

**SMES' REDRESS PARTICIPATION IN EU PUBLIC CONTRACTS IN  
THE WAKE OF THE EVOLUTION CENTRALISED PROCUREMENT  
REVIEW BODIES?**

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**ABSTRACT.** The European economic landscape is in an extremely fragile state, struggling to productively emerge from one of the worst recessions experienced in the last number of decades. Small and medium size enterprises (SMEs) are playing a vital role in assisting the market to return to a stable level. This paper will attempt to explore the intrinsic relationship between SMEs and public procurement. In particular it will question whether the introduction of centralised public procurement review bodies protect and enhance SMEs' redress rights. The paper will conclude by examining whether the Irish public procurement market would benefit from the introduction of a procurement review body.

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<sup>1</sup> This is a working paper based on research undertaken by the authors for the proposed IPPC 2012 paper; "The role of Procurement Review Bodies post transposition of the Remedies Directive in Europe"

In times of global economic uncertainty, the European public procurement market is still relatively large and fertile and has the capacity to support small and medium size enterprise (SME) participation across the individual member states. It is estimated that approximately 18% of member states' GDP is spent on procuring supplies, services and goods on an annual basis.<sup>2</sup> Initial legislation governing member states public procurement activities was introduced in 1971 aspiring to encourage cross-border trade and support the single market goals. An additional public procurement Directive, the *Remedies Directive* was introduced in 1989 to legitimise redress rights for aggrieved unsuccessful tenderers. The Directive was amended in 1992 to include the activities of the Utilities sectors and was substantially revised in 2007.<sup>3</sup>

In the wake of the introduction of the Remedies Directive a number of specialised public procurement review bodies were introduced in a number of member states. This paper proposes to examine whether the introduction of such bodies can support SMEs' redress participation in EU public contracts. The latter section of the paper will concentrate on the single case study of Ireland, it will briefly examine the remedial rights available to SMEs and will question whether the introduction of a public procurement review body would enhance the rights available to unsuccessful tenderers.

The research outlined in the case study section is based on the initial results from an Interreg €3.2 million project "Winning in Tendering" which is being carried out between Dublin City University (DCU), the Irish Institute for Purchase and Materials Management (IIPMM), and Bangor University. The "Winning in Tendering" (WiT) project sits within Priority 1 (Knowledge, Innovation and Skills for Growth), Theme 2 (Skills for Competitiveness and Employment Integration) of the Ireland/Wales 2007-2013 cross-border co-operation programme.

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<sup>2</sup> European Commission Staff Working Paper Evaluation Report on the Effectiveness of EU Public Procurement Legislation (Part 1) (2011)

<sup>3</sup> Directive 2007/66/EC of the European Parliament and of the Council of the 11<sup>th</sup> December 2007 amends *Council Directives 89/665/EEC* and *92/13/EEC* with regard to improving the effectiveness of review procedures concerning the award of public contracts.

It aims to transform the public tendering experience of Small Indigenous Suppliers (SISs) and to influence behaviour of Public Procurers across the Ireland/Wales Interreg region. The project was approved under the Interreg 4A call for strategic projects in June 2010.

The Ireland/Wales 2007/2013 cross-border co-operation programme is one of the many Interreg IV structural funds programmes that target specific regions. The Programme has a focus on co-operation to ensure integrated regional development through common strategies through funding projects that address the challenges laid out in EU, Irish and Welsh policies and have a positive impact on local communities in the cross border area.

The Programme is structured around two key Priorities:

- Priority 1: Knowledge, Innovation and Skills for Growth
- Priority 2: Climate Change and Sustainable Regeneration

The “Winning in Tendering” project sits within Priority 1 – Theme 2 Skills for Competitiveness and Employment Integration. It has been awarded almost £.2.7m (GBP) of ERDF funding in a £3.6m (GBP) total budget.

