



Dáil Éireann

An Coiste um Chuntais Phoiblí

An Dara Tuarascáil Eatramhach maidir le Fáil sa tSeirbhís Phríosúin agus
nithe abhaineann le Fáil Phoiblí ginearálta.

Samhain 2010

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Committee of Public Accounts

Second Interim Report on Procurement in the Prison Service and
Public Procurement matters generally.

November 2010



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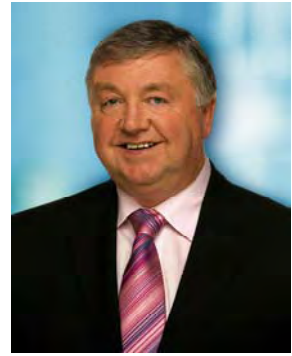
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Chairman's Preface

I welcome the publication today of the Committee's report on Public Procurement. Issues relating to public procurement are a regular feature of the work of the Committee following on from the audit findings of the C&AG.

The importance of getting value for money for the goods and services procured by the State is underlined by the fact that in 2009, this spend came to €16.3 billion. The examination by the Committee on the operation of the National Procurement Service and the way the Irish Prison Service delivered its construction programme between 2004 and 2007 provides a useful insight into the approach of the public service to procurement. Future reports of the Committee will examine wider procurement matters such as the major construction contracts and the whole delivery of services by bodies who receive a grant from the State: these latter bodies operate primarily in the Health Sector. The Committee will also examine the whole issue of the procurement of legal services in a forthcoming report.

This Report makes a number of recommendations that will cultivate a better compliance culture within the public service and will also drive the value for money agenda.

I would like to express my appreciation to the Members of the Committee and to the Committee secretariat for the work they have put in to producing this Report.

Bernard Allen TD
Chairman

24th November 2010

Executive Summary

The State in recent years has spent between €15 billion to €16 billion per annum on the procurement of goods, services and capital works. A key concern of the Committee is that the State gets value for money for this expenditure and that public contracts are awarded fairly and in accordance with procurement guidelines. This Report examines some key procurement issues and makes recommendations whose long term aim is to get better value for money for the State.

At a basic level public procurement issues boil down to how good are our public servants at ensuring that there is not only compliance with guidelines but also whether they are sufficiently skilled and resourced to drive market interventions that will ensure the most competitive price for the public service. With the economic downturn, there is huge competition in the market place for public service contracts. The State, through the civil service Departments and offices and the wider public service must position itself to take advantage of this.

The National Procurement Service (NPS) has the capacity to deliver better value for money and it is targeting specific goods and services based on the analysis of surveys it has undertaken on what public bodies are spending on such goods and services. The NPS is now co-ordinating practices and is undertaking some purchases which can be made in bulk and is trying to bring a higher degree of professionalism to procurement. The Committee's examination and this Report focuses on how the NPS interfaces with the market and the impact it has had to date. Arising from this examination, this Report makes a number of recommendations that will assist the National Procurement Service achieve its potential.

One way of ensuring both compliance and value for money is to put contracts to the market and yet every year the civil service departments and offices award contracts to the value of almost €70 million without a competitive process. While there are some genuine reasons for this, it is a practice that should only be resorted to in extreme circumstances and Chapter Three of this Report examines this issue and at ways of minimising the practice.

In the area of compliance, the Report examines what is involved so as to ensure that public contracts are awarded openly and fairly. The Report outlines in some detail in Chapter Four the general rules and some case law relating to public procurement. In particular the Chapter deals with the need for a comprehensive notification in advertisements of the scope and nature of the contract on offer; the need to treat all potential tenderers equally and the need to ensure that the entire process is handled openly and in a transparent manner. This Chapter provides a useful backdrop to examining the approach of the Irish Prison Service and it is also a useful guide to all public servants involved in procurement.

Chapter Five can be seen as a case study which shows how the Irish Prison Service approached its capital programme in 2004. Over three years the Prison Service awarded contracts worth €97 million to one company [Glenbeigh Construction] based on a tender for a specific project where that company had submitted the lowest tender: the tender being for work that was then valued at €2.37. While the Irish Prison Service and the Department of Justice has resolutely defended the way it did its business between 2004 and 2007, the

Report shows that at a minimum there were serious shortcomings in the award of these contracts.

While responsibility for procurement rests with managers and ultimately with Accounting Officers, more can be done also at central government in terms of monitoring practices and where necessary, controlling the procurement activities of public bodies.

There is a degree of ambiguity about the role of the Department of Finance in that it cannot take decisive action on its concerns where there is a failure by a public body to undertake its public procurement functions in an appropriate manner. Given the extent of the budget for procurement, the Committee will make certain recommendations which will require all public bodies to demonstrate their capacity to undertake procurement in a manner that will not only ensure compliance with the rules of procurement but will also drive the value for money agenda in ensuring that the State gets more for less.

Chapter One

Introduction and Proceedings before the Committee

1.1 Introduction

Procurement of goods and services, including capital works, by state authorities amounted to €15 billion in 2008 and €16.3 billion in 2009. Given the sheer scale of this spend there is a huge onus on all those who hold responsibility for procurement of goods and services in the public sector to ensure that public monies are spent in accordance with the law and also that the State gets value for money. A concern of the Committee of Public Accounts, arising from the long list of issues that are raised in audit reports year on year, is the extent to which the public servants have the skills and capacity to achieve the optimum return for the State. This Report is confined to certain elements of the €16 billion budget, mainly in relation to central government procurement which has an annual spend of approximately €2 billion: however the findings and recommendations have a wider remit especially in the case of capital spending. Finally, the procurement of legal services by public bodies will be the subject of a separate Committee report.

1.2 Accountability Issues

The accountability issues that arise in respect the procurement are as follows:-

- The extent to which the State is taking steps to get better value for goods and services that fall within the remit of the National Procurement Service.
- The extent to which public bodies recourse to procuring goods and services without going to tender.
- The scope available to public bodies as set down by the EU and national guidelines in relation to the procurement of goods and services.
- The extent to which the capital programme of the Irish Prison Service adhered to the National and EU guidelines on public procurement in the period between 2004 and 2007.
- The extent to which public authorities are regulated in the area of public procurement.

1.3 Proceedings before the Committee

Arising from issues covered by Chapter 16 of the 2008 Annual Report of the Comptroller and Auditor General, both the Accounting Officer and the Director General of the Irish Prison Service attended as witnesses at the Committee meeting of 8th October, 2009 to deal with the matter. In addition the Committee received correspondence on the issue from the Secretary General of the Department of Finance and this correspondence is included in Appendix A of this Report.

Chapter 8 of the 2009 Report of the Comptroller and Auditor General was examined by the Committee at its meeting of 14th October 2010 when the Chairman of the Office of Public Works, who is also the Accounting Officer for the National Procurement Service, was

called as a witness. Officials from the Department of Finance also gave evidence to the Committee at both hearings.

1.4 Structure of the Report

In Chapter Two, the Report examines the approach of the National Procurement Service to driving value for money not only in respect of civil service Departments but also in respect of the wider public service.

Chapter Three examines the extent to which the civil service procures goods and services without going to competitive tender.

In Chapter Four, the rules and general provisions of public procurement, many of which are now based on EU as well as national guidelines are set out.

Chapter Five provides a detailed assessment of the award of this 2004 contract by the Irish Prison Service.

Chapter Six broadens the scope of the review on procurement by examining ways to better regulate public procurement while also driving the value for money agenda.

Finally, in Chapter Seven, the findings and recommendations of the Committee are set down.

Chapter Two

Achieving value for money in public procurement

2.1 Introduction

The economic downturn has brought the public procurement expenditure into sharp focus as the State tries to get more value for what it is purchasing. One of the responses of the Government was to establish the National Procurement Service (NPS) to exert greater control over this expenditure and to centralise, where possible, the purchase of goods and services. The NPS aims to directly influence the public service procurement landscape in a number of significant ways. These would include: the direct purchase of goods and services commonly used across the public service; the establishment of sectoral procurement networks to encourage aggregation of demand; the provision of learning opportunities and the provision of access to eprocurement facilities. In terms of impact to date, the NPS has pointed to procurement savings of €35 million arising directly from Departments, Offices and agencies working directly with them.

The Chairman of the Office of Public Works has set out in a letter to the Committee the approach and the impact of the NPS and this is in Appendix B of this Report. This Chapter examines the role of the NPS and the steps that need to be taken for it to achieve its potential in getting better value for the procurement spend of the State. This examination is happening against a backdrop where there is now strong competition in the market place for all public contracts.

2.2 How much is involved in public procurement

Chapter 8 of the Annual Report of the Comptroller and Auditor General sets out the estimate for expenditure on procurement of goods and services totalling €9.3 billion with a further €7 billion being spend on capital works.

A more details breakdown of this figure is as follows:

Expenditure Area	Value € billion
Health Sector	4.7
Central Government	2.0
Local Authorities	1.7
Education Sector	0.9
Sub-total – All goods and services procurement	9.3
Capital Work	7.0
Total Public Procurement	16.3

2.3 The role of the National Procurement Service

The NPS groups its work around three main strategic goals, namely:-

- Strategic sourcing
- Education, development and guidance
- E-procurement.

Strategic sourcing

The NPS has identified the importance of professionally targeted purchasing based on the analysis of data, trends and Government policies across the public sector. To that end it has completed a major exercise to identify the top procurement spend categories across the entire service. This analysis gives the NPS and the wider public service a clear focus on categories of procurement that should be targeted for intervention. During the past year the NPS has launched major procurement campaigns in areas that could be best described as being among the most important “big ticket” items. These are areas of procurement that have a reach across the majority of the public service and, therefore, afford an opportunity for heightened levels of collaboration and also promise the possibility of maximum return on investment. These areas include energy, office supplies and equipment, vehicles, plant and equipment.

Education, development and guidance

An essential element in driving VFM is the need to have a sufficiently knowledgeable and skilled cadre of staff who have responsibility for buying goods and services from the marketplace. The NPS has established a cross-sectoral education and development work group to identify specific training needs for procurement officials in the public service; it has established an accredited diploma programme for all NPS officials in collaboration with the Dublin Institute of Technology and it is funding attendance of officials in an MBS in strategic procurement, at Dublin City University. The NPS is also working with suppliers and has organised workshops for SME’s which give practical guidance for those who want to supply goods and services to the public sector.

E-procurement

The NPS maintains the *www.etenders.gov.ie* website which is where suppliers can find procurement opportunities. It has approximately 4,300 public service buyers and 61,000 suppliers registered. The website assists suppliers who have an interest in public sector contracts by automatically e-mailing them alerts when tenders of interest are published. An upgraded website, which it will also have significant enhancements and efficiencies for buyers and suppliers, will come on stream in 2011.

2.4 The approach of the NPS

A key element in targeting the purchase of goods and services by the State is to establish what the public authorities are spending on goods and services. To that end, the NPS surveyed all 307 public bodies under its remit so as to establish their respective top 30 areas of expenditure by value. This has enabled the NPS to analyse the findings so as to

prioritise its intervention in the market. The NPS has responsibility for managing the procurement of goods and services common to all areas for Government Departments and the results of the survey arms the NPS with information as to where better value can be obtained in the market place, especially with bulk buying to cover not only the central government but also the wider public sector including the local authorities, education sector etc..

In addition to central contracts where the price of the item is centrally agreed and state authorities can draw-down on the basis of need, the NPS has also developed framework contracts where mini competitions can be run by state authorities amongst a predefined group of suppliers. The NPS encourages public bodies to collaborate where possible when undertaking a mini-competition so as to ensure that they can leverage the price based on the volume required. In practical terms, the impact of the NPS has been that individual departments can now buy items such as stationery or other low risk items on the basis of a price that was contracted by the NPS which would have been able to get a more competitive price as it is buying in bulk and not just for one Department. In terms of framework contracts, the NPS, at the time of its examination was concluding a contract for the supply of electricity and natural gas. What the Committee will want is that, over time, the NPS should be able to show how much has been saved through its input based on unit price of particular goods or by way of overall costs of a service like say natural gas to a large state body like the HSE or the university sector. A second requirement of the Committee is that Accounting Officers and accountable persons ensure that those involved in the procurement of goods and services are fully conversant with the services and work of the NPS. It is essential that, prior to initiating any competitive procurement exercise, officials familiarise themselves with contracts or frameworks already in existence centrally.

2.5 Resources of the NPS

The Committee notes that the NPS has not reached its staff complement and as at October 2010, it still had 21 unfilled positions, although the Department of Finance had agreed to the filling of some of these posts. The Committee notes also the fact that a procurement advisory group was established this year and this group gives the NPS access to the best of national and international advice on procurement and supply chain management. On the latter group, the Committee sees its input as crucial in creating strategic momentum within the NPS and will recommend that it be placed on a strong footing within the NPS.

On the extra staff, the Committee sees dangers if these are simply deployed from other parts of the civil service because of cutbacks. The Committee will recommend that a review of the skills requirement take place so that the recruitment has a strategic focus: two areas in particular that need to be addressed are staff that can analyse data and produce management reports on trends and secondly the need to employ staff with a proven track record in competitive procurement.

2.6 View of the Committee on scope to achieve greater economy

The Committee accepts that following the establishment of the NPS that there is now a greater focus on achieving value for money for the procurement spend. The work of the NPS in surveying and getting feedback from public authorities was an important first step

in enabling it to further target its interventions in the market place. The Committee is of the view that the NPS now needs to consolidate its position by being able to demonstrate the impact it is having in the procurement spend. Because actual expenditure is more often than not buried in different subheads and accounts across 307 public authorities, the Committee finds it difficult to get a clear handle on the impact of the NPS to date and the extent, for example, of its impact when account is taken of the Government decision of 2009 that all public contracts be reduced by 8%. The NPS needs to position itself where it can report on savings as well as other areas that fall within its remit and the Department of Finance should position itself so that it can set targets for the savings to be achieved through the input of the NPS. In addition the OPW, in consultation with the NPS Board, should agree key performance indicators so that the work of the NPS can be benchmarked against centrally agreed targets. Finally, the mandate of the NPS may need to be reviewed if there is an ongoing level of non-compliance by public bodies with NPS facilitated procurement. A return should be made annually to the Comptroller and Auditor General and to the Department of Finance by 31st March so as to enable the staff of the Comptroller and Auditor General and the Department of Finance to monitor the take up by public bodies of NPS framework and central contracts. This will enable the C&AG to audit purchasing practices in those organisations and to report where value for money issues arise as a result of the decision of the public body not to avail of NPS contracts.

Chapter Three

Non-competitive procurement

3.1 Introduction

Accounting Officers are required to complete an annual return to the Comptroller and Auditor General and to the Department of Finance in respect of non-competitive contracts. This return gives details of the subject or purpose of the contract, its value and the reasons for not having a competitive process. In regard to the 2009 return, the Comptroller and Auditor General has expressed reservations in respect of the return made by the HSE and this is an issue that will be followed up on in future audits and by the Committee. Under the terms of Department of Finance guidelines issued in August 2010, all contracts with an expected value of over €25,000 are now to be advertised on the *eTenders* website. This Chapter outlines the basis for non-competitive procurement: The Committee is of the view that returns show that there is a need to be proactive in terms of trying to prevent recourse to non-competitive procurement and this issue is also addressed in this chapter.

3.2 Extent of non-competitive procurement

Annual returns by departments and offices for 2009 indicate that payments were made in respect of 469 contracts that were concluded without competition. For a detailed breakdown of this figure, see Appendix C. These contracts had a reported value of more than €69 million in 2009. This was a moderate reduction in both the number and value of non-competitive procurement payments reported in 2009 relative to the situation in 2008. Analysis of the returns found that the Irish Prison Service continues to have the highest reported level of contracts awarded without a competitive process, with expenditure of €22 million on 154 contracts in 2009. In addition the C&AG expressed reservations in respect of the HSE return which showed 22 instances of non-competitive procurement of goods and services valued at €4,094,445. The practices of voluntary hospitals, which use public funds allocated by way of a block grant to procure goods and services, was not included in the figures and therefore the true extent of non-competitive procurement in the health sector is not known. This is not a satisfactory situation from a public accountability viewpoint. It should also be pointed out that local authorities are not required to submit a return as they fall outside the audit remit of the Comptroller and Auditor General: Also the practices of non-commercial state bodies and there were significant examples on non-competitive procurement in the delivery of the competency development programme run by FÁS which indicates that the true extent of non-competitive procurement is far higher than the figures contained in the returns.

3.3 Reasons for adopting a non-competitive approach

There are a number of reasons why Departments may procure goods or services without recourse to a competitive process. These include:-

- Where a Department or Office has to respond urgently to events and thus cannot await the outcome of a competitive process;

- Where services or supplies related to branded products which are selected to meet a need;
- Where a contract is rolled over because of the expertise built up by the contractor and when it would not be cost effective to terminate the contract and start a new one;
- Where a view is taken that the expertise required coincides with the departments needs;
- Where there is only one supplier of the required service;
- Where security considerations prevail.

3.4 Lowering non-competitive procurement

The Committee holds the view that the figure of €69 million for 2009, even though an improvement on the 2008 figure (which stood at €79), is too high and not defensible particularly as, in all likelihood, the true figure of the wider public service is substantially higher. A greater effort will have to be made in reducing this procurement figure so that only the most urgent and exceptional circumstances are approved by Accounting Officers and that urgency cannot be used where there were delays by the contacting authority.

The Committee notes that while recourse to non-competitive procurement can arise to cover valid administrative challenges, such validity must be clearly demonstrated and any such recourse must be balanced against the obligation on public bodies to follow a competitive process which is carried out in an open and transparent fashion given that this is expected to yield the best value for public procurement.

Accounting Officersⁱ must guard against actions that are taken for administrative convenience and should ensure that decisions not to go to tender for a product or service are backed by documentation which shows that such decisions represent good value. The work of the NPS in doing a lot of groundwork by standardising tender documentation should also ease the burden on those responsible of undertaking competitions and thus assist Departments in using more competitive processes.

As highlighted in evidence at the Committee meeting of 14 October 2010, there are a small number of public bodies that account for the bulk of the expenditure in this area. The Committee notes that the Department of Finance and the NPS are working with the Irish Prison Service, the Garda Síochána and the Department of Defence so that the cost of non-competitive procurement is minimised. The Committee will also follow-up with these bodies when their accounts fall for public examination.

Finally, as set out in Chapter Six, the Committee will recommend that the figure for non-competitive procurement be included in a statement attached to the appropriation account and signed off by the Accounting Officer: in that way, the practice will have to get higher prominence in the Department and this will help create an internal tension within Departments that should result in lowering the figure.

ⁱ The reference in this Report to Accounting Officer applies also to officials designated as accountable persons in public bodies

Chapter Four

Background Law on Procurement

4.1 Introduction

Public procurement, especially once it relates to items that fall above an EU threshold can be complex and slow. This Chapter examines the main provisions involved in procurement as set down by the EU and national guidelines. Public bodies that are tardy in terms of applying the guidelines run a huge risk of being sued by those who have a claim that they were not treated fairly. It is also useful to set down the principle provisions in the guidelines so as to fully assess the award by the Irish Prison Service of contracts worth almost €97 million to one company based on the winning tender for a project worth €2.37 million. This Chapter also examines the provisions of the public works directive that applied in 2004 and finally the provisions, if any, in place for framework agreements in 2004. Finally the impact of the Remedies Directive, which was transposed into Irish law in December 2009 is noted.

4.2 Membership Obligations

Upon our accession to the EEC in January 1973, Ireland became subject to the obligations that govern the conduct of all Member States. A number of these relate specifically to public procurement. While both Community law and the Treaty have, since that time, evolved considerably, the primary tenets associated with the procedures for the award of public contracts were unchanged between 1973 and 2004, when the Irish Prison Service procurement process commenced.

Under European rules, it is essential for an appropriate degree of advertising to be carried out when initiating procedures for the award of a public contract. Critically, the nature and scope of the contract must be clearly stated in the relevant notice or contract documents, as appropriate.

In the absence of a Community definition, the introduction of a framework or, indeed, any other undefined concept into a public contract award procedure would have to correspond fully with the existing body of rules regarding the release of relevant information.

Perhaps most significantly, it should be recognised that when a contract award procedure has exhausted its effects, a new procedure must be commenced for any new award. It is not permitted to award a contract for a second phase of a project by using the criteria and requirements specified in relation to an earlier phase of the same project unless this possibility has been expressly provided for in advance.

Finally, under the European regime, unless one of the derogations expressly specified in the Public Works Directive applies, a failure to commence a new procedure when a new contract is to be awarded constitutes a direct breach of the procurement rules. This can result in judicial proceedings being instigated by an aggrieved party or by the Commission against the authority.

4.3 Actions by the Commission

The Commission, in its capacity as guardian of the Treaty, has a considerable track record in taking infraction proceedings against Member States on foot of Article 169 of the Treaty (now Article 226 EC) in the event of a failure to fulfil obligations.

Under the EC Treaty, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, it may deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. In the event that the State concerned does not comply with the opinion within the response period laid down by the Commission, the latter may bring the matter before the Court of Justice.

It should be emphasised that any unwarranted cascading or extension of contracts beyond the original specified requirements, being in breach of the rules, may prove problematic and, indeed, costly for a Member State. There is no time limit on the Commission's right to take an action in the Court of Justice; the case-law arising from numerous Court of Justice infraction cases constitutes evidence of this untrammelled discretion.

The specific instances justifying the invocation by public authorities of derogations or exemptions from competition in awarding public contracts are expressly set out in the public procurement directives. These are the *only* derogations available to public bodies, and, where invoked, will be very strictly interpreted in judicial proceedings. The burden of proving the existence of the exceptional circumstances justifying the use of a derogation rests with the organisation attempting to rely on that derogation. Moreover, all of the conditions set down for the derogation to apply must be met concurrently.

The European Court has, on many previous occasions, concluded that derogations from competition have failed to comply with the express provisions of the directives and has thus found their use to be invalid. This reflects the overriding proviso that a public authority is not permitted to confer upon itself '*an unrestricted freedom of choice*' and may not '*play God*,' by awarding contracts without advance advertisement.

4.4 Government Guidelines

Government Guidelines on Competitive Tendering were published in successive documents in 1986, 1994 and 2004. Each proclaimed competitive tendering as a basic requirement with regard to the procurement activities of Government Departments, Local and Regional Authorities and other bodies dependent on State funding in awarding public contracts.

The following extracts constitute evidence of the importance placed upon competition at governmental level:

The 1994 Edition

"It is a basic principle of Government procurement that a procedure based on competitive tendering should always be used, unless exceptional circumstances apply, in which case the approval of the GCC should always be obtained."

The 2004 Edition

The 2004 version, entitled ‘Public Procurement Guidelines - Competitive Process’ includes a requirement for a competitive process (including advertising) for contracts below the EU Threshold (Section 5) and provides details on advertising in the OJEU for EU Public Procurement Procedures (Section 6.3).

Section 5

“It is a basic principle of public procurement that a competitive process should be used unless there are justifiably exceptional circumstances. The type of competitive process can vary depending on the size and characteristics of the contract to be awarded and the nature of the contracting authority.”

Section 6.3

“It is a legal requirement that contracts with estimated values above the thresholds set out in the Directives (apart from some defined exceptions) be advertised in the OJEU and that these contracts are awarded in accordance with the provisions of the Directives. Contracting authorities covered by the public sector Directive must also ensure that most works contracts and related services contracts, which they subsidise by 50% or more, are awarded in accordance with the provisions of that Directive. Any infringement of the terms of the Directives can give rise to various legal or financial sanctions.”

4.5 Access to Contract Information

While public procurement procedures for works of significant value are governed by the directives adopted at European level and transposed into national law by the Member States, a number of important principles deriving from the EC Treaty have universal application whatever the value of contracts being awarded.

It is recognised that consistent failure to advertise forthcoming contracts will inevitably lead to dysfunction in the marketplace, as suppliers are denied the essential information which would enable them to make decisions about entering the competitive market. Economic operators thus starved of the oxygen necessary for their business activities would be likely to suffer and ultimately fail.

The twin principles of ‘equal treatment’ and ‘transparency,’ as enunciated by the Court of Justice on so many occasions, combined with the requirements to publish notices set down in the directives, constitute the ‘active ingredients’ that enable public authorities to give effect to the freedoms underpinning the European Project, including the freedom of movement of persons and capital, the freedom of establishment and the freedom to provide services.

While the principles may not be specifically referred to in the directives, or may be included only in their recitals, they provide a major structural bulwark in public procurement as an essential support for the directives’ other provisions.

4.6 The Significance and Purpose of Equal Treatment

According to the European Court of Justice, the principle of equal treatment demands universal application:

*“Although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is [...] to ensure in particular the development of effective competition in the field of public contracts.”*ⁱⁱ

The importance of the twin principles is highlighted thus:

*“The duty to treat tenderers equally lies at the heart of the procurement directives and, together with the principle of transparency, must be complied with at every stage of the award procedure so as to afford equality of opportunity to all tenderers when formulating their tenders.”*ⁱⁱⁱ

The Court has defined equal treatment in terms of the treatment of comparable and different situations:

“Firstly, in that regard, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.”^{iv}

Associated with this principle is the prohibition on discrimination, or the principle of non-discrimination, on the grounds of nationality:

“The general principle of equality, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law.”^v

Indeed, the close association between transparency and equal treatment has been described by the Court as a process whereby the need for equal treatment demands, in turn, a need for transparency:

“The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the [...] public authority to ensure that those principles are complied with.”^{vi}

4.7 The Significance and Purpose of Transparency

The principle of transparency operates in tandem with equal treatment and non-discrimination on grounds of nationality, in that transparency safeguards against a situation

ⁱⁱ C-243/89, CEC v Kingdom of Denmark (‘Storebaelt’), 22/06/1993.

ⁱⁱⁱ C- 174/03, Opinion of Advocate General Jacobs, Impresa Portuale di Cagliari Srl v Tirrenia di Nacigazione SpA, 21/04/2005.

^{iv} C-304/01, Kingdom of Spain v CEC (‘Spanish Fisheries’), 09/09/2004.

^v Case 810/79, Uberschar v Bundesversicherungsanstalt für Angestellte, 08/10/1980.

^{vi} C-458/03, Parking Brixen GmbH v Gemeinde Brixen (‘Parking Brixen’), 13/10/2005.

in which tenderers are treated differently with regard to the release of information for tendering purposes.

The practical implications of the principle of transparency are numerous, but in the case of contracts fully covered by the scope of the directives, advertisement is a major feature. The Court has found, for example, that the subject matter of a contract and the means by which tenders are to be evaluated must be made known to potential tenderers in advance:

“The principle of equal treatment of service providers, laid down in Article 3(2) of the Directive, and the principle of transparency which flows from it require the subject-matter of each contract and the criteria governing its award to be clearly defined.”^{vii}

The requirement to observe the principle of transparency as a guiding principle at every stage of the procurement process has been repeatedly emphasised by the Court:

“In fact, the principle of transparency is, moreover, a guiding principle for the award procedure as a whole. It also comprises, for example, the demonstrability of decisions taken by contracting authorities and, generally, an objective approach during an award procedure.”^{viii}

There is therefore a general obligation to disclose all of the relevant information relating to a given procurement:

“The principle of transparency implies an obligation upon the contracting authority to publish all precise information concerning the conduct of the entire procedure.”^{ix}

Indeed, according to the Court, the notice or contract documents must contain sufficient information to enable all potential tenderers to understand the manner in which the procedure will be conducted:

“[The principle of transparency] implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.”^x

4.8 Transparency and Competition

As well as supporting the principle of equal treatment, the principle of transparency and the advertising requirements flowing from it directly facilitate effective competition:

“That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to

^{vii} C-340/02, CEC v French Republic, 14/10/2004.

^{viii} C-231/03, Opinion of Advocate General Stix-Hackl, Co.Na.Me v Comune di Cingia de' Botti ('Coname'), 12/04/2005.

^{ix} T-125/06, Centro Studi Antonio Manieri Srl v Council of the European Union ('Centro Studi'), 28/01/2009.

^x C-496/99 P, CEC & CAS Succhi di Frutta SpA ('Succhi di Frutta'), 29/04/2004.

enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.”^{xi}

The preventative role played by the principle of transparency with regard to corruption was stressed by Advocate General Poiares Maduro:

“Accordingly, transparency in public procurement is a requirement of primary Community law and, at the very least, entails some advertising. The importance of advertising is twofold: first, potential tenderers are made aware of the fact that a business opportunity exists, which in turn can lead to an increase in the degree of competition for the contract, as more tenders are likely to be submitted; second, advertising guards against partiality and corruption as it facilitates the review of procurement procedures.”^{xii}

4.9 Attaining Free Competition

On the basis that the primary aim of the European project is the attainment of free market competition, competition has been confirmed as a fundamental principle in its own right:

“The Court has consistently held that the directives, just like Community law in general, are designed, first, to eliminate practices that restrict competition and, second, to open up the procurement market concerned to competition, that is to say to ensure free access in particular for undertakings from other Member States.”

“The principle of competition is therefore one of the fundamental principles of Community law on the award of public contracts.”^{xiii}

The Works Directive Applicable in 2004

The Public Works Directive (Dir. 93/37/EEC), adopted on 14 June 1993 by the Council (of Ministers), was designed to further coordinate the procedures for the award of public works contracts beyond what was achieved by previous directives.

It set out, in particular, “to ensure development of effective competition in the field of public contracts.” With this in mind, matters relating to the advertisement of contracts were highlighted in the introductory recitals.

Brief extracts from Recital 10 include the following:

“It is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community;

the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them;

for this purpose, it is appropriate to give them adequate information on the works undertaken and the conditions attached thereto [...]”

^{xi} C-324/98, Telaustria Verlags GmbH & Telekom Austria AG (‘Telaustria’), 07/12/2000.

^{xii} C-250/07, Opinion of Advocate General Poiares Maduro, CEC v Hellenic Republic, 17/12/2008.

^{xiii} C-247/02, Opinion of Advocate General Stix-Hackl, Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici (‘Sintesi’), 01/07/2004.

With regard to the public works arena, and the transposition of directives into Irish law, Ireland was fully compliant with its EC membership obligations in 2004. It was therefore incumbent upon the public authorities carrying out contract award procedures at that time to comply with the rules of the directives and Irish regulations. There were no areas of inconsistency between the two, which might give rise to inconsistencies of interpretation.

Regarding the threshold for application of the Public Works Directive, this was based upon the Euro value of SDR 5,000,000, adjusted every two years.

From January 1st 2004, the threshold for application of the Public Works Directive was reset at Euro 5,923,624 (exc. VAT). Contracts of this value and above were fully covered by the European directive during the years 2004 and 2005. A revised works threshold of €5,278,000 applied during 2006 and 2007.

Framework Agreements in 2004

Unlike its predecessors, the most recent Public Sector Directive (implemented on 31 January 2006) contains specific provisions on framework agreements. These were introduced following requests from Member States and to address certain issues that had arisen regarding the alleged misuse of framework agreements by, amongst others, the Northern Ireland Department of the Environment.

The directives in operation prior to 2006 contained no formal provisions on framework agreements. However, as outlined by Professor Sue Arrowsmith, frameworks were in use in certain Member States as a means of establishing the terms in accordance with which purchases might be made over a period of time:

“Since an entity can operate all types of single-provider frameworks without violating either the specific procedures in the regulations/directives or the directives’ general principles, single-provider frameworks are permitted.”^{xiv}

As is clear from Professor Arrowsmith’s words, framework agreements were only ‘permitted’ under Directive 93/37/EEC to the extent that their use did not run counter to the Directive’s express provisions.

Nevertheless, the Commission voiced certain concerns relating to alleged breaches of Community law arising from the use of framework agreements by the Northern Ireland Department of the Environment, and in a 1997 press release announced its intention to refer the matter to the Court of Justice:

“The Commission has decided to refer the United Kingdom to the Court of Justice concerning the use of "framework arrangements" by the Department of Environment (Northern Ireland) for procuring architectural, engineering and other construction-related services. Under this procedure, a tender notice is published in the EC Official Journal indicating a general category of services to be provided rather than giving details of a specific contract. Once a list of approved suppliers has been established by this procedure, entities may choose suppliers from the list without going through a new competitive procedure for each individual contract. The case raises an important question of principle,

^{xiv} Arrowsmith, Sue, *The Law of Public and Utilities Procurement*, London: Sweet & Maxwell, 2005. Page 676.

namely the use by contracting entities of such framework contract arrangements for the procurement of services, supplies and works. The use of such framework contracts is not authorised by the public procurement rules to public service, supplies and works contracts (Directives 92/50/EEC, 93/36/EEC and 93/37/EEC respectively).”^{xv}

In a second press release relating to framework agreements published in July 2000, the Commission accepted that the use of such agreements was not, in and of itself, problematic, but stated that the primary point of contention was the lack of transparency relating to individual contracts awarded over the course of the framework:

“As in other public procurement contracts, there are strict procedures to be followed in the awarding of framework agreements.”

“The framework agreement itself must be awarded in accordance with the public procurement Directives. The Commission takes the view that if the terms of a framework agreement are sufficiently specific as to detail the key elements of any individual contracts to be awarded subsequently, and if these are set out in binding form, when those individual contracts are awarded it is not necessary to follow the detailed procedural requirements of the Directives. However, where the key terms and conditions of individual contracts are vague, or simply not specified at all, they must be advertised in the Official Journal and follow the detailed procedural requirements of the public procurement directives [emphasis added].”

In this case, the Commission considers that the essential conditions of individual contracts were not specified in a binding manner in the framework agreement. Individual contracts awarded under the framework agreement should therefore have followed the detailed procedural requirements of the public procurement directives.”^{xvi}

Ultimately, this complaint did not progress to the Court of Justice; however, the Office of Government Commerce (OGC) (UK) referred to the matter briefly in its guidance document on ‘Framework Agreements in the new procurement Regulations:’

“The European Commission has, during recent years, expressed some concerns about this approach. The main concern has been that, in making call-offs under a framework agreement, there should be no scope for substantive amendments, through negotiation, to the terms established by the framework agreement itself.”^{xvii}

In light of the matters outlined above, it must be concluded that prior to the adoption of Directive 2004/18/EC, the use of framework agreements in the public sector constituted, at best, something of a ‘grey area.’ If the use of a framework agreement was permitted at all, it was contingent on the contracting authority fully discharging its obligation of transparency from the very beginning with regard to the conditions and subject matter of individual contracts to be awarded over the course of the arrangement. In summary, it must be emphasised that, during the period in which Directive 93/37/EEC was applicable, the use of a framework agreement did not, in any way, provide authorities with the freedom, let

^{xv} European Commission, Press Release IP/97/1178, 19/12/97.

^{xvi} European Commission, Press Release IP/97/1178, 20/7/00.

^{xvii} Framework Agreements – OGC guidance on Framework Agreements in the new procurement Regulations, January 2006. Pages 3-4.

alone ‘*carte blanche*,’ to embark upon procurements that were not fully detailed in the original notice.

Remedies Directive 2007/66/EC

A particularly significant development in the public service procurement environment has been the implementation of the Remedies Directive which came into force here on 25th March 2010. The Directive is designed to provide for effective and rapid remedies in the case of infringements of Community Law in the field of public procurement

The new provisions introduce measures on:

- **strengthening the right and opportunity of bidders to challenge award decisions**
- **penalising contracting authorities who seriously breach the rules and**
- **bringing transparency to direct awards without competition, where such awards are considered permissible under the rules.**

As part of the Directive, a standstill period must be observed between the decision to award and the formal conclusion of a contract. This period must be at least two clear weeks from the date of dispatch of the notification letters to unsuccessful tenderers.

Notification letters to unsuccessful tenderers and candidates must inform the addresses of the decision reached concerning the award of the contract. Certain information, including a summary of the reasons for the decision to reject an application or tender and the precise duration of the standstill period, must be included.

The new provisions give wide ranging powers to the High Court which can make interlocutory orders with the aim of correcting an alleged infringement or it can order measures to suspend the procedure for the award of a public contract. Moreover, the Court can set aside, vary or affirm a decision, may declare a public contract ineffective or, as an alternative, may impose penalties on a contracting authority. The High Court now also has wide powers to award damages.

The Committee understands that guidelines on the impact of the Remedies Directive are currently being drawn up by the Department of Finance.

Chapter Five

Procurement of capital works in the Irish Prison Service between 2004 and 2007

Introduction

Chapter Four outlines some of the principle provisions laid down in the guidelines relating to procurement. The Chapter is relevant not only to the issue of the Irish Prison Service contracts but also as general guidelines to public servants who have an involvement in public procurement. Getting the processes and procedures right not only avoids a legal minefield where there is a risk of damages being awarded by the courts, it also saves on legal bills and on the time that has to be devoted to it by senior officials in defending the actions of the organisation. It also means that the award of contracts is not delayed unduly. The Irish Prison Service contracts are an interesting case study of how a large public sector body went about implementing its building programme. While the evidence taken by the Committee at its meeting on 8th October 2009 highlight the fact that a different approach is now being taken in respect of capital contracts by the Irish Prison Service, nevertheless the award of the 2004 is relevant as, in the view of the Committee, it demonstrates serious shortcomings in procurement practices by a public body and has key learning points for the future.

5.1 The award of the contract

Chapter 16 of the 2008 Annual Report of the Comptroller and Auditor General dealt with arrangements operated by the Irish Prison Service in respect of the construction and enhancement of facilities at 15 locations. The set of procurements issues dealt with in that Chapter was based on an accepted tender for the construction of an accommodation block at Loughan House. The process kicked off with a tender notice in the *Official Journal of the EU* that indicated that the procurement would take place under a framework agreement and that the Irish Prison Service might enter negotiations to extend the scope of the agreed contract to a number of other projects over a three-year period. Nine tenderers originally participated in response to the 2004 advertisement. That was short-listed down to four companies and Glenbeigh Construction, which had won a number of previous contracts with the Irish Prison Service submitted the lowest tender at €2.37 million and was awarded the contract. The next lowest tender was for €2.53 million, a difference of just €160,000. All tenders had an in-built inflation figure and the inflator of the second lowest tender was 2% lower than that of the successful tender. Ultimately, Glenbeigh Construction was awarded €97 million worth of contracts based on the initial award of the contract for Loughan House. These subsequent projects, which numbered 73 in total, were undertaken at 15 prisons throughout the State and are set out in Table 1 below.

Table 1 - Expenditure by the Prison Service on capital projects

Facility	Total value of the contracts €m
Castlerea Prison	42.07
Special Service Wide Projects	20.9
Loughan House	12.58
Shelton Abbey	5.71
Mountjoy	4.43
Portlaoise	3.78
Cloverhill	1.61
Midlands	1.48
St Patricks Institution	1.31
Wheatfield	0.85
Cork	0.77
Beladd House Prison Service Training Centre	0.74
Limerick	0.52
Building Services Division	0.17
Special Works Training Unit, Arbour Hill and Irish Prison Service HQ in Longford	0.07
Total Costs	96.99

5.2 Background to the award of the Contract

In 2004 the Irish Prison Service came under pressure to cater for a growing prisoner population and with demands for better, more humane, prison conditions. Conditions were also favourable for getting major works completed in that the Government was in a position to fund all infrastructure projects. It was also a time when the country was in the midst of a building boom and therefore it was not always easy to get builders to undertake projects and building cost inflation was high.

It was against this background that the Irish Prison Service sought tenders for a project in Loughan House and requests for tender were sought in the EU Journal on 2nd July 2004. The advertisement stated that it was a framework contract and that scope of the contract could be extended to include other projects awarded within the next three years.

In evidence it was highlighted that a key concern of the Irish Prison Service related to the need to attain value for money and the successful tender had an inbuilt inflator that was limited to 12% which gave cost certainty in a market where demand was pushing up prices. The Irish Prison Service and the Department of Finance did point to the value that was got from this provision having regard to building inflation. The framework contract also allowed the Irish Prison Service to deliver a range of critical projects quickly. The Accounting Officer also pointed to the findings of three independent costs reviews carried out by professional quantity surveyors on three of the bigger projects completed and all gave favourable reports in terms of the achievement of value for money.

Finally, on the use of framework contracts, the Department of Finance had sanctioned a drawdown contract in 2002 and this sanction appears to have given some comfort to the Irish Prison Service in tendering a framework contract based on a project in Loughan House.

5.3 The prison works programme for the period 2004 to 2007

The Department of Justice, Equality and Law Reform and the Irish Prison Service did not have a detailed programme of work when it advertised for a framework contract in 2004. In his evidence to the Committee the Accounting Officer admitted that it was not anticipated that €97 million worth of contracts would be awarded under this framework contract. It can be accepted that there would be monies made available for building and refurbishment programme, even if the details were not agreed in 2004. However, given the nature of the prison structures in the State (conventional cell type prisons, open prisons, prisons that are in buildings that are subject to preservation orders for example), the Committee finds it difficult to come to terms with the idea that there would be a generic building type put in place which would be facilitated by a framework agreement to cater for all building projects, albeit there was provision for other call-off items that are required in a medium security environment built into the contract. It is important therefore, to examine the initial request as a starting point to how a successful bid for work worth €2.37 million led on to the award of contracts totalling almost €97 million.

5.4 The initial approach to the market.

The initial request for tenders provided that the Irish Prison Service “*reserves the right to enter negotiations with the successful contractor to extend the scope of the agreed contract terms to a number of other projects, within three years of the award of the initial contract*”. As will be outlined later in this Chapter, there were serious flaws in this approach.

In addition, the Committee understands that the published notice was announced as non-mandatory (or voluntary), which indicates that the total value of the works to be procured as a result of the notice would fall below the EC Works threshold of just under €6 million. Given that almost €97 million worth of contracts were subsequently awarded, it is the view of the Committee that the advertisement was seriously deficient as a notice to the market in that the exact significance of the contract might not be clearly understood by interested parties exercising ordinary care.

5.5 The Loughan House project

The initial project in Loughan House was for works valued at €2.37 million in 2004. The Irish Prison Service was initially of the view that this project would be the first to get started, however that project as initially intended, which was to provide for 50 spaces did not proceed and instead a 60 bed unit was completed at Loughan House at a cost of €4.7 million. It appears that it was not the original intent that the Irish Prison Service would put in a hypothetical building project to the market in order to secure a contractor for a range of building works: in effect however, that is what happened. The Committee is of the view that what was constructed subsequently at Loughan House constituted a new project. In

that regard, the advice available to the Committee is that the Irish Prison Service should have formally notified the EU of the cancellation of the initial project: this did not happen.

5.6 Operation of the Framework Contract

The notice published by Irish Prison Service indicated that a framework agreement would be established. At that point in time, in 2004, framework agreements were not formally recognised in respect of works contracts by the European public sector rules. As the actions of the Commission in relation to the Northern Ireland Department of the Environment demonstrate, framework agreements were only permitted, if at all, once '*the essential conditions of individual contracts*' had been '*specified in a binding manner.*' In that regard the Irish Prison Service, as is clear from the evidence, did not specify, in a binding manner or otherwise, the details of the individual contracts to be awarded over the course of the agreement. The largest of these contracts for instance, in Castlerea, was for a contract that came to over €19 million. A contract of that size might have greater appeal to the construction industry, not only in Ireland but overseas for instance, than a smaller contract worth just over €2million which was what was advertised for Loughan House. It is the contention of the Committee that in order to ensure full compliance with EU rules, the Irish Prison Service could only have used a framework contract if all these subsequent contracts were stipulated and that could only have happened in the context of an approved capital programme covering a three year period, which was not in place at that time.

5.7 Advice received in relation to procurement matters.

As outlined in paragraph 16.55 of the C&AG's Report, a firm of design consultants and quality surveyors, KMCS, was engaged to advise the Irish Prison Service in relation to the 2004 construction tender process. Subsequently KMCS were appointed as project managers for 22 of the 96 works projects undertaken under the framework contract. The Committee notes that KMCS was awarded the work on these 22 projects without having to tender for it and that the Company had built up a relationship with the Irish Prison Service since 2000, when KMCS first started working for the Irish Prison Service. It was also pointed out in evidence that KMCS had lot of experience with prison construction contracts. The Committee can only conclude that KMCS got a number of jobs without having to tender for them because the Irish Prison Service found it administratively convenient to so retain the company's services. As outlined in the evidence given to the Committee, the Irish Prison Service agreed that awarding contracts of this nature without going to competitive tender was a weakness in their systems and have instituted changes in such procurement practices.

It is also clear from the evidence given to the Committee that the Irish Prison Service relied heavily on the expertise of KMCS not only because of their expertise in working in a prison setting but also because of their extensive knowledge of framework agreements. In that regard, the Irish Prison Service did not taken separate legal advice on the 2004 contract, but rather relied on KMCS. The Committee is strongly of the view that the Irish Prison Service took an unnecessary risk in relying solely on a firm of quantity surveyors to give legal advice on a procurement contract especially given that the whole operation of framework contracts fell into a grey area in 2004.

5.8 New procurement procedures in place at the Irish Prison Service

While the Committee is extremely critical of the Irish Prison Service for the way it awarded the 2004 contract, it does wish to record in this Report the fact that it welcomes the steps taken by the Irish Prison Service since 2007 to improve and standardise procurement procedures. In particular the establishment of a central procurement unit and the publication of Prison Service Procurement Policy are key developments that will bring a professional approach to the whole area of procurement. The Committee also notes that the contract for the current building programme at the Irish Prison Service operates within a multi-operator framework. The Committee takes some assurances from the evidence of the Accounting Officer when he stated that important lessons have been learned for the future based on the observations of the Comptroller and Auditor General and of procurement experts.

5.9 Conclusion

The Committee is of the view that the 2004 framework contract did not fully and accurately publicise the procurements initiated between 2004 and 2007 and in that regard, the Committee can only conclude that the Irish Prison Service may very well have breached EU procurement guidelines. The nature of the advertisement was too vague and allowed a degree of scope to the Irish Prison Service to extend the nature of the contract that simply was not available under procurement law. Greater consideration should have been given in 2004 to the way in which an unspecified programme of capital works could be delivered quickly while ensuring that the principals of public procurement were fully adhered to. The Committee finds that the Irish Prison Service relied too heavily for contractual legal advice on a quantity surveyor firm in awarding this contract and this firm subsequently was awarded contracts for some aspects of the construction work without having to tender for it. While the Committee accepts that the Irish Prison Service has learned from the reviews of its procurement practices and that it has taken positive steps to put procurement on a professional footing within the Service, it is of the view that the handling of this contract has exposed the taxpayer to potential and unnecessary risks of claims from other construction companies who could claim that they were denied a fair shot at the work in the capital programme.

Chapter Six

Next Steps in Procurement

6.1 Introduction

The purpose of this Chapter is to establish what other measures can be taken to address issues that will assist in the drive to achieve greater value for money or which will help public authorities with compliance issues. The Committee on many occasions has taken issue with the role of the Department of Finance in the procurement area and is of the view that the Department needs to be more proactive in procurement. Likewise Accounting Officers need to have systems in place to ensure that guidelines are implemented fully and that procurement is a priority within the organisation, not least because of the risks that are inherent in procurement if things go wrong. Finally, the whole financial accounts and the way that procurement transactions are both accounted for and certified needs to be more transparent.

6.2 The need for an enhanced role of the Department of Finance

The letter to the Committee from the Secretary General of the Department of Finance in Appendix A sets out the role of the Department and can be summarised as follows:

- The publication and dissemination of guidelines for observance by all public bodies;
- Approval, by way of delegated sanction, is given to Departments by the Department of Finance for capital expenditure on the proviso that procurement rules are adhered to.

The Secretary General did outline that while observance of the procurement guidelines is a matter for each public authority the Department would have a concern where there was non-compliance of such guidelines. The Committee is of the view that while the Department may have ongoing concerns, arising from its monitoring of procurement, that this approach appears to be ineffective.

All Departments are allowed spend public money under the delegated sanction of the Department of Finance. The Committee is of the view that in allocating voted monies to Departments and Offices, that the Department of Finance should give an annual sanction which sets out the conditions under which the monies are allocated to the Department and which should state that in the case of funds available to procure goods and services that the sanction will be withdrawn if the Department of Finance becomes of the view that the public body has not taken sufficient steps to undertake procurement in a manner that ensures compliance or if it is apparent that Departments/Offices are not availing of centrally placed contracts and frameworks or if it becomes aware of a significant loss to the State arising from the procurement practices of that public body. The Committee is of the view that in placing such conditions on its sanction to spend funds that the Department of Finance will have a stronger oversight of public procurement practices by spending Departments/Offices.

6.3 Enhancing the procurement function within public bodies

Procurement can give rise to complex legal issues and indeed many of the top law firms in the State now have dedicated procurement law experts to advise clients who may have a grievance in the way a process was handled and who will seek redress especially if the process is not watertight. Given the complexity of the system it is therefore essential that officials involved in the process are adequately skilled and equipped to do their jobs.

In that regard it is noted that there are many accredited training courses now available to public servants to enhance their skill levels. This is further a way of ensuring that those working in the procurement area have appropriate qualifications and can advise line managers whose day to day job generally would not normally involve procurement but in whose area a contact with an outside body may have to be put in place.

The Committee also welcomes the work being done by the NPS in consultation with the Chief State Solicitors Office and the Office of the Attorney General in standardising tender documentation and contracts. These documents, on completion, should significantly reduce the administrative burden for officials involved in the procurement process while also reducing legal exposure to the State through the deployment of legally compliant documentation. In this regard the Committee will be recommending that it is essential that all Government Departments and public authorities use these documents at the earliest opportunity.

It is clear that the position of procurement officer has assumed a key status in organisations and Accounting Officers should know the value of having competent officials in this area not only to guide colleagues but also to ensure that procurement units are not bypassed or are used as rubber stamps as happened for instance in FÁS.

The other skill that is needed by those that are purchasing goods and services is the ability to identify the optimum procurement strategy in order to obtain the best value for the State. Given that centrally agreed frameworks and contracts will have had the benefit of aggregation and have been market tested, the assumption should be that public bodies should draw down from these contracts where possible and the Committee will recommend this. The Committee also sees benefit, where a product or service is not part of an existing central or framework contract, that public bodies should first establish whether the product or service is procured by any other public body and may be able to bundle its requirements with that of the other public body. An example of this could for example be the purchase of pharmaceutical products by the Irish Prison Service which would also be purchased in much larger quantities by the HSE. In that regard, the Committee recommends that all Accounting Officers establish cross divisional teams of senior staff with procurement experience whose role will be to assist in determining value in respect of the purchase of goods and services and also to ensure that the process stays legally sound. The Committee notes for instance developments at the Department of Justice and Law Reform where a procurement strategy group was established which not only monitors compliance with guidelines but also has to be consulted at pre tender stage for all procurements which exceed a threshold of €5,000. The Committee sees merit in this approach as, with greater competition for public contracts, public bodies need to take the initiative in getting goods and services at a more competitive price and they must try and avoid at all costs the risks that are inherent in procuring goods and services.

6.5 Changes to Financial Accounts

As outlined in paragraph 2.6, getting a handle on what a public body spends on public procurement is not straightforward. This is because the expenditure is categorised under various headings in the accounts or across subheads. For instance, and going back to FÁS, the Committee was never able to establish how much it spent on advertising. The NPS has already collated data on the top thirty spend items of 307 public bodies. With modern financial management systems (where all items of expenditure are coded) it should be a relatively easy task to collate procurement expenditure so as to enable Accounting Officers give a summary of the amount spent by the public authority on goods and services in a note to the appropriation accounts. At the moment these figures are not stated and therefore, from a public accountability viewpoint, it is difficult to establish whether public monies were spent in a manner that was deemed value for money.

In order to be able to follow the cash flow of all public bodies, the Committee recommends that appropriation accounts of Government Departments and Offices and the annual accounts of all other public authorities should have a detailed note on the amount of expenditure related to public procurement and that this expenditure be further broken down by standard categories, to be determined by the Department of Finance or by an itemised list of the top thirty items. The Committee will ask the Financial Accounting Division of the Department of Finance to draw up proposal for consideration by the Committee and which can be used for the 2011 Appropriation Accounts.

Finally, the information from each Department which is supplied to the Comptroller and Auditor General and copied to the Department of Finance under Circular 40 of 2002 in respect of non-competitive procurement should be included in a note on the Appropriation Account of that body.

Chapter Seven

Findings and Recommendations

Findings

1. Since mid 2009, Departments and Offices, in collaboration with the NPS, have accrued procurement related savings of some €35 million.
2. Central Government Departments and Offices purchased goods and services worth €69 million in 2009 without putting the tenders to public competition.
3. The National Procurement Service has three strategic goals, namely: strategic sourcing; education, development and guidance; and eProcurement.
4. The National Procurement Service has identified the top 30 spending areas by public sector bodies following a survey of the 307 public bodies that fall within its overall remit.
5. Adherence to procurement practices and the achievement of value for money is left primarily to each public authority and is a matter that is observed but not regulated by the Department of Finance.
6. The handling by the Irish Prison Service of its building and refurbishment contracts between 2004 and 2007 may well have lead to a breach of EU Guidelines.
7. The 2004 advertisement by the Irish Prison Service of the framework contract for building and refurbishment works was deficient as a notice to the market place.
8. In the Irish Prison Service, one company, Glenbeigh Construction, was awarded contracts to the value of €96.99 million based on the acceptance of its tender for a project in a framework contract that had a value of €2.37 million.
9. In awarding the framework contract to Glenbeigh Construction in 2004, the Irish Prison Service did not seek legal advice from the Attorney General on whether the award of the contract complied with EU Regulations but rather, it appears, relied on the advice of a firm of design consultants and quantity surveyors that it had retained for its building and refurbishment programme.
10. KMCS, the firm of design consultants and quantity surveyors which was retained by the Irish Prison Service to advise on the framework contract was also appointed the project manager for 22 projects undertaken under the programme without having to tender for this work.
11. The current building and refurbishment programme of the Irish Prison Service operates within a multi-operator framework.

Recommendations

1. Key Performance Indicators that will govern the work of the National Procurement Service should be set so that its impact in achieving value for money can be measured.
2. The National Procurement Service should review its staffing requirement prior to filling the 21 posts approved in 2010 by the Department of Finance so as to ensure that it recruits and/or appoints staff with key skills that are necessary for the Service to achieve its mandate.
3. Accounting Officers, having regard to the level of risk associated with procurement, should ensure that those involved in procurement, in particular procurement officers, have the appropriate skills and qualifications required to undertake the procurement function in that regard, public bodies are encouraged to avail of the accredited training courses that have now become available through external providers. Bodies are also encouraged to participate in the educational opportunities that are increasingly being made available by the National Procurement Service.
4. All public bodies should use the template tender and contract documentation that has been developed by the National Procurement Service and the Chief State Solicitors Office.
5. Accounting Officers should establish cross divisional teams within their organisations to evaluate procurement proposals so as to get maximum value from contracts and to ensure that risks associated with procurement are managed.
6. Accounting Officers should ensure, unless there are valid reasons to the contrary which should be clearly recorded for audit purposes, that frameworks negotiated by the National Procurement Service are availed of by the public authority.
7. The Appropriation Account of each Department should contain a note of the figure supplied to the Comptroller and Auditor General under Circular 40 of 2002 relating to the amount of goods and services that were procured without a competitive process.
8. The accounts of all public bodies should outline the overall amount spent by that body in the year in question on publicly procured goods and services and this figure should be further broken down in a note to the accounts into a number of standard categories as set down by the Department of Finance.
9. In order to enhance its oversight role, the Department of Finance should outline the conditions attached to the annual allocation of funds to the department and office in respect of the allocation for the procurement of goods and services. A similar provision should be made by Accounting Officers in respect of public authorities that receive funding from the vote.

10. The National Procurement Service should, before 31st March of each year report to the Comptroller and Auditor General and to the Department of Finance on contracts and frameworks established for use by public authorities.

Appendix A

Correspondence from Mr. David Doyle, former Secretary General, Department of Finance



An Roinn Airgeadais
Department of Finance

3.7

May 2009

Sráid Mhuirfean Uacht, Upper Merrion Street, Teileafón / Telephone: 353-1 676 7571
Baile Átha Cliath 2, Dublin 2, Facsimhír / Facsimile: 353-1 678 9936
Éire. Ireland. Glao Áitiúil / LoCall: 1890 66 10 10
<http://www.irish.gov.ie/finance>

Mr Ted McEnery
Clerk to the Committee of Public Accounts
Leinster House
Dublin 2



Dear Mr McEnery

I refer to your recent letter in relation to a draw-down contract for capital projects undertaken by the Irish Prison Service between 2004 and 2007 and to the request for this Department to examine the matter and to provide a report to the Committee. The Prison Service contracts were also referred to briefly at the meeting of the Committee which I attended on the 30 April.

It might be useful if I were to outline the role of the Department of Finance in relation to public procurement generally. The Committee will be aware that public procurement guidelines are published and disseminated by the Department of Finance for observance by all public bodies. The guidelines are re-iterated in the Code of Practice for the Governance of State Bodies. The procurement guidelines promote a competitive tendering process as the norm and outline competitive procedures appropriate to the value of contracts. The procedures require that works contracts above €5 million in value, and supplies and service contracts above €130,000, placed by central Government Departments or agencies to be advertised in the Official Journal of the EU. Contracts in excess of €50,000 must generally be advertised on the national public procurement website (www.etenders.gov.ie). For lower value contracts, direct invitation of tenders from a number of suppliers or service providers, sufficient to ensure adequate competition, is recommended.



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As regards Department of Finance sanction of expenditure, for capital expenditure Departments receive delegated sanction for capital works on the basis that all normal rules and procedures, including those relating to procurement, are adhered to. Responsibility for compliance rests with contracting authorities who are accountable in giving effect to these rules and guidelines. Systems of accountability operate through local management, management boards, board sub-committees, Government departments under whose aegis State bodies operate, scrutiny via audit system (internal and external), and via reporting to Dáil Eireann by the Comptroller & Auditor General and public examination by the Public Accounts Committee. As regards procurement, while the Department of Finance provides informal helpdesk advice to public purchasers via telephone, email and a website, it is not within the capacity of the Department to monitor and ensure full compliance at operational level across the entire public service.

As a further comment I would stress that any level of non-compliance by a public authority with public procurement rules and guidelines would be of concern to the Department of Finance. It is important that deficiencies in procurement procedures and practices identified in systems of public accountability and scrutiny are corrected – involving an examination of guidelines and revisions where appropriate. In the case of contracts examined by the Committee on 26 March, I understand that the Accounting Officer of the Irish Prison Service has confirmed that a professionally trained central procurement unit has been established and that there is now a stronger focus on procurement at senior management level.

In relation to the particular draw-down contract referred to in your letter, it is understood that the individual contracts placed under that contract were not comprehended by the Comptroller and Auditor General report being examined at the meeting on 26 March. However, I now understand that they are currently being separately examined by the Comptroller and Auditor General. When and if the Comptroller and Auditor General reports on the matter and the Committee issues its report, the Minister for Finance will respond via his formal “Minute” on the findings.

At this stage, and in order to be of assistance to the Committee, I would offer the following informal observations based on the exchanges at the 26 March examination and on information to hand from the relevant public advertisement.

The procedure undertaken appears to reflect “draw-down” arrangements used for certain requirements by some contracting authorities, e.g. the contracts put in place by the Government Supplies Agency (GSA) for commonly acquired supplies and services (office supplies, printing, advertising etc.). These supplies and services would be drawn down as required for a specified time (typically three years) by central Government departments and agencies on the basis of prices and terms tendered in response to an appropriate competitive tendering process conducted by the GSA. These arrangements can reflect an efficient procurement process that gives value for money and is consistent with best practice and public procurement law.

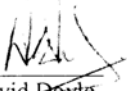
In the past, these arrangements would typically be used for supplies and services rather than works contracts. However, EU public procurement Directives, published in 2004, introduced provisions for more flexible public procurement procedures suited to modern purchasing and tendering methods. The new measures included provisions for frameworks whereby, under clear and transparent rules, contracting authorities could put in place arrangements to award contracts for requirements, to one or more qualified tenderer(s) for a period of up to four years without having a full tendering process for each requirement.

It is understood that the arrangement in question entered into by the Irish Prisons Service was advertised nationally on the *eTenders* website and EU wide via the Official Journal of the EU. The issue of whether the scope, or the potential scope, of the work involved was made sufficiently clear to meet transparency requirements and whether the selection of only one contractor resulted in a lack of adequate competition or value for money is one that would need to be considered in the light of the examination referred to earlier. As indicated, this Irish Prison Service works contracts procedure was undertaken at an early stage after the adoption of more flexible rules under the EU procurement regime. Since then guidelines on the appropriate use of these types of framework agreements were issued and published in October 2007 by the Department’s

National Public Procurement Policy Unit and I enclose a copy for the information of the Committee.

In conclusion, I wish to repeat my assurance of the Department of Finance's continued assistance and co-operation in the work of the Public Accounts Committee and hope that the above explanation will be of use to the Committee.

Yours sincerely



David Doyle
Secretary General.

Guidance on Framework Agreements

1. Introduction

The purpose of this document is to provide guidance to public purchasers on the operation of framework agreements as provided for under current public procurement Directives and national regulations which implement those Directives. It outlines the procedures for establishing frameworks, types of frameworks (single supplier, multiple suppliers) and procedure for award of contracts based on frameworks. The guidance relates to framework arrangements being put in place by contracting authorities covered by Directive 2004/18/EC as implemented by SI 329 of 2006.

2. Framework agreements

2.1 Prior to the adoption of the current public procurement Directives, 2004/17/EC covering the utilities sector and 2004/18/EC covering the public sector, a provision for framework agreements existed only in the utilities sector. However, public sector contracting authorities in many Member States operated efficient framework type arrangements, based on competitive tendering, which represented good practice and achieved value for money. These typically were used to “draw down” commonly procured supplies or services as needs arose in a given period.

In the absence of a specific provision covering framework, there was uncertainty as to how some of these arrangements complied with the legal provisions of the public sector procurement Directives. This uncertainty is removed with the implementation of Directive 2004/18/EC.

New provisions

2.2 The new public sector Directive 2004/18/EC takes on board the definition of framework agreements as set out in Utilities Directives but introduces provisions designed to ensure that they are awarded in an open, transparent and competitive manner. Article 1(5) defines a framework agreement as *‘an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity.’* In effect, framework agreements are agreements with suppliers or service providers which set out terms and conditions under which specific purchases can be made during the term of the agreement. Article 32 of Directive 2004/18/EC sets out the conditions and procedures under which agreements must be set up and contracts based on the agreements awardedⁱ.

ⁱ Regulations 33, 34 and 35 of SI No. 329 of 2006 implement Article 32 of Directive 2004/18/EC. These regulations are set out in an appendix to this guidance.

3. Advantages of frameworks

3.1 The advantages of frameworks arise from the

- flexibility they bring to the public procurement function. They provide a transparent and competitive mechanism whereby contracting authorities can place contracts with suppliers in the framework without having to carry out onerous tendering procedures for individual requirements that are covered by the framework
- reduced administrative cost of tendering either within or across contracting authorities
- potential to develop competition on price and or quality and ensure better service
- potential to encourage competition, in particular where there are limited numbers of suppliers, with resulting cost benefit and improved service to contracting authorities.

However these advantages can only be achieved where public purchasers have an understanding of the market in which they are operating, and how competitive pressures work in that market, to enable them establish the appropriate conditions for the framework to operate.

3.2 The contracting authority also needs to be in a position to manage the framework – in particular if the framework is for technical, complex or high value goods or services or operates across a number of authorities. In such cases, the needs of the suppliers and the relevant purchasers need to be met, e.g. in regard to customer complaints, supplier complaints, monitoring of the framework so that it is operated in accordance with the terms set down and is delivering required outcomes. Such frameworks may need dedicated contract management. Smaller frameworks within contracting authorities can generally be managed internally.

3.3 Frameworks may not always be a suitable purchasing/procurement strategy and contracting authorities need to assess whether or not they are suitable for the acquisition of particular goods or services. For example, a framework arrangement might not be the most suitable for long term service contracts that typically might run longer than the duration of a framework agreement (normal maximum 4 years, see 7.1).

3.4 In general, where framework agreements are put in place, they should provide an economic and efficient means of purchasing and supply. Their use should be generally advantageous and more beneficial to authorities than carrying out standard tendering procedure for individual requirements. It would be expected, therefore, that they would be generally used by the participating authority or authorities for works,

supplies or services which are the subject of a framework agreement. However, purchasing outside the framework is not precluded where, for instance, an authority believes that the terms of the framework do not fit a particular requirement or that more advantageous terms can be obtained outside the framework.

Some key features of frameworks agreements:

- *can be placed by an individual contracting authority, a group of contracting authorities or a central purchasing authority*
- *can be with a single supplier or multiple suppliers*
- *if with multiple suppliers, the minimum number must be three (provided there are at least this number of qualified candidates)*
- *“mini – competitions” may be held between participants as needs arise*
- *the maximum duration is four years (unless in exceptional circumstances justified by the subject of the framework)*
- *the terms and criteria for awarding contracts must be published at outset and not substantially changed*

4. Contracting authorities and scope for use of frameworks

4.1 Framework agreements can be set up by

- individual contracting authorities
- a contracting authority acting on behalf of a number of other contracting authorities
- a central purchasing authority acting on behalf of a sector or group of contracting authorities

When a framework is being established on behalf of a group of contracting authorities or a central purchasing authority, the authorities which are party to it must be made clear. This can be done either by listing the authorities in the notice or framework documentation or describing them in a way that makes the scope and range of the framework clear to market operators. For instance it would probably be acceptable to describe a framework as applying to “all central Government Departments and Offices” or “all Local Authorities in the province of XXX” in the published notice, and for greater clarity, listing the relevant authorities in the framework documentation. On the other hand, for example, describing a framework as “open to all public bodies” would not be sufficiently clear and transparent.

4.2 Extending the use of a framework to contracting authorities not included at the outset is specifically precluded. The same rule applies as regards suppliers or services providers. Only those pre-qualified and admitted at the outset may participate in the framework: it is not open to authorities to admit new entrants during the course of the agreement.

4.3 Where central or multi – authority frameworks are put in place it is important that all parties to them are familiar with the terms and conditions. It is necessary to ensure that authorities participating observe the provisions of the framework: here again the necessity for appropriate management is stressed.

5. Establishing a framework

5.1 The process of establishing a framework agreement includes many of the features involved in conducting a standard tendering procedure. When a contracting authority considers that a framework arrangement is appropriate for its needs, and the estimated value of the total contracts to be awarded exceeds the relevant thresholds, it must follow the advertising and procedural rules set out in the EU Directivesⁱⁱ.

The EU Directives provide that participants in a framework agreement can be selected using the standard open, restricted, competitive dialogue or negotiated procedures (however, use of the latter two procedures would be rare; the appropriate exceptional conditions set out in Articles 29 and 30 of Directive 2004/18/EC must exist. In practice, therefore most frameworks would be established using the open or restricted procedure). Framework agreements can be put in place with a single supplier or with multiple suppliers.

5.2 Frameworks are advertised using the standard OJEU contract notice. When publishing, the contracting authority must indicate

- (i) that the intention is to establish a framework
- (ii) whether the framework is single supplier or multi – supplier and if the latter the, number of suppliers it intends to include
- (iii) the duration of the framework and
- (iv) an estimate of the total value of purchases expected to be made for the duration of the framework
- (v) procedure being used (open , restricted etc.).

ⁱⁱ Given the nature of frameworks (involving aggregation or requirements, fulfilling requirements over a period etc.) this would relate to the majority of agreements. It is entirely possible, of course, to establish frameworks for small requirements, in total not exceeding the relevant Directive thresholds, based on flexible procedures set out in national guidelines for awarding sub – threshold contracts.

Procedures involving single and multiple – supplier frameworks

5.3 In some instances a conventional tendering process (specifying a need, inviting tenders, evaluating tenders and awarding contracts to the best tenderer in accordance with the award criteria) may be suitable for establishing a single supplier or multi - supplier framework.

(i) Single supplier: This would involve publishing a tender notice (as outlined at 5.2) indicating the intention to set up a single supplier framework, inviting tenders and awarding all contracts under the framework to the most suitable tenderer selected on the basis of the published award criteria. The terms and criteria for award of contracts would be precisely formulated and published in the contract notice or tender documentation. The contracting authority may draw down requirements in accordance with the agreed terms as needs arise for the duration of the framework. Under this arrangement there is no scope to supplement or amend the initial tender. The price, delivery times, and other terms are likely to be settled but some terms, such as the quantity, may not. The price need not be fixed in absolute terms; it may be possible to set it by reference, for example, to a price index provided the mechanism chosen makes it possible to price specific orders in an objective and transparent manner.

(ii) Multi – supplier: Under the same procedure, a multiple - supplier framework could be put in place by publishing this intention in the tender notice. The notice would indicate the relevant number of participants to be selected on the basis of the award criteria (price or most economically advantageous, possibly based on order of merit) at the end of a full tendering procedure. In setting up multiple supplier frameworks, a minimum of three participants must be included (provided, of course, that there is at least this number of qualified tenderers). These selected tenderers would be used for further requirements for the works, supplies or services which were the subject of the tendering process. The terms for awarding further contracts under the framework would have to be set out in the tender notice or tender documentation, e.g. possible use of mini-competition (see 5.5), award criteria for mini – competition, rotation etc.

Alternative type of multi – supplier arrangement

5.4 The following outlines a more flexible, less rigid alternative which would, perhaps, more commonly arise in the context of establishing a framework. A central purchasing authority or a contracting authority may wish to set up a framework to be used by a group of authorities under an open procedureⁱⁱⁱ. There may not be a

ⁱⁱⁱ It would also be possible to set up this type of multi – supplier agreement using the restricted procedure. Use of the restricted procedure in the conventional manner would involve a two stage process, firstly pre-qualification on the basis of the normal Directive pre-qualification criteria followed by a request for information on pricing or other award criteria and admission to the framework on the basis of the two stage process. This latter two stage approach may be appropriate in certain cases (e.g. for the award of services contracts to make the process more manageable) but for establishing many frameworks the one stage open procedure may be more suitable.

requirement to be fulfilled immediately on the basis of a tendering procedure. In the circumstances, the authority may invite tenders and select a number of candidates (minimum of three) on the basis of published criteria, including economic or other award criteria. For example, in addition to information on tenderers' capacity and expertise, it may request interested parties to submit information on pricing of the relevant goods or services, delivery schedules etc. and include these as criteria for admission to the framework.

All the terms will not be precisely specified at the time of establishing the framework. There is now a provision whereby sub competitions or "mini – competitions" may be used to determine the most competitive supplier for a particular requirement among framework participants.

Mini competitions under multi - supplier frameworks

5.5 Under this new provision, participants will have been selected on the basis of the rules for admission to the framework as set out at 5.4. [or 5.3 (ii) if participants are chosen on the basis of a full tendering procedure]. The criteria for the award of subsequent contracts will also have been set out. (See section 6 on award criteria). Precise specifications or prices will not be established. As requirements arise, an authority would contact in writing the participants in the framework which it considers are capable of performing the contract and invite them to submit competitive bids. (This need not necessarily include all the participants to the framework. There may be instances, for example, where the framework covers a range of supplies, some of which may not be supplied by all participants. It should be borne in mind, also, that not all participants will necessarily compete for every requirement; for example, they may already be operating at full capacity. The numbers admitted in the first instance should allow for this and be sufficient to ensure adequate competition in the operation of the framework).

5.6 An appropriate timeframe must be allowed for the submission of bids for the mini - competition. This timeframe is not prescribed but it must be reasonable and have regard to the complexity and time required to prepare a bid for submission. The bids received are then evaluated and contracts awarded on the basis of award criteria indicated under the rules of the framework. It is also permissible to use an electronic auction, conducted under the provisions of Article 54 of Directive 2004/18/EC and the corresponding national implementation measures, among the competing participants to determine the most economically advantageous offer^{iv}.

^{iv} An electronic auction requires careful preparation. Price, and possibly other criteria which can be represented numerically, will be the basis for award of contract.

The following is a practical example of a framework which would involve a mini – competition to award supply contracts. Suppliers of a range of personal computers (desktops, laptops etc.) would be invited to tender to supply a contracting authority, or authorities, for a specified period. Participants would be selected on the basis of capacity to supply and appropriate award criteria such as indicative pricing, delivery times etc. The terms of the agreement need not specify quantity, precise technical specifications or price of items which are the subject of the supply framework. As requirements arise, an authority would contact the parties to the framework that are in a position to supply and invite them to submit competitive bids which would form the basis of the mini - competition. These would be evaluated on the basis of the rules and criteria, more precisely formulated where necessary, as set out in the terms of the framework. The contract would be awarded to the participant who submitted the most economic or lowest priced bid in accordance with the rules and criteria set out.

6. Award criteria

The basis for admission to the framework and award of contracts must be set out in the published notice or in the documentation being supplied to candidates. The criteria under which tenders will be evaluated and contracts awarded must be indicated.

It is important to note that substantive changes or modifications in award criteria are not permitted during the operation of the framework. This needs to be borne in mind in particular when holding mini-competitions for the award of contracts. In such cases it would seem reasonable that, at the outset, that criteria weighting would be indicated within an indicative range. In inviting bids in the context of holding a mini-competition for particular requirements, it would seem appropriate that the criteria and weightings would be more precisely formulated having regard to the requirement concerned. It is conceivable that some of the stated criteria would attract less weighting in one case than another. For example, timeframe for supply or delivery of a service might be important in the performance of one contract but less relevant in other cases.

The following is a practical example of a framework which would involve a mini – competition to award service contracts. Public authorities may be required to implement a public sector wide or a sectoral policy initiative. Some authorities may require specialist advice on this. A central authority promoting implementation could select a number of suitably qualified specialists for inclusion in a framework. Authorities requiring advice would choose from those included on the framework and engage services based on tenders submitted in a mini – competition and evaluated under the criteria and terms set out in the framework agreement.

7. Duration of frameworks

7.1 The duration of framework agreements is limited to a maximum of four years. However, there is provision to establish frameworks for longer than this in exceptional circumstances where this can be justified by the subject of the framework contracts. An example which has been quoted relates to a situation where in order to supply or fulfil a contract, a level of capital investment is required on the part of a contractor. If the appropriate return on this investment cannot be achieved within a normal maximum four year period, a longer term framework may be justified.

7.2 The relevant Article in the procurement Directives does not contain any provisions on the duration of contracts entered into during the course of the framework. This may be a particular consideration coming toward the end of the framework's duration. While there is nothing explicit in the rules, it would most likely be seen as an abuse of the system to place a contract of a duration that extends substantially beyond the published termination date of a framework that is due to expire. Unless there were particular circumstances justifying it, this would probably be seen as restrictive and contrary to the principles of market openness and competition.

8. Impact on SMEs

Estimating the value and establishing frameworks for works, supply and service contracts will generally involve aggregation of requirements for a period of time and will, possibly, extend to a number of contracting authorities or sectors. Consideration should be given to how proposed arrangements will impact on small and medium sized enterprises (SMEs). While total demand may be aggregated, requirements will generally be drawn down in small lots, in many cases following mini – competitions. In selecting participants, authorities should ensure that where smaller enterprises can meet requirements or compete for particular lots, the terms of the framework facilitate their inclusion. There will be instances where flexibility and ability to respond speedily to requirements will place such enterprises in a particularly favourable position to participate and compete effectively.

The following sets out an example of a framework that could facilitate small or medium sized enterprises. A contracting authority or sector with responsibility for providing a national service may require works, supplies or services to be provided nationally. Rather than put one national framework in place, invitations could be invited from parties who would participate in a framework for requirements to be met on a local or regional basis. Interested small or medium enterprises could qualify for inclusion and successfully compete for contracts.

9. Contract award notices

The obligation to publish a contract award notice applies in the case of framework agreements where the total value of contracts to be awarded exceeds the relevant EU thresholds. The standard Contract Award Notice is used for publication. However, the requirement to publish relates only to the framework agreement at the time is established, not to individual contracts or draw-down of requirements or awards based on mini – competitions undertaken under the agreement.

10. Remedies and standstill period

Framework agreements covered by the public procurement Directives and the contracts awarded under them are subject to the provisions of the Remedies Directives. However, in regard to the need to observe a “standstill period” between the time a decision is taken and the time a contract is put in place, the “standstill” need not apply to contracts placed on the basis of mini-competitions under a framework agreement. Recent revisions to the Remedies Directive provide that the “standstill period” need only apply to decisions on admission of candidates or tenderers to the framework at the stage when the initial agreement is being put in place.

*National Public Procurement Policy Unit
October 2007*

Appendix

Regulations from SI 329 of 2006 covering Framework Agreements

Contracting party may enter into framework agreements

33. (1) A contracting authority may enter into a framework agreement as provided by this Regulation.

(2) In entering into a framework agreement, a contracting authority shall follow the rules of procedure prescribed by these Regulations for all phases up to the award of contracts based on the agreement. The parties to the framework agreement are to be determined by applying the award criteria set in accordance with Regulation 66.

(3) A contracting authority that proposes to award a contract by means of a framework agreement shall award the contract in accordance with the procedures specified in Regulations 34 and 35. Those procedures are applicable only between the contracting authority and the economic operators that were originally parties to the agreement.

(4) In awarding a contract on the basis of a framework agreement, the parties may not make substantial amendments to the terms specified in the agreement, in particular in the case referred to in Regulation 34.

(5) The duration of a framework agreement may exceed 4 years only in an exceptional case that is justified by factors such as the subject matter of the contract.

(6) A contracting authority may not use framework agreements in such a way as to prevent, restrict or distort competition.

Framework agreement entered into with a single economic operator

34. (1) A contracting authority may award a contract on the basis of a framework agreement with a single economic operator within the limits of the terms specified in the agreement.

(2) In deciding whether to award such a contract to a single economic operator, the contracting authority may in writing request the operator to supplement its tender to such extent as it requires. The contracting authority may decide not to award the contract on the ground that the operator has failed to comply with such a request to that authority's satisfaction.

Framework agreement entered into with several economic operators

- 35.** (1) A contracting authority may enter into a framework agreement with several economic operators, but in that case the number of economic operators must be not less than 3, unless there is—
- (a) an insufficient number of economic operators to satisfy the relevant selection criteria, or
 - (b) an insufficient number of admissible tenders that satisfy the relevant award criteria.
- (2) A contracting authority may award a contract based on a framework agreement entered into with several economic operators either—
- (a) by applying the terms specified in the agreement without reopening competition, or
 - (b) if not all the terms are specified in the agreement, when the parties are again in competition on the basis of the same terms (which may, if necessary, be more precisely formulated), and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the appropriate procedure.
- (3) For the purposes of paragraph (2)(b), the appropriate procedure is as follows:
- (a) for each contract to be awarded, the contracting authority shall consult in writing the economic operators that appear to the authority to be capable of performing the contract;
 - (b) the contracting authority shall fix a time limit that is sufficiently long to allow tenders for the contract to be submitted and, in particular, shall take into account factors such as the complexity of the subject matter of the contract and the time needed to submit tenders;
 - (c) economic operators must submit their tenders in writing;
 - (d) the contracting authority shall keep the content of the tenders confidential until the deadline for receiving tenders has expired;
 - (e) the contracting authority shall award the contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

Appendix B

Correspondence from Ms. Clare McGrath, Chairman, Office of Public Works outlining the approach and the impact of the NPS



Ceann Oifig
Baile Átha Throim
Co. na Mí

Head Office
Trim
Co. Meath

Tel/Phone: (046) 942 6000
Facs/Fax: (046) 948 1793
Íosghlao/LoCall 1890 213414
Suíomh gréasáin/website: www.opw.ie

4 November 2010

Ms Eimear Lavelle,
Committee Secretariat,
Committee of Public Accounts,
Leinster House
Dublin 2.

Dear Ms Lavelle,

I refer to your letter dated 20th October 2010 arising from my appearance before the Committee on 14th October 2010 in relation to Chapter 8 of the 2009 Annual Report of the Comptroller and Auditor General on Public Procurement.

As I outlined to the Committee on 14 October, the NPS has three main strategic goals, namely: Strategic Sourcing; Education, Development and Guidance; and eProcurement. The impact of the NPS has been significant in all three of these strategic areas.

Strategic Sourcing:

The NPS has identified the Top 30 spending areas by public sector bodies and has considered the areas where collaboration and where aggregation in procurement can be most effective. It is focussing its strategic sourcing interventions in these areas. In terms of contracts put in place by the NPS, leveraged savings will be delivered by the NPS through aggregating the public sector demand in procurement categories where there is commonality across the public service, such as electricity, fuel, stationery and office supplies. Significant savings in these areas will only be achieved over time and cannot be achieved in the short space of a year or two.

By identifying the top 30 spending categories and targeting these in a strategic way, economies of scale and better contracts management can be achieved, with a reduced administrative burden, which will in itself result in savings. Benchmarking from other jurisdictions confirms that using centralised competitions such as these can result in administrative savings in the order of €6,000 to the contracting authorities availing of such contracts as a result of not having to administer the procurement themselves. The cost of putting a centralised contract in place is estimated to cost €25,000, but clearly the more organisations that avail of the centralised frameworks, the greater the administrative savings to those organisations will be.

To date in 2010, the NPS has put in place individual contracts with a total value in the order of €21 million in the categories of printing services, vehicles, clothing and footwear and plant and equipment. Since my appearance before the Committee in October, two more significant Framework Agreements have been established by the NPS in the energy category, for Electricity and Natural Gas, which have potential values of €230m and €56m per annum respectively. In addition, a framework for print media advertising was established on 1st November 2010, with a

Oifig Bhaile Átha Cliath/Dublin Office (01) 647 6000
Oifig Chláir Chlainne Mhuiris/Claremorris Office (01) 647 6000
Oifig Chill Chainnigh/Kilkenny Office (056) 777 2600

significant increase in the discount now available to public bodies availing of this contract. The discount available on the standard rate card has increased from 44% to 50.1% and this discount is now available to a wider range of contracting authorities than the previous central Government contract, including the third level education sector.

Overall Savings Achieved:

In addition to the savings that can be achieved as a result of the public procurement initiatives as direct procurements, the NPS has also overseen savings of €27 million across the public sector in 2009 by supporting public sector bodies in achieving reductions of 8% in contracts in excess of €100,000. These savings have accrued to the Departments making the savings. A further €7.5million has been reported for 2010, bringing the total amount saved under this initiative to approximately €35 million.

However, these savings do not fully reflect the total savings achieved in the area of public procurement. The negotiated reduction of 8% represents only a very small proportion of the overall savings made. Public sector procurement has achieved significant savings, both by re-tendering for goods and services (which are not captured in these statistics for 2009) and through Departments getting better value from the market (getting more goods and services from the same level of expenditure as before, as a result of lower prices generally available in the marketplace).

It must also be borne in mind that procurement budgets have been reduced substantially by the Department of Finance in 2009 and 2010. In some cases, savings have been achieved by organisations deciding not to spend or to spend less. Primarily, reductions in allocations have produced these savings, which are not captured in the “8%” saving. However, the NPS has an active role to play in supporting public sector buyers to enable them now and in future to continue to buy the same or a greater amount of goods and services for less.

The 8% reduction is just one small initiative which is part of this overall support for public sector procurers, including freeing up their time to work on sector-specific procurement in cases where the NPS takes over the procurement of common goods and services, or where it is agreed that particular Departments or Agencies will take the lead in particular procurement projects on behalf of others.

Examples of Unit Price Savings:

In the category of uniform clothing, the 2010 competition for Defence Forces' DPM (combat) uniforms has produced an extremely keen pricing structure. Overall the Defence Forces will now benefit from an approximate saving in excess of 30% in comparable garment pricing over the 2006/09 costs.

In the category of stationery products, as part of its pre-tender market research, the NPS benchmarked the performance of the existing NPS stationery contract (which was limited to Central Government only) with the prices paid by other public bodies for a standard range of stationery items. The result of this exercise showed that for the vast majority of items, the NPS contract was performing better for the basket of items by a range between 2% and in some cases over 100% in terms of unit cost. The new NPS tender competition is currently being evaluated and it is not possible to say at this stage what the precise unit cost savings will be.

In the case of the energy frameworks, it will only be possible to state the unit cost savings achieved once the mini-competitions for the different sectors have been completed. It is a feature of these contracts that the value for money achieved will be assessed on an ongoing basis as part of the management of the framework. The NPS will be in a position to report on these savings in future.

The increase in the discount available to public sector bodies in the print advertising contract

(detailed above) is another example of the savings that can be achieved by using NPS contracts.

In addition to the financial savings being delivered, other areas in which the NPS is making progress include:

- The NPS, is pro-actively engaged with other key stakeholders in public procurement such as Enterprise Ireland, InterTrade Ireland, IBEC and ISME.
- The project to standardise tender and contract documentation has been completed with the Chief State Solicitor's Office and the Office of the Attorney General, and the standardised documents are ready for issue to contracting authorities.
- The NPS has established an Advisory Group to ensure that the NPS has access to a range of guidance and advice on latest developments in procurement and supply chain management from individuals with international, industry and academic expertise.
- Supporting professionalism in procurement: A number of NPS staff have commenced an accredited Diploma in Public Procurement with Dublin Institute of Technology (DIT). In doing this, the NPS has raised the profile of procurement training – when the NPS approached the market initially, no such accredited courses were available. Now three such courses are available to public sector procurers.
- The NPS has established the first Inter-sectoral Education and Development Working Group to identify the specific training needs of procurement officials in the public service and to identify appropriate accredited training. The NPS is also running a series of seminars on Excellence in Public Procurement, which is being delivered free of charge to public procurers and which have proved very popular. Training materials and information on our current activities will be made available to NPS clients via a new website, currently in development.

These activities will bring medium to long-term benefits to the procurement landscape in Ireland.

If you have any further queries in relation to this matter, please do not hesitate to contact Ms. Eilis O'Connell, Deputy Director, National Procurement Service on 046-9426163 or by e-mail: eilis.oconnell@opw.ie

Yours sincerely



CLARE McGRATH
CHAIRMAN
COMMISSIONERS OF PUBLIC WORKS

Appendix C

Detailed breakdown of Contracts concluded without competition

3.3

October 2010

Ms Eimear Lavelle
Committee Secretariat
Committee of Public Accounts
Leinster House
Dublin 2



Dear Ms Lavelle,

I refer to this Department's letter of 3 June 2010 providing information for the Public Accounts Committee about Circular 40/02 returns from Departments and Offices (re contracts over €25,000 awarded without a competitive process) and, in particular, to the accompanying tables which set out the number and value of such contracts as reported by each Department and Office for 2008 and 2009.

Subsequent to that letter, and in the course of our further examining the 2009 returns data in discussion with the Office of the Comptroller and Auditor General, some matters were identified which require slight revision to our 3 June tables. There are a number of reasons for the revision, the principal ones being as follows:

- o a small number of Offices had initially sent returns to either the Office of the C&AG or this Department's National Procurement Policy Unit (NPPPU), but not to both, as is required;
- o some returns wrongly included non-contract expenditure not encompassed by the Circular;
- o different interpretation and presentation by C&AG and NPPPU of some returns, e.g. presenting multi-annual contracts on an annual or full-term cost basis;
- o need to determine the status of some small Offices/agencies in terms of their obligations under the Circular; and
- o the correcting of an error in a return.

These issues have now been reconciled and **I now attach two revised tables with the amended figures for 2008 and 2009**. I apologise for any inconvenience this may have caused, and I hope that the revised material is of assistance to the Committee.

Yours sincerely,

Deirdre Hanlon
Principal
National Public Procurement Policy Unit

Circular 40/02 Returns for Year Ended 31 December 2008
Contracts/Purchases of more than €25,000 (excl VAT) undertaken without a competitive process

Totals		
Number of contracts awarded	522	
Value of contracts awarded	€79,111,183	
Department/Office	Number of contracts awarded	Value of contracts awarded €
Department of Communications, Marine and Natural Resources	11	1,193,858
Department of Agriculture & Food	3	8,245,203
Dept of Arts, Sports & Tourism	9	995,419
Department of Community, Rural and Gaeltacht Affairs	4	2,782,226
Department of Defence	42	4,412,336
Department of Education & Science	2	182,844
Department of Enterprise, Trade & Employment	13	1,582,591
Department of Environment, Heritage & Local Government	12	917,322
Department of Finance	2	1,693,443
Department of Foreign Affairs	8	951,461
Department of Health and Children	8	1,175,222
Dept of Justice, Equality & Law Reform	61	7,746,607
Department of Social and Family Affairs	7	872,769
Department of the Taoiseach	1	50,917
Department of Transport	1	68,393
Office of the Revenue Commissioners	17	2,556,908
Office of Public Works	18	1,889,749
Office of the Comptroller & Auditor General	3	157,296
Office of the Houses of the Oireachtas	9	645,670
Central Statistics Office	2	89,555
Public Appointments Service	1	38,870
Office of the Commission for Public Service Appointments	1	96,283
Director of Public Prosecutions	0	0
Office of the Ombudsman	0	0
State Laboratory	16	786,637
The Courts Service	21	2,578,292
Attorney General	1	567,450
The Chief State Solicitor	0	0
Irish Prison Service	193	27,741,211
Legal Aid Board	0	0
An Garda Siochana	38	7,740,218
Ordnance Survey Ireland	8	757,355
Valuation Office	0	0
National Gallery of Ireland	6	293,000
Property Registration Authority	4	302,078
Totals	522	79,111,183

Circular 40/02 Returns for Year Ended 31 December 2009
Contracts/Purchases of more than €25,000 (excl of VAT) undertaken without
a competitive process

Totals	
Number of contracts awarded	447
Value of contracts awarded	€64,925,590

Department/Office	Number of contracts awarded	Value of contracts awarded €
Department of Communications, Marine and Natural Resources	4	1,614,164
Department of Agriculture & Food	10	5,500,413
Dept of Arts, Sports & Tourism	9	1,183,475
Department of Community, Rural and Gaeltacht Affairs	5	1,093,767
Department of Defence	40	4,173,089
Department of Education & Science	3	1,189,587
Department of Enterprise, Trade & Employment	11	718,218
Department of Environment, Heritage & Local Government	9	1,170,905
Department of Finance	4	5,993,905
Department of Foreign Affairs	3	163,328
Department of Health & Children + OMCYA	2	201,130
Department of Justice, Equality & Law Reform	44	5,682,200
Department of Social and Family Affairs	6	478,778
Department of the Taoiseach	0	0
Department of Transport	0	0
Office of the Revenue Commissioners	8	519,353
Office of Public Works	11	895,015
Office of the Comptroller & Auditor General	2	93,911
Office of the Houses of the Oireachtas	7	389,328
Central Statistics Office	3	219,513
Office of the Commission for Public Service Appointments	3	89,989
State Laboratory	12	452,989
The Equality Authority	3	114,500
The Courts Service	20	1,856,854
The Chief State Solicitor	1	50,953
Irish Prison Service	154	22,042,576
Legal Aid Board	2	174,087
An Garda Siochana	62	8,148,897
Ordnance Survey Ireland	4	425,340
National Gallery of Ireland	3	115,142
Property Registration Authority	2	174,184
Totals	447	64,925,590
HSE	22	4,094,445
C&AG Total (with HSE)		69,020,035

Appendix D

Orders of Reference of the Committee of Public Accounts

- (1) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a Standing Committee, to be known as the Committee of Public Accounts, to examine and report to the Dáil upon—
 - (a) the accounts showing the appropriation of the sums granted by the Dáil to meet the public expenditure and such other accounts as they see fit (not being accounts of persons included in the Second Schedule of the Comptroller and Auditor General (Amendment) Act, 1993) which are audited by the Comptroller and Auditor General and presented to the Dáil, together with any reports by the Comptroller and Auditor General thereon:

Provided that in relation to accounts other than Appropriation Accounts, only accounts for a financial year beginning not earlier than 1 January, 1994, shall be examined by the Committee;
 - (b) the Comptroller and Auditor General's reports on his or her examinations of economy, efficiency, effectiveness evaluation systems, procedures and practices; and
 - (c) other reports carried out by the Comptroller and Auditor General under the Act.
- (2) The Committee may suggest alterations and improvements in the form of the Estimates submitted to the Dáil.
- (3) The Committee may proceed with its examination of an account or a report of the Comptroller and Auditor General at any time after that account or report is presented to Dáil Éireann.
- (4) The Committee shall have the following powers:
 - (a) power to send for persons, papers and records as defined in Standing Order 85;
 - (b) power to take oral and written evidence as defined in Standing Order 83(1);
 - (c) power to appoint sub-Committees as defined in Standing Order 83(3);
 - (d) power to engage consultants as defined in Standing Order 83(8); and

- (e) power to travel as defined in Standing Order 83(9).
- (5) Every report which the Committee proposes to make shall, on adoption by the Committee, be laid before the Dáil forthwith whereupon the Committee shall be empowered to print and publish such report together with such related documents as it thinks fit.
- (6) The Committee shall present an annual progress report to Dáil Éireann on its activities and plans.
- (7) The Committee shall refrain from—
 - (a) enquiring into in public session, or publishing, confidential information regarding the activities and plans of a Government Department or office, or of a body which is subject to audit, examination or inspection by the Comptroller and Auditor General, if so requested either by a member of the Government, or the body concerned; and
 - (b) enquiring into the merits of a policy or policies of the Government or a member of the Government or the merits of the objectives of such policies.
- (8) The Committee may, without prejudice to the independence of the Comptroller and Auditor General in determining the work to be carried out by his or her Office or the manner in which it is carried out, in private communication, make such suggestions to the Comptroller and Auditor General regarding that work as it sees fit.
- (9) The Committee shall consist of twelve members, none of whom shall be a member of the Government or a Minister of State, and four of whom shall constitute a quorum. The Committee and any sub-Committee which it may appoint shall be constituted so as to be impartially representative of the Dáil.

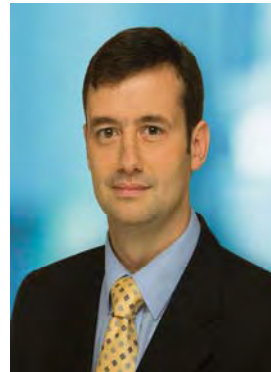
Appendix E
Membership of the Committee
of Public Accounts



Allen, Bernard (FG)
(Chairman)



Collins, Niall (FF)



D'Arcy, Michael (FG)



Enright, Olwyn (FG)



Fleming, Seán (FF)



Kenneally, Brendan (FF)



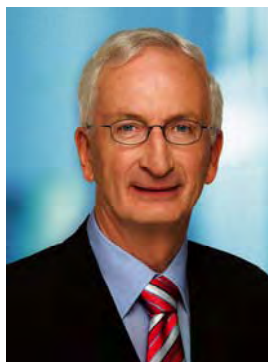
McGrath, Michael (FF)



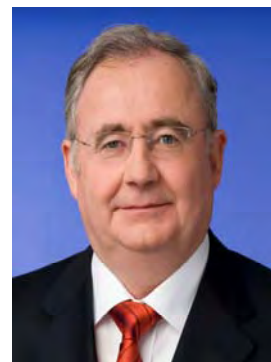
O'Brien, Darragh (FF)
(Vice-Chairman)



O'Keefe, Edward
(FF)



O'Keefe, Jim (FG)



Rabbitte, Pat (Lab)



Shortall, Róisín (Lab)

