



Public Contracts Group Consultation on public procurement in Ireland

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Introduction

Five years have passed since Ibec published the report Ensuring Value from Public Procurement (December 2008). During that time, there have been a number of reforms to public procurement in Ireland. This covers the establishment of the National Procurement Service, the introduction of the remedies regulations, model contracts for standard goods and services, the drive for efficiencies, aggregation and centralisation of contracts, the green procurement action plan, Circular 10/10 and other initiatives aimed specifically at SMEs. This year saw the appointment of the first Chief Procurement Officer and the establishment of the Office of Government Procurement.

Ibec is seeking input from business is being sought on areas for reform or improvement, current issues or problems in public procurement, what's working well and what's not etc. Input received will form a key part of our communication/interaction with Government. Part of this will involve the publication of a new position paper on public procurement, which will allow members to put forward clear examples ideas for improving the public procurement process in Ireland.

Areas of interest include but are not limited to the following:

- Public procurement reform in general;
- The new Office of Government Procurement;
- Terms & conditions being sought (e.g. indemnity, liability etc);
- Administrative burden;
- Aggregation of contracts;
- Use of framework contracts;
- Consortia;
- Barriers affecting SMEs;
- EU directives;
- Promoting innovative procurement;
- Promoting public procurement as an export market;
- International experience of public procurement, which could be applied in an Irish context.

The purpose of the following sections of this document is to highlight areas that member companies have raised with Ibec in recent years as well as identifying areas where views from our members would be particularly welcome.

Views can be submitted to aidan.sweeney@ibec.ie.

1. Current Government reform

1.1 Office of Government Procurement

The new Office of Government Procurement (OGP) will centralise the procurement of common goods and services. This move is in line with best practice in the public and private sector and is part of the continuing reform programme being driven by the Department of Public Expenditure and Reform. Procurement has evolved into a professional business discipline over the last decade in particular and the move by the Government will concentrate, develop and leverage that expertise across the public service.

The establishment of the OGP was recommended in the report on the Review of the Central Procurement Function. The National Procurement Service will cease to exist on the 1 January 2014, with its functions being transferred to the new office. The National Procurement Policy Unit (NPPU) will also report to the new office. This is a significant change as policy and operations had been separated under previous arrangements. The OGP is currently recruiting expertise from within the public sector and from the private sector. When fully operational, the office will be expected to have approximately 200 staff managing approximately €4billion euro worth of public sector spending.

The office will be led by Paul Quinn, the first Chief Procurement Officer for the Irish Government. His role includes leading a programme of work to integrate procurement policy, strategy and operations in a new central procurement office; strengthen spend analytics and data management; have much greater aggregation of purchasing across public bodies to achieve better value for money; examine the specifications set out for goods and services; evaluate demand levels to assess how demand can be reduced; and strengthen vendor and category management. The OGP will also align to specific sectors which will remain outside the direct control (health, education, defence, local government) with each having unique spends according to their areas.

For discussion:

- How should industry interact with the new body/category councils?
- Should the OGP establish a procurement feedback group (PFG) consisting of representative of all stakeholders in the public procurement process to facilitate discussion and the exchange of views?
- One of the innovations that the OGP will introduce is in the area of contract management and oversight. Do you have any suggestions on how this should work?
- Will we see similar approaches to the UK where mechanisms facilitate better client-supplier relationships (e.g. addressing issues of over-specification of contracts)?
- Should we benchmark Ireland against other EU Member States/regions?

1.2 Government policies

There are a number of recent measures designed to improve access by companies, SMEs in particular, to public sector opportunities in Ireland that have not been acted upon. These include Circular 10/10 - Facilitating SME Participation in Public Procurement (August 2010); and Buying Innovation: The 10 Step Guide to SMART Procurement and SME Access to Public Contracts (July 2009). Circular 10/10 already contains a provision on the acceptance of self-declarations for selection purposes, liability etc. However, one of the key weaknesses of both Irish and EU legislation in this area is the lack of specific guidance (e.g. what other types of financial information will be acceptable). This needs to be addressed in the Irish context. Specific problems relating to the procurement process are dealt with later in this document.

For discussion:

- What are your experiences of reforms over recent years?
- Do you have any views on how Government can improve its overall sourcing strategy?
- How can improved data analysis support Government to achieve efficiencies?
- Have you seen any new/ improved changes in the buying practices or procurement procedures by public sector buyers? If so, by whom?
- Has your perception of the skills of public sector buyers changed over recent years?
- Could communication with industry on reform initiatives be improved?