Small and medium size enterprises represent the overwhelming majority of all businesses in Wales and Ireland. National statistics for 2010 show 99% of enterprises in Wales (94% micro enterprises employing less than 10 staff) are SMEs generating £40.8 bn (GBP) turnover. In Ireland figures for 2009 are of a similar magnitude with 90.8% of enterprises in the micro category. Despite the overall importance of the sector to the national economy access to publicly tendered contracts has been constrained. In particular, the ability of SMEs to engage in public procurement is impaired by the complexity of the tendering process and a lack of skills and experience.

The “Winning in Tendering” project addresses the barriers faced by small enterprises. The project aims to provide SISs with the following three actions;

- Legal educational guidance and case studies in plain language on the revolutionary 2007 EU Remedies Directive;

- A tender review programme enabling Welsh and Irish SISs to learn why they failed to win past tenders, thus improving skills and encouraging SISs to re-enter the tendering game with renewed optimism;
- An On-line diagnostic 'health-check' educational tool to allow SISs to self-evaluate their tender readiness

The project aims to provide Public Procurers with the following two actions;

- A SIS-Friendly Procurement Competency Framework, whereby procurers actively consider SIS vulnerabilities in designing tenders;
- Case studies and educational guidance to help procurers overcome negative impacts of below EU threshold advertising, thus improving SIS access to opportunities.

The project addresses skill gaps of SISs and public procurers, which inhibit the region's competitiveness and sustainable development, via unique, innovative and complementary targeted interventions including training for procurers and SISs. This paper focuses on one of the work streams that of understanding the impact of the remedies directive on public procurement.

## EUROPEAN PUBLIC PROCUREMENT LEGISLATION

The activity of public procurement involves the disbursement of public money aimed at the acquisition of works, supplies and services for consideration.<sup>4</sup> Public procurement rules establish specific contract award processes to guarantee that public purchases are made in a competitive, transparent and fair manner, which ensures contracting authorities and entities get best value for taxpayers' money.<sup>5</sup> There are several sources of public procurement law governing European member states activities. The primary source is the Directives adopted by the European Parliament and Council – secondary law.<sup>6</sup> The

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<sup>4</sup> Glynn, B. 2012

<sup>5</sup> Mori and Doni 2010

<sup>6</sup> Directive 2004/18/EC of 31 March 2004 OJ (2004) L 134/114, Directive 2004/17/EC of 31 March 2004 OJ (2004) L 134/19

legislation sets out detailed procedural rules and remedial rights for public contracts with a value over the pre-determined EU financial thresholds. The Directives are ultimately underwritten by a series of fundamental freedoms and principles derived from the *Treaty of the Functioning of the European Union* ("TFEU") – primary law. Despite the fact that the TFEU does not specifically refer to procurement, all member states' contracting authorities must comply with the internal market's fundamental freedoms, namely the free movement of goods, persons, services and capital and the prohibition on anti-competitive measures. Member states' public bodies must conform to the principles derived from the fundamental freedoms for both above and below threshold contracts. Those principles include: transparency; mutual recognition; proportionality; non-discrimination; and equal treatment.<sup>7</sup>

The main objective of the legislation is to promote effective competition in the single market and to prevent domestic protectionist purchasing.<sup>8</sup> Arrowsmith comprehensively notes that the legislation is primarily concerned with opening competition in the single market and it is at the discretion of individual member states to incorporate social and policy goals into the domestic legislation and guidance.<sup>9</sup> This distinction is crucially important for the implementation of redress legislation in member states. The Remedies Directive relies on decentralised compliance and adequate enforcement of the substantive regime in member states. Bovis comments that an effective domestic regime ensures swift resolution of disputes and stringent enforcement of decisions by domestic review bodies which enjoy procedural autonomy.<sup>10</sup>

The Remedies Directive lends itself to decentralised implementation, encouraging the use of specialised procurement review bodies. Aggrieved tenderers can initiate challenges under implementing national legislation subject to general principles of judicial review and contract law. The role of the national courts and enforcement bodies is not to 'second guess' the public body's actions, but to concentrate on how the awarding decision was

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<sup>7</sup> Case C-507/03, *Commission v. Ireland* [2007] ECR I-9777

<sup>8</sup> Olykke, Grith Skovgaard. 2011.

<sup>9</sup> Arrowsmith, Sue. 2005

<sup>10</sup> Bovis, C. 2006

made.<sup>11</sup> In addition to domestic court litigation, tenderers may seek to remedy a breach of the procurement rules by bringing the alleged infringement to the attention of the European Commission. The Commission has the power to investigate and institute infringement procedures. This paper will concentrate on the options opened to aggrieved tenderers before national courts, and will in particular examine the scope and use of specialised procurement review bodies. The paper will follow a simple methodology, it will firstly explore the current legal landscape governing SME redress rights and it will examine the discretionary review bodies adopted by 13 member states, identifying their common traits and characteristics. The paper will then question whether it would be appropriate and beneficial to replicate a specialised review body in Ireland based on the common traits identified in the member states.

SMEs play a critical and fundamental role in the European social and economic market. The European Commission recognised that SMEs from the period of 2002 – 2010 were responsible for creating over 85% of all new jobs in Europe, with micro-enterprises alone responsible for 58% of total net employment growth. SMEs are the key drivers for generating local employment, sustaining local economies and promoting entrepreneurship and business risk taking in all areas of society.<sup>12</sup> However, the Commission recognised SME participation in the European public procurements markets is disproportionate to the number of SMEs operating in member states. A report launched in 2010 estimated that SMEs secure 33% of the value and 60% of the number of contracts above the thresholds fixed by the EU directives on public procurement (2006-2008 data). The report outlined the most reported barriers which dissuade SME participation, including the difficulties SMEs face in obtaining information, having adequate knowledge of the tender procedures, having the administrative capability to complete the detailed forms, having the technical and financial capabilities required by the authorising

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<sup>11</sup> Little, C and Waterson C. 2011

<sup>12</sup> EIM. (2011) Do SMEs create more and better jobs? Available at; [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index_en.htm)

authority and being discriminated against in other member states.<sup>13</sup>

The European Commission is committed to sustaining and encouraging SME participation and growth across the single market and has integrated SME friendly initiatives into public procurement policy and procedures, this is evident in the *Small Business Act for Europe (2008)* and is communicated clearly in the *Public Procurement for Better Environment (2008)*, the *Pre-Commercial Procurement (2007)* and in the *Integrating Social Considerations into Public Procurement (2001)* reports. SMEs' participation and redress rights are protected through the implementation of the suite of European public procurement legislation.

## REMEDIES LEGISLATION

The initial Remedies Directive was updated in 2007 to enhance the guarantees of transparency and non-discrimination in public procurement procedures, to allow for rapid redress actions for aggrieved unsuccessful tenderers and to guarantee that all tender applications are evaluated equally.<sup>14</sup> The Commission initially proposed to amend the Directive in May 2006 as a resolution to the discordant national legislation regarding redress policies. The Commission through consultation processes and reviewed case law recognised two general issues experienced across member states, one being the lack of fair, non-discriminatory redress processes for unsuccessful large and small tenderers and second being the rapid turnover of signing tenders with winning bidders. The Commission carried out the consultation process over a three year period consulting with awarding authorities, legal professionals, economic experts, non-governmental

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<sup>13</sup> DG Enterprise and Industry (2010) Evaluation of SME Access to Public Procurement Markets in the EU. Available at; [http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes\\_access\\_to\\_public\\_procurement\\_final\\_report\\_2010\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf)

<sup>14</sup> European Commission, Impact Assessment Report – Remedies in the field of Public Procurement SEC/2006/0557

organisations, private businesses and member states' representatives.<sup>15</sup>

The Directive aims to protect tenderers' redress rights and to create competitive, fair tendering processes by imposing a '*standstill period*' and stringent rules against illegal direct awards. The '*standstill period*' requires the authorising agent to refrain from signing the contract for a period of ten days after the winning tenderer has been agreed. The standstill period should give unsuccessful tenderers sufficient time to assess whether it is appropriate to initiate a review procedure. In the case where a review proceeding is initiated, the procurement process becomes automatically suspended and cannot be completed until the review has been addressed and completed.<sup>16</sup> This is the first remedial right available to SMEs. Prior to commencement of the standstill period the contracting authority is required to stipulate a notice to all unsuccessful tenderers informing them of the reasons of their rejection including a statement of the attributes and advantages of the successful tenderer, it will additionally include a comprehensive list of the scores obtained by the successful and unsuccessful parties.

The Directive also aims to maintain integral and ethical procedures through stern rules against illegal direct awards. The Directive provides for national courts to hold such awards as ineffective. This is the first Directive to impose the remedy of ineffectiveness; previously the highest remedy available was the declaration of voidness of contracts found to be illegally awarded.<sup>17</sup> The Directive was transposed differently across member states, Cyprus, Finland and Spain transposed the Directive by the use of separate acts, similar to the actions of the UK and Ireland. France, Portugal, Austria and Italy transposed the Directive by means of a new Administrative Justice Code. However, the majority of the member states including most of the

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<sup>15</sup> Commission Staff Working Document – Annex to Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts {COM (2006) 195}- Impact Assessment Report – Remedies in the field of Public Procurement SEC/2006/0557

<sup>16</sup> Directive 2007/66/EC, Article 2.2(a)

<sup>17</sup> Directive 2007/66/EC, Article 2.2(d)

2004 accession states transposed all the procurement Directives into unique legislative acts. The majority of the states have opted to include the 10 day standstill period and have implemented the remedy of ineffectiveness completely, with some states providing financial and interim redress solutions for contracts deemed ineffective.<sup>18</sup>

The Remedies Directive greatly enhances SMEs' redress rights, allowing SMEs' to obtain information as to why they were unsuccessful and outlines a distinguished redress path to take in the event of a possible infringement of the rules. A number of member states have allowed for national public procurement review bodies to support and enforce the remedial rights deriving from the Directive.

### **SPECIALISED PUBLIC PROCUREMENT REVIEW BODIES**

In light of the introduction of the Remedies Directive, a considerable number of member states designed and implemented centralised public procurement review bodies to provide aggrieved tenderers with a quick and cost-efficient redress alternative to that of expensive and lengthy litigation procedures. Prior to the first major enlargement of the EU in 2004, the Organisation of Economic Cooperation and Development (OECD) launched a joint report with the EU guiding the accession states on how to identify the public procurement review procedures best suited to the individual country's specifications.<sup>19</sup> The report provided possible institutional reform models based on best practices identified from a comparative study of redress procedures adopted in the individual EU member states. The report recommended the European states seeking to join the EU should adopt a complaints review mechanism in the form of an independent review body or administrative court which had the eligibility to take legal action and review both above and

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<sup>18</sup> Bianchi, Tiziana and Guidi, Valentina. *The Comparative Survey on the National Public Procurement Systems Across the Public Procurement Network. (Authority for the Supervision of Public Contracts Department for the Co-ordination of European Union Policies)* December 2010 Institute Poligrafico e Zecca dello Stato S.P.A.

<sup>19</sup> OECD (2000) *Public Procurement Review Procedures*. Sigma Papers No.30, OECD Publishing

below threshold contracts. A more recent EU report was published in summer 2011 highlighting the most recent impact of the use of these specialised bodies on their national public procurement markets. The reports findings are summarised below. (Figure 1.1)<sup>20</sup>

(Figure 1.1)

MEMBER STATE	PROCUREMENT REVIEW BODIES / ADMINISTRATIVE COURTS	PUBLISHED REPORTED FIGURES	COMMENTARY
Bulgaria	Specialised Review Body within the Commission on the Protection of Competition	1 103 complaints before the Commission for Protection of Competition (court of first instance) 799 rulings (2009 data)	A <i>Public Procurement Agency</i> also operates as an independent body of the Ministry of Economy, Energy and Tourism.
Denmark	Complaints Board for Public Procurement	75 cases in 2009 181 cases in 2010 12% of the cases were not admissible from procedural point of view About one third of the complaints are upheld by the courts	A <i>Competition Authority</i> operates as an agency under the Danish Ministry of Economic and Business Affairs
Estonia	Public Procurement Commission	No figures have been published at an EU level.	The <i>Public Procurement Office (PPO)</i> supervises the implementation of the Public Procurement Act.
Latvia	Procurement	A reported 200 cases	A number of supervisory

<sup>20</sup> Note; The information contained in Figure 1.1 has been derived from European Commission Staff Working Paper Evaluation Report on the Effectiveness of EU Public Procurement Legislation (Part 1) (2011), European Commission Staff Working Paper Evaluation Report on the Effectiveness of EU Public Procurement Legislation (Part 2) (2011), the Comparative Survey on the National Public Procurement Systems across the PPN Systems (2011) and from member states individual publications.

	Monitoring Bureau	per year are brought before the Procurement Monitoring Bureau	bodies operate within the <i>Procurement Monitoring Bureau</i> , which carry out <i>ex-ante</i> controls for projects under Structural Funds and acts also as first instance review body. The <i>Corruption Prevention and Combating Bureau</i> , the <i>State Audit Office</i> and the <i>Administrative Court</i> share the responsibility for the supervision of public procurement activities.
Hungary	Public Procurement Council – Arbitration Committee	636 procedures launched in 2008; (20% of the decisions of the first instance review body are challenged)	The Council acts as a first instance arbitrary review body.
Malta	Appeals Board of the Department of Contracts	No figures have been published at an EU level, however it is noted, aggrieved tenderers are reluctant to file complaints due to high cost associated. (administrative fees plus the cost of legal representation)	The <i>Department of Contracts</i> is responsible for monitoring public procurement activities and is an integrated part of the Ministry of Finance.
Austria	Federal Award Control Office at Federal Level	106 review applications (before conclusion of contract 84 above and 22 below thresholds), 90 petitions for interim measures (75 above and 15 below thresholds) and 8 applications for declaratory procedures (2010 data)	The <i>Court of Auditors</i> is responsible for the supervision of public procurement activities on federal, state and municipal level, the <i>Rechnungshof</i> is a body responsible for control of conduct of public procurement procedures at federal, state and municipal level. Contracting Authorities can ask for legal advice from the <i>Verfassungsdienst of the Bundeskanzleramt</i> (at federal level) and to the state administration

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			(at the state and local level).
Poland	Public Procurement Office	1 537 cases before the National Board of Appeals (first instance review body) and 277 cases before the courts (second instance review body) (2008 data)	Along with the <i>Public Procurement Office</i> , a supervision function is also carried out by the Supreme Chamber of Control.
Slovenia	National Commission for the Review of Public Procurement Procedures	Review of Public Award	No figures have been published at an EU level, however it is noted the number of applications for review have decreased recently due to high deposits.
			The <i>Review Commission</i> is also supported by the <i>National Court of Audit</i> and the <i>Department of Public Private Partnership and Public Procurement System</i> , which operates within the Department of Finance.
Czech Republic	Office for the Protection of Competition	459 complaints reported 391 (first instance rulings) and 89 preliminary rulings (2009 data)	<i>National Supervisory Boards</i> operating within the Office for the Protection of Competition are responsible for supervising the award of public contracts. The Boards have the power to impose sanctions for non-compliance.
Germany	Procurement Chambers	Review of	1 158 cases before the procurement review chambers (first instance), and 227 cases before the courts of appeal (second instance) (2008 data)
			The majority of the federal states have institutionalised bodies ( <i>VOB-Stellen</i> ) which are responsible for supervising the public procurement procedures. The Federal Court of Auditors is responsible for monitoring the institutionalised bodies.
France	Administrative Tribunals	5000 cases before Administrative Tribunals (2004 data)	There a number of bodies responsible for supervising public procurement activities at both local and national levels, these include; the <i>Service of state Control</i> , the <i>General Directorate for Competition Policy</i> , the <i>Consumer Affaires</i> and

			<p><i>Fraud Control, the Public Accounting General Directorate, ex-ante control of contracts by Government Representatives at local level (prefets de region, prefets de department or sous-prefets), State Audit Control and the Regional Audit Offices, the Court of Auditors.</i></p>
Finland	Court of First Instance	600 cases brought before the Market Court (first instance) (2009 data)	<p>A <i>Public Procurement Advisory Unit</i> was established by the Association of the Finnish Local and Regional Authorities and the Ministry of Employment and Economy, the unit focuses on providing both Contracting Authorities and businesses entities with information and advice on procurement. The Strategic Group on Government Procurement under the Ministry of Finance supports and develops the strategic steering of central government procurement as well as the implementation of the state procurement strategy.</p>

While a number of the central and eastern European states adopted all of the recommendations outlined in the OECD report, there is still a wide disparity between the member states on the implementation of the redress models. There are a number of common traits and characteristics evident across the member states which may encourage SMEs' redress participation. These can be classified into the following;

**1. Independent Status**

The majority of the member states listed have allocated the remedial rights to independent review bodies or to the administrative courts. It is essential that the reviewing entity has an independent status to effectively review the actions of a

contracting authority or entity in an objective and fair manner. SMEs may perceive that there is a lesser reputational risk with making a complaint to an independent body rather than raising the complaint before the contracting authority itself. The independent status of the reviewing body also reduces the threat of any preferential behaviour made in favour of the contracting authority. Among others Germany, France, Malta and Hungary have established the review bodies with an independent status.

## **2. Powers to Investigate**

The majority of the bodies enjoy the powers derived from the Remedies Directive, including the powers to automatically suspend a contract, the powers to lift an automatic suspension, the powers to declare a contract void, to declare a contract ineffective, to order a contract to be varied and enjoy the power to request the contract to be amended. The Court of Justice of the European Union has ruled on the importance of enforcement bodies having the power to effectively enforce the decisions they make.<sup>21</sup> SMEs should be able to seek the redress powers enjoyed by the reviewing body in a reasonably prescribed time.

## **3. Locus Standi / Accessibility**

The bodies also share a common definition on which entities have the standing '*locus standi*' to bring a complaint before the board or court of initial review. The general agreement appears to allow any entity who has an interest in the contract whether they have or have not tendered for the contract the right to initiate a challenge.<sup>22</sup> Accessibility to the review body should not be limited through the imposition of large challenging fees, such as those imposed in Slovenia and Malta. There is a requirement to include some form of charge in order to reduce the risk of abuse of fraudulent claims, however this fee should be set to an appropriate and proportionate level that represents current market value and which would not exclude SMEs' participation.

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<sup>21</sup> Judgement of 18 March 2004, Case C-314/01 Siemens Österreich and ARGE Telekom.

<sup>22</sup> Note; This accessibility test has been adopted from the Court of Justice rulings in; Judgement of 12 February 2004, Case C-230/02 *Grossman Air Service* and Judgement of 24 June 2004, Case C-212/02 *Commission v Austria*

#### **4. No power to award damages**

The majority of the states clearly outline that the independent review bodies do not enjoy the power to award damages to an aggrieved tenderer. Tenderers are required to seek the remedy of damages in a higher court, this was recommended in both the OECD report and rulings from the Court of Justice of the European Union.<sup>23</sup> This limitation will not hinder the SMEs access to redress procedures, the bodies can still award the remedies of automatic suspension, amend contract specifications and rule a contract as ineffective.

#### **5. Additional Duties**

A proportion of the member states have allocated additional roles to the review bodies, requesting them to provide training and offering best practice advice to both the suppliers and public procurers. These additional duties are supported by specialised procurement departments in some states, including Finland, Poland and Bulgaria.

The utilisation of procurement review bodies appears to enhance SMEs' accessibility to open, fair and non-discriminatory redress procedures. The review bodies complement the objectives of the Remedies Directive, offering a more simplistic and cost-effective alternative to expensive and cumbersome litigation procedures. The most effective review bodies operate with an independent standing, consider claims made by an entity which has a clear interest in the outcome of the tender and offering a variety of remedies and the option to appeal to a higher court. The review bodies in essence effectively encourage and uphold SMEs' procurement rights.

### **IRELAND AS A CASE STUDY**

SMEs are described as the backbone of Irish economy, with over 86,000 SMEs operating in Ireland employing more than 700,000

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<sup>23</sup> Judgement of 24 September 1998, Case C-76/97 Walter Tögel

people and generating €90 billion in annual turnover.<sup>24</sup> SMEs however, have been the hardest hit in the economic downturn, with the SMEs sector's contribution to the Irish economy falling 5% from 53% to 48% in a three year period from 2007 – 2010.<sup>25</sup> The economy plummeted into a severe recession in early 2008 and has yet to recover from it. Economic growth has been further hindered by the difficulties in the domestic and international financial markets and the associated recession in the economies of the major trading partner states.<sup>26</sup> The public finances rapidly slipped into deficit and stringent austerity measures have been introduced to control public expenditure.

There does not appear to be a definite value for the public procurement market in Ireland, with various organisations arguing the 2011 market ranged from €9billion to €14billion.<sup>27</sup> The true figure may fall somewhere in between, the National Recovery Plan report published the following estimated figures for the procurement market.<sup>28</sup>

#### Composition of Allocations 2009 – 2014

Public Expenses accumulated; Administrative Subsidies, Grants and other Schemes and Procurement
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<sup>24</sup> Fine Gael, (2011) Putting Small Business First. Available at; <http://www.colmbrophy.ie/wp-content/uploads/2011/02/FG-Small-Business-Policy.pdf>

<sup>25</sup> European Commission Enterprise and Industry. (2010) SBA Fact Sheet - Ireland

<sup>26</sup> Duffy, D., Durkan, J. and O'Sullivan, C, Quarterly Economic Commentary, Winter 2011/Spring 2012, The Economic and Social Research Institute Series, 0376-7191

<sup>27</sup> Note; the NPS valued the 2010 market at 15.05bn [Euro]. [http://www.procurement.ie/sites/default/files/national\\_procurement\\_conference\\_-\\_the\\_irish\\_procurement\\_landscape\\_-\\_vincent\\_campbell\\_16.02.02.pdf](http://www.procurement.ie/sites/default/files/national_procurement_conference_-_the_irish_procurement_landscape_-_vincent_campbell_16.02.02.pdf)

<sup>28</sup> The National Recovery Plan 2011 – 2014. Table 4.1. Current Expenditure Measures. <http://www.budget.gov.ie/The%20National%20Recovery%20Plan%202011-2014.pdf>

Allocations	2009 <i>bn</i>	2010 <i>Bn</i>	2011 <i>Bn</i>	2012 <i>Bn</i>	2013 <i>bn</i>
	14.1	13.8	12.8	11.2	9

It must be noted, this report does not provide an accurate reflection of the market value as the procurement financials are not valued in isolation but are calculated in accumulation with the available allocations for administrative subsidies, grants and other schemes. However, the table clearly depicts the change in the public procurement market. There is a clear appreciation of the importance of SMEs to the Irish economy and a number of government policies and guidance documents have been adopted to encourage SME participation in the public procurement market.

Public procurement activities are governed in Ireland by a series of national regulations implementing the European Directives<sup>29</sup> and guidance documents published by the Department of Finance. The regulations apply automatically to contracts which are valued above the pre-determined EU thresholds, the various pieces of non-mandatory guidance documents apply to contracts valued both above and below these thresholds.

**Circular 10/10** is a non-mandatory government guidance document which was designed and adopted in 2010 to ensure small and medium size business are not hindered from tendering for contracts that they could effectively complete. The Circular aims to encourage accessibility by requiring contracting authorities to advertise all contracts for supplies and services with an estimated value of €25,000 and upwards on [www.etenders.gov.ie](http://www.etenders.gov.ie), aims to remove capacity barriers by requiring contracting authorities to ensure that any capacity levels they set for tenderers are relevant and proportionate to the circumstances of the particular contract and provides for

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<sup>29</sup> The European Communities (Award of Public Authorities' Contