publication of Documents

In the Public Sector Regulations and the Utility Regulations, a contracting authority is generally required to offer, by electronic means, unrestricted and full direct access free of charge to the procurement documents from the date of publication of the contract notice (or the date on which an invitation to confirm interest is sent). There are only limited exceptions to this rule. The text of the notice (or invitation to confirm interest) is required to specify the internet address at which the procurement documents are accessible.

Procurement documents are defined in the Public Sector Directive as any document produced or referred to by a contracting authority to describe or determine elements of a procurement or a procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.

A similar definition appears in the Utility Regulations (although it refers also to qualification system notices). In practice, the requirement to publish this information from the outset of the procurement process can present challenges for contracting authorities and contracting entities.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The Public Sector Regulations provide that when fixing the deadline for receipt of tenders or requests to participate, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders. These Regulations set out the rules governing minimum timescales. For open procedures, the minimum time limit for receipt of tenders is generally 35 days from the date on which the contract notice was sent to the OJEU. For restricted procedures and for competitive procedures with negotiation, the minimum time for receipt of requests to participate is 30 days and for receipt of tenders it is generally 30 days.

For the competitive dialogue procedure, the minimum time for receipt of requests to participate is 30 days, and there is no minimum deadline for receipt of tenders. Certain reductions in timescales are available if tender documentation is accepted electronically, where a Prior Information Notice has been published or where there is particular urgency. Sub-central authorities also have greater scope to reduce certain timeframes.

The minimum timescales under the Utility Regulations are more flexible, in part. While the minimum timeframes for the open procedure are similar to the Public Sector Regulations, under the restricted procedure and the negotiated procedure (with prior notice of competition), the minimum period for receipt of requests to participate is generally 30 days and for receipt of tenders, ten days although these periods can be reduced in certain circumstances. In competitive dialogue, the standard minimum response time is 30 days (although this can be reduced) and there is no minimum time limit for the receipt of tenders.

2.7 Eligibility for Participation in Procurement Process

Contracting authorities have some discretion in determining the criteria that interested economic operators must meet in order to be eligible to participate in a regulated procurement process, although this is not entirely without restriction.

The Regulations do specify certain mandatory grounds upon which a contracting authority is required to exclude an economic operator from participation in a procurement procedure where it becomes aware that the economic operator concerned has been convicted of certain offences within the last five years (eg, participation in a criminal organisation, corruption or fraud) or where there have been certain breaches of obligations relating to the payment of taxes or social security obligations. However these provisions are subject to the self-cleaning provisions in the Regulations which afford candidates an opportunity to persuade an authority that they can be relied upon to perform the contract, notwithstanding the existence of a relevant ground for exclusion. An authority is also not obliged to exclude a candidate where, on an exceptional basis, there are overriding reasons relating to the public interest such as public health or the protection of the environment.

These rules may be applied by contracting entities under the Utility Regulations also, unless the entity in question is also a contracting authority, in which case it is obliged to apply them.

2.8 Restriction of Participation in Procurement Process

Rules governing the selection criteria for shortlisting tenderers are set out under Regulation 58 of the Public Contracts Regulations and Regulation 89 of the Utility Regulations. In general terms, the selection criteria to be imposed on an economic operator as requirements for participation in a procurement procedure may relate to the following:

- suitability to pursue a professional activity;
- economic and financial standing; and
- technical and professional ability.

All requirements for participation in a procurement procedure must be related and proportionate to the subject matter of the contract concerned.

Both Public Sector and Utility Regulations permit a contracting authority or a contracting entity to limit the number of candidates who may be invited to tender or dialogue where the restricted procedure, competitive procedure with negotiation, competitive dialogue or innovation partnership procedures are used.

Under the Public Sector Regulations, where the number of candidates is to be limited this must be published together with the objective and non-discriminatory criteria to be used to evaluate the candidates. Under the restricted procedure, the minimum number who may be invited to tender is five; in competitive procedures with negotiation, competitive dialogues and innovation partnerships, the minimum number is three. It is possible to invite a lesser number of candidates in certain circumstances, provided the number invited is sufficient to ensure genuine competition.

The Utility Regulations also require objective rules and criteria to be used to reduce the number of candidates, but no minimum numbers are set; instead the Utility Regulations merely provide that the contracting entity shall take account of the need to ensure adequate competition when selecting the number of candidates.

2.9 Evaluation Criteria

The Public Sector Regulations and the Utility Regulations require contracts to be awarded on the basis of the most economically advantageous tender. 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 can decide what award criteria they wish to use, however they do not have an unfettered discretion in this regard.

Award criteria always have to be related to the subject matter of the contract in question. The Public Sector Regulations and the Utility Regulations suggest that award criteria may comprise (amongst 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. A fixed price can also be set by the contracting authority or contracting entity so that economic operators compete on quality criteria only.

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.

3. General Transparency Obligations

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

There is a general obligation to disclose the selection criteria upon which contracting authorities and contracting entities determine which candidates to invite to tender, negotiate or dialogue; there is also a general obligation to disclose the award criteria used to establish the most economically advantageous tender. These rules are necessary to ensure that tender processes are fair and transparent.

Selection and award criteria ought to be apparent from the contract notice, however, in practice, these are often set out in detail (together with sub-criteria, associated weightings and other aspects of the evaluation methodology) in the selection and tender documents.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Under both the Public Sector Regulations and the Utility Regulations a contracting authority or contracting entity shall as soon as possible but no later than 15 days following receipt of a request in writing from an unsuccessful candidate, inform the candidate of the reasons for the rejection of its request to participate in the competition.

Usually this information would be provided in writing and in practice such information is provided to unsuccessful candidates without them having to request it as contracting bodies often wish to disclose their reasoning early with a view to exhausting the statutory limitation periods for challenge before the competition reaches the award stage.

If reasons are not provided earlier in the competition to an unsuccessful candidate, it is entitled to be furnished with a summary of these at the award stage (pursuant to the remedies legislation referred to above). Reasons are usually provided in writing and by electronic means.

3.3 Obligation to Notify Bidders of Contract Award Decision

Under both the Public Sector Regulations and the Utility Regulations a contracting authority or contracting entity shall as soon as possible inform each tenderer of a decision reached concerning the award of a contract and no later than 15 days following receipt of a request in writing from an unsuccessful tenderer, they must inform the tenderer of the reasons for the rejection of its bid and (where its tender was admissible) the characteristics and relative advantages of it the tender selected as well as the name of the selected tenderer.

Unsuccessful tenderers should also be informed of the reasons for the contract award decision at the end of the award process when the "standstill letters" are issued. These letters are required to inform tenderers of the award decision reached. They must also state the exact standstill period applicable to the contract. Those tenderers which have submitted an admissible tender must be informed of the name of the successful tenderer and the characteristics and relative advantages of the tender selected.

It is commonplace for the scores of the successful and unsuccessful tenderer to be provided in respect of each award criterion (and sub-criterion), together with a short narrative explaining the characteristics and relative advantages of the successful tenderer's response. Recent decisions of the Irish Courts (including in RPS v Kildare County Council [2016] IEHC 113) have elaborated on the precise obligations of contracting authorities when it comes to debriefing unsuccessful tenderers. The statement of reasons must be sufficiently detailed to explain how the successful tender was advantageous by reference to particular matters, examples or facts; vague or general statements of reasons will not be acceptable.

Other recent cases relating to debriefing include: Sanofi Aventis Ireland Ltd trading as Sanofi Pasteur v Health Service Execu-

tive 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.

Reasons are usually provided in writing and by electronic means.

3.4 Requirement for Standstill Period

There is a requirement for a standstill period in most regulated procurements. During this period no contract can be lawfully concluded. The length of the standstill period depends on the method used to transmit the standstill letter: where fax or electronic means are used to despatch the letter, the standstill will be 14 calendar days beginning on the day after the letter is sent; where the letter is sent by any other method (eg, ordinary post) the standstill period will be 16 calendar days beginning on the day after the letter is sent.

4. Review Procedures

4.1 Responsibility for Review of Awarding Authority's Decisions

In Ireland, the courts deal with review applications. There is no specific court or tribunal that is specialised to handle procurement cases exclusively. These cases are commenced by way of judicial review in the High Court and decisions of the High Court may be appealed to the Court of Appeal. Appeals to the highest court, the Supreme Court, are only permitted in exceptional circumstances.

4.2 Remedies Available for Breach of Procurement Legislation

An unsuccessful tenderer seeking to challenge an award decision will typically make a claim for damages where there has been a breach of the procurement legislation and it can demonstrate some loss. The Court may award damages as compensation for loss resulting from a decision that there has been an infringement of EU or Irish law. In the case of Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform [2018] IECA 35, the Irish Court of Appeal determined that damages could only be awarded where there has been a "sufficiently serious" breach (ie, the Francovich test).

The Courts may set aside, vary or affirm decisions of contracting bodies. They may also set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure.

In certain limited circumstances, the Courts can declare a concluded contract to be ineffective, however no such declaration has been made in Ireland since this remedy was first introduced a number of years ago. 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 a civil financial penalty (of up to 10% of the value of the contract) and/or the termination or shortening of the duration of the contract.

4.3 Interim Measures

The Courts may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of a decision of the contracting authority.

When considering whether to make an interim or interlocutory order, the Courts may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.

The Courts may by order also suspend the operation of a decision or a contract.

If legal proceedings are commenced in the High Court against a decision to award a regulated contract, the award process will be automatically suspended, with the effect that the authority is prevented from concluding the contract with its preferred bidder until the Courts determine the matter or lift the suspension or the legal proceedings are discontinued or otherwise disposed of. Contracting authorities 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. The principles to be applied in these circumstances are those set out in Campus Oil Limited v Minister for Industry and Energy (No 2) ([1983] IR 88).

4.4 Challenging Awarding Authority's Decisions

Under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (SI No 130 of 2010) review procedures 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.

4.5 Time Limits for Challenging Decisions

The time limits for Court application depend on the nature of the application. Where an order is sought 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 generally be made within 30 calendar days of the date that the applicant was notified of the decision or the date that the applicant knew or ought to have known of the alleged infringement.

Where the application is for a declaration of ineffectiveness, it must be made within six months after 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 and 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.

The Courts do have discretion to extend the statutory time limits for making an application where they consider 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. However, the decision to extend the time limit was subsequently appealed and the Court of Appeal restored a strict approach to time limits in procurement cases. The Court of Appeal [2016] IECA 59 held that enabling such an action to proceed would constitute a gross impairment of the effectiveness of the implementation of the Directives.

In the case of Newbridge Tyre and Battery Co Ltd v Commissioner of An Garda Síochána ([2018] IEHC 365), the Irish 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.

4.6 Length of Proceedings

The length of judicial proceedings can vary significantly depending on the complexity of the case and the attitude of the parties to the litigation. Judicial reviews will often take between 12 and 18 months to reach full hearing and final judgment. Applications to lift automatic suspensions can be held within two to three months of legal proceedings commencing. The Courts are mindful of the pressure to conduct procurement litigation efficiently and will proactively manage cases to trial, particularly if they are dealt with by the Commercial Court (which handles cases valued at EUR1 million or more).

4.7 Annual Number of Procurement Claims

It is difficult to be precise as legal proceedings often commence and are later discontinued before trial for one reason or another. On average, one might expect five to ten reported procurement decisions of the Irish Courts each year.

4.8 Costs Involved in Challenging Decisions

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 EUR200,000 to EUR300,000 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.

5. Miscellaneous

5.1 Modification of Contracts Post-award

The Public Sector Regulations, the Utility Regulations permit the modification of a contract following their award 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 supplies, works or services by the original contractor, as 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 (but not under the Utility Regulations) there are limits on the increase in a contract value that

a modification may entail. According to the Public Sector Regulations and the Utility Regulations the modification must also be publicised in the OJEU.

- Where the need for modification arises 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 (but not the Utility Regulations), there are limits on the increase in contract value permitted and under the Public Sector Regulations and the Utility Regulations, the modification must be publicised in the OJEU.
- Where there is a change to the contractor or concessionaire as a result of an unequivocal review clause or a corporate restructuring (provided certain safeguards are in place and there are no other substantial modifications to the contract).
- Where the value of the modification is minimal in value, provided that the modification does not alter the overall nature of the contract. It is worth noting that the rules in the Public Sector Regulations and the Utility Regulations on minor modifications were initially 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% for supplies/services contracts and 15% for works contracts). This alignment was later achieved by legislative amendments so the Regulations now accord with the EU directives.

Other modifications will be permissible provided that they are not "substantial" ie, they do not render the contract or the framework agreement materially different in character from the one initially concluded. A modification shall be considered to be substantial where one or more of the following conditions is met:

- the modification introduces conditions which, had they been part of the initial procurement procedure, would have:
  - (a) allowed for the admission of other candidates than those initially selected;
  - (b) allowed for the acceptance of a tender other than that originally accepted; or
  - (c) attracted additional participants in the procurement procedure;
- the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- the modification extends the scope of the contract or framework agreement considerably; or
- a new contractor replaces the one to which the contracting entity had initially awarded the contract (unless this results from a review clause or corporate restructuring).

These tests derive from the European Court of Justice case in Pressetext (Case C-454/06).

5.2 Direct Contract Awards

Direct contract awards can only be made in very limited circumstances where the negotiated procedure without prior notice is used; see **2.1 Prior Advertisement of Regulated Contract Award Procedures**. As the circumstances in which no contract notice is required are exceptions to the general rule, they will be construed narrowly and the onus will be on a contracting body to justify any reliance it places on them.

5.3 Recent Important Court Decisions

Word Perfect Translation Services Limited v the Minister for Public Expenditure and Reform [2019] IESC 38

This case concerned a tender for interpretation services. Word Perfect sought a review of the award decision on a number of grounds, including manifest error in the scoring of the successful tender. Following decisions of the High Court and the Court of Appeal, the Irish Supreme Court considered the standard of review to be applied in scoring challenges. While the decision turned largely on an analysis of the factual situation, the Court affirmed previous case-law (in particular, SIAC Ltd v Mayo County Council [2002] 3 IR 148) and held that the standard of review required an assessment of whether a scoring decision was vitiated by "manifest error". The Court found that there was a manifest error in one respect.

Word Perfect Translation Services Limited and the Minister for Public Expenditure and Reform [2019] IECA 264

In separate litigation involving a different award process but the same parties as above, the Irish Court of Appeal gave an important decision in relation to the discovery of documents in procurement cases. The High Court had initially determined that nine categories of documents sought by the applicant, Word Perfect, should be discovered. These documents related principally to the evaluation of tenders. The Court of Appeal considered whether all categories of discovery sought were relevant and necessary to enable Word Perfect to fairly and properly challenge the award decision. In a comprehensive judgment, the court overturned the High Court decision and concluded that none of the nine categories of discovery ordered by the High Court were relevant and necessary. The case includes a useful summary of the principles applicable in such cases.

5.4 Legislative Amendments Under Consideration

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

Eversheds Sutherland provides legal advice and solutions to a global and local client base ranging from small and mid-sized businesses to the largest multinationals. The firm's offices in Dublin and Belfast complement a network of 67 offices in 34 countries, advising across a broad range of legal areas. The firm's public procurement team in Ireland is recognised by clients and all independent legal directories as being among the leading practices and is consistently involved in all major public projects, acting for awarding authorities and bidders alike. The firm advises on contentious and non-contentious procurement matters and is particularly active in sectors such as transport, energy, housing, waste, healthcare and technology/telecoms. The dedicated procurement team provides a high-quality and cost-effective service based on its values of responsiveness, collaboration and innovation.

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