1.3 SMEs

A national strategy with the specific aim of developing a procurement culture inclusive of SMEs is required. Contracting authorities should take full advantage of the flexibilities within the EU procurement directives that could facilitate a level playing field for all companies wishing to participate in public tendering. For example, the European Commission's communication regarding a follow up to the "Top Ten Consultation" (June 2013) states that "contracting authorities will be encouraged to split contracts into lots allowing for the participation of more bidders, particularly SMEs, and will have to explain to bidders when not doing so (application of the "comply or explain" principle)". The use of "lots" can be used to widen the field as well as potentially spreading risk amongst more than one entity. SMEs and public procurement regularly feature in the Government's Action Plans for Jobs.

Reforms SMEs Want From the Public Procurement Process

- An open PP process with transparency on contracts
- Improved access to decision makers
- Reductions in the length of the PP process
- A focus on price rather than value-for-money
- Recognition of SMEs' administrative burdens and PP costs
- Improvement in payment times to suppliers
- More pre-tender engagement between buyers and SMEs
- Reforms to make PP a friendly environment for SMEs
- Introduction of Technical Dialogue pre-tender procedures
- Criteria to encourage partnering for large contracts
- Reduction of insurance and turnover requirements
- Dedicated model contracts for business and IT services
- Capping indemnity levels to percentage of contract value
- Improved post-tender transparency in debriefing process
- A procurement feedback group for all stakeholders
- Greater standardisation of tender terms and conditions
- The development of model contracts
- Removing Intellectual Property ownership requirements
- Contracting authorities to develop own multi-annual procurement plans
- Budgetary authorisation prior to launch-of-tender
- Increased use of direct invitation for smaller tenders
- Contracting authorities taking full advantage of the flexibilities within the EU procurement directives
- Contracting authorities to run partnering/networking events for prospective bidders to identify potential partners
- The use of public procurement to promote innovation

Source: IBEC surveys 2008 and 2010

For discussion:

- Should the OGP carry out a full assessment and develop measures that will facilitate SME involvement in central aggregated contracts (e.g. lots, consortia etc)?
- Should Government encourage consortia? If so, how can Government encourage consortia?
- How important are Meet the Buyer events? Is there a need for Meet the Supplier events so companies can identify who to partner with?
- How to companies inform buyers what new/innovative products are out there?
- Do we see any opportunities for Ireland in terms of pre-commercial procurement?

1.4 Procurement and public sector reform (External service delivery, shared services & eGovernment)

The public procurement process is essential to supporting the success of desired benefits and potential gains from external service delivery. The perception of public procurement should move from regarding the process as a bureaucratic mechanism to one that can not only facilitate, but also drive, strategic commissioning. The procurement phase encompasses the competitive nature of the process and structuring of specific contracts with metrics for success.

Based on analysis of the international roll-out of external services the following can impact the value-for-money of the project:

- Policy uncertainty;
- Poorly specified contracts;
- Inflexibility during contract delivery phase;
- Complexity and cost of the procurement process.

National and European regulations will have an impact on the timing of the pre-contract procedure, award criteria adopted, and duration of the contract. However, European regulations are frequently cited as a barrier to reforming and improving the process in Ireland. This begs the question as to how other EU Member are able to operate more flexible public procurement practice, under the same legal regime.

Sharper public procurement would avoid adding unnecessary costs and complexity to bidding and would move the focus to “what” is being purchased rather than “how” it is being procured. Government should promote a more flexible approach to procurement of external services. For example, the administrative burden should be minimised; risk should be managed and not avoided; detailed market analysis and early market engagement should occur.

Public sector buyers should also exploit the full range of procurement procedures permissible under existing EU rules. For example, competitive dialogue is a dynamic way of conducting a large and complex tender process for services, because it allows contracting authorities to discuss all aspects of the proposed contract with tenderers. This can secure greater value for money, as tenderers have a better understanding of the buyer’s culture and requirements, allowing for future problems to be solved more efficiently.

The Department of Public Expenditure and Reform should take the lead in identifying what changes should be made to the public procurement practices, based on examples of best practice that already take place in Ireland and internationally.

For discussion:

- How can improved procurement practices support the reform agenda?
- What skills are needed so the OGP & others can support roll-out of other reform areas?
- Successful procurement in these areas will require addressing administrative issues such as TUPE and Vat, would you agree?

1.5 Revision of the EU procurement directives

The process for introducing new governing rules for public procurement across the EU is well advanced. This will see new legislation replacing the current procurement directives (Directive 2004/17/EC and Directive 2004/18/EC) as well as the adoption of a directive on concessions, which were until now only partially regulated at European level. The new rules will include measures to facilitate the delivery of key policy objectives through public procurement. These policy objectives include: innovation, growth of SMEs, green public procurement and socially responsible public procurement. Given its potential purchasing power, remit and coordinating role, the new Office of Government Procurement (OGP) will be essential to Ireland successfully implementing procurement strategies that effectively address these policy objectives.

For discussion:

- Ahead of the national transposition of the new rules, how should Government consult with industry?
- Do you think the revised directives will clean up the confusion that existed in the current ones?
- Should Ireland recognise that the measures contained within the new directives represent the minimum criteria/levels that governments should seek (e.g. turnover caps etc)?

1.6 eProcurement

Greater use of ICT by Government in terms of e-procurement can help reduce both the administrative burden and the costs of bidding by companies (e.g. standard information provided once etc). There is a distinct lack of information on the level of e-procurement in Ireland. At a bare minimum, Ireland uses electronic means to advertise tenders (e.g. eTenders) and it is required that all tenders above €25,000 be electronically advertised. As part of the National Payments Plan, the Central Bank of Ireland is looking at the Digitisation of Procurement and Payment Processes for Ireland. Deloitte has been engaged to conduct this study on the CBI's behalf.

For discussion:

- What is your view on eProcurement in Ireland?
- Do any public sector bodies engage in eProcurement? If so, who?
- Do you have any issues relating to the new eTenders site v old site?
- Is there a need for online submissions/avoid duplication?

2. Improving the procurement process

2.1 Process improvements

There is significant scope to make improvements to public procurement in Ireland that will benefit all parties and ultimately the tax-paying public. The length of the procurement cycle is a serious issue. From the origination of the request for proposal to the contract signing can take years in some cases. Many companies believe that the timeframes set by contracting authorities are unreasonable. They place an unnecessary burden on bidders and result in increased costs being passed on to the public sector and ultimately the taxpayer. Also, unnecessary delays during the procurement cycle can have significant financial and resource implications on companies involved in the bidding process. Procurement timetables should reflect the size and complexity of the contract.

Minimising the administrative burden of tenderers can be an effective method of reducing the duration of the procurement cycle and would also allow tenderers to dedicate more time to focus on the technical proposal. For example, the administrative information required should be standardised. Also, the possibility of granting an exemption from the administrative requirements for tenderers who have recently participated in another procurement process should be examined

For discussion:

- **Transparency** – How should public sector buyers improve transparency in terms of signaling upcoming opportunities? Are PIN notices enough?
- **Streamline the process** - Can we speed up the process further? For example, pre-registration of information, PQQ process etc?
- **Assist response times** – Should Government make it easier to replicate charts, tables etc?
- **Need for greater standardisation of documents** – What is the level of consistency in T&Cs, PQQs etc?
- **Post-tender negotiation** – Should there be greater clarity on the starting points for discussions?

2.2 Terms & conditions

The administrative burden is a significant problem for companies, which adds unnecessary costs and complexity to bidding. Standardised terms and conditions and introducing model contracts for general goods and services have been introduced. Nevertheless, these input needs to be sought from industry in addition to contracting authorities through an open consultation process. It should also draw on the experience of other countries.

The National Procurement Service, with the assistance of the Chief State Solicitor's Office, published on 17 June 2011 the new standardised tender documentation (model RfT; model contracts and guidance material) for purchasing general goods and services. The use of these new legal documents will be mandated across central and local Government. Ibec had successfully lobbied to be consulted on the documentation and the Public Contracts Group had made a number of recommendations for improvement. We also advised Government that these contracts were only suitable in the areas of general goods and services. They should not be adapted to more complex areas (e.g. software).

For discussion:

- What are the current problems companies are finding in relation to T&Cs?
- Should standard T&Cs and model contracts be developed for other areas? If so, which areas would be suitable?

2.3 Indemnity/liability provisions

Terms and Conditions often contain unnecessarily broad indemnity provisions. As it stands the indemnity required against some tenders will be wholly disproportionate to the value of the contract. Indemnities must be viewed in the context of adding unnecessary costs to contracts and reducing competition. The current provisions have the potential to affect the procurement process in a number of ways:

- A quick cost benefit analysis by SMEs will convince them that the cost of acquiring such high insurance against the possibility of winning the contract is too much of a risk for their business.
- The contracting authority stymies the potential competition for the tender thereby ruling out better/cheaper/innovative solutions.

By-and-large, companies have no difficulty in accepting responsibility for the successful delivery of contracts. As it currently stands, however, the level of indemnity required against some tenders is wholly disproportionate to the size of the contract size. This can have the effect of putting off potential bidders and stymie competition. Thus, the OGP needs to give serious consideration to capping the requested levels of indemnity, and ensure that it reflects the overall value of the contract more closely.

For discussion:

- What are the current problems companies are finding in relation to T&Cs?
- Have you experienced a situation where requested provisions have resulted in deciding not to proceed with bidding?
- In terms of clauses relating to damages, do you feel that liquidated damages in Irish public contracts are excessive?
- Should Government set out the calculations and test of how the LD percentage figure is generated; to reflect the genuine pre-estimate of loss?

2.4 Greater use of framework contracts

Over the coming months, the OGP will commence the procurement process to put frameworks in place for the following areas:

Category	Sourcing priorities	Lead
Utilities	Energy	OGP
Professional services	Legal Audit Insurance Finance	OGP
ICT office	Telecoms Postage ICT/equipment	Local authorities
Marketing, print, stationery	Monitoring uptake with existing arrangements	OGP
Facilities management	Cleaning Catering Maintenance Rent	HSE
Building, maintenance, minor works		Local authorities
Lab diagnostics		HSE/Education
Medical professional		HSE
Medical equipment		HSE

On 29 May, Government suffered a temporary setback to its procurement aggregation drive when the High Court ruled against the mandatory use of framework contracts. However, the Office of Government Procurement has published Circular 16/13: Revision of arrangements concerning the use of Central Contracts put in place by the National Procurement Service to provide greater certainty in the use of such arrangements. In the case of *Copymoore Limited & Ors -v- The Commissioner of Public Works in Ireland* [2013] IEHC 230 it was judged that Circular 06/12, which made National Procurement Service framework contracts mandatory across the public sector was ultra vires on the grounds that it effectively altered the terms of the tender that had been previously awarded (i.e. it never mentioned that the potential market would be increased by making all buyers buy from the same supplier). The judgement hence made the use of framework agreements optional once more by public buyers.

The new Circular published on 28 September replaces Circular 06/12. It states that “public bodies should encourage and promote the use of central frameworks by the public bodies under their remit” because the benefits include “cash savings; administrative savings from reduced duplication of tendering; greater purchasing expertise; improved consistency; enhanced service levels and legal certainty”. Public sector buyers are “also reminded that it is Government policy that public bodies, where possible, should make use of all such central arrangements”. In order to ensure maximum take-up of the framework contracts, it states that “where public bodies do not utilise central procurement frameworks they should be in a position to provide a value for money justification”, which “should take into account the full costs of running a public procurement competition”.

Framework contracts are a strategic tool of the OGP and it was necessary for them to address the issues raised in the High Court judgement. Circular 16/13 clarifies the use of such arrangements, without necessarily making them mandatory. In terms of addressing the nature and scope of the advertised competition, the OGP and others conducting procurement competitions will have to be clear in the potential scope of the contract.

For discussion:

- Are there problems with how framework contracts are currently being managed? For example, appropriate time to respond to calls etc?
- Should cost savings achieved through the use framework contracts be made public?
- Are there cases of ‘scope creep’ involving framework contracts?

2.5 Giving certainty to the tender process

In some instances, calls for tenders have been made before the budgetary envelope has been agreed, which in turn leads to difficulties in concluding tender negotiations. Some companies have experienced time delays of up to four years from announcement of the tender process to the signing of contracts due to funding issues with some government departments and local authorities.

Ibec had previously called for:

- Budgetary authorisation should be obtained prior to the launching of a call for tender. This will avoid the exposure of successful tenderers to potential delays to the signing of contract or the cancellation of the procurement procedure altogether.
- A system of internal compliance checks needs to be in place to ensure funds are available prior to a Request for Proposal (RFP). Early engagement between all internal stakeholders should be encouraged.
- Each contracting authority should develop its own multi-annual procurement plan. This will form the implementation framework for specific actions through annual programmes based on sound budgetary planning.

For discussion:

- Do these problems persist? If so, are the recommendations still valid?
- Should each contracting authority publish annual procurement plan and multi-annual procurement strategies?

2.6 Intellectual property

Public sector contracts routinely include a clause with regard to intellectual property to the effect that ownership of all intellectual property in any outputs or anything developed during the provision of the service rests with the public sector body. In many cases a company's intellectual property has been built up over many years and this should be acknowledged, particularly for SMEs where it is its life-blood. Also, strict/inflexible IP ownership requirements are out-of-step with the Government's own policy of ensuring that Ireland is economically attractive to develop and exploit intellectual property.

The European Commission affirms the need for a coherent IP policy for contracting authorities in the Member States. It suggests that suppliers who maintain the IP "*may consider it to be an investment, a building block for other projects*" and that this "*would normally be reflected in a lower price for the purchaser*". Hence, by not insisting in IP ownership, contracting authorities secure the best available solution in the marketplace and encourage innovation.

The public sector may be able to obtain more favourable commercial terms if it was to accept a royalty-free non-exclusive licence to use contract generated IP. At a minimum, industry would expect that the Contractor can reuse know-how as well as retain ownership of enhancements, variations and modifications to pre-existing IP. We would wish to see more flexibility with regard to intellectual property rights to allow parties to reach an agreement on IP ownership and licensing that meets the needs of both parties; one that ensures that the Client has sufficient rights in place to ensure receipt of the services.

For discussion:

- Do IP issues remain? If so, what are the principal problems facing your company?
- Do some buyers take a more pragmatic approach to IP?
- Do you have suggestions for innovative ways to approach IP? For example, should contractors get a broad licence of any newly created IP owned by the client?

2.7 Enabling strategic tendering

Throughout the procurement cycle, Irish contracting authorities should facilitate companies to take a more strategic focus regarding public procurement. This will benefit open and transparent competition, while also creating an environment that focuses on value for money and outcomes.

Public procurement officials should make use of the full range of permitted tendering procedures. For example, the competitive dialogue process is under-utilised in Irish public procurement; contracting authorities tend to opt for the fixed-price tenders because they are more familiar with the rudiments of the process. Competitive dialogue is a dynamic way of conducting a large and complex tender process because it allows contracting authorities to discuss all aspects of the proposed contract with tenderers. This process can secure greater value for money, as tenderers have a better understanding of the buyer's culture and requirements, allowing for future problems to be solved more efficiently.

For discussion:

- Do public sector buyers currently make use of the full range of procurement procedures?
- Do buyers have a particular preference for one procedure (e.g. restricted) over another (e.g. open)?
- Circular 10/10 called for tenders over €25,000 to be advertised on eTenders, did you notice a rise in opportunities for your business?

2.8 Award of contract, de-briefing and seeking remedies

Given that the Remedies Directive is to improve the effectiveness of national review procedures, the question remains whether the High Court is the most appropriate review body? Timelines within the national remedies regulations contain strict deadlines for appeal, which are not appropriate for initiating a review through the High Court. Common problems associated with legal challenges in the High Court are the following:

- Fear of retaliation
- Legal costs
- Standards of proof
- Evidential difficulties
- Curial deference
- Timescale

One approach would be to extend the remit of an existing independent body such as the Comptroller & Auditor General or the Competition Authority to reviewing public contracts. This could precede an application to the High Court.

Empowering another body would benefit public procurement in Ireland threefold. First, it would greatly facilitate the speed of decision and would be in keeping with the general aim of the new Remedies Directive. Second, it would minimise costs on all sides. Thirdly, given the importance of small and medium enterprises (SMEs), and in particular micro-enterprise, to the Irish economy, a level playing field is needed for all economic operators wishing to participate in public tendering. Such companies would not have the financial resources to pursue a claim in the High Court.

Other EU countries have specialist procurement review bodies. For example, Denmark has an administratively independent body called the Complaints Board for Public Procurement. The decisions of the Board cannot be brought forward to another administrative authority, but it can be brought forward to the national courts at latest 8 weeks after the decision has been announced.

For discussion:

- Have you recently considered mounting a challenge to a contract award? If so, did the costs of the challenge have a bearing on how to proceed?
- Should Ireland introduce an intermediary body/ombudsman to provide an initial tender review service?
- In terms of feedback, is there variation in the quality of information provided? What type of information would be useful for companies?

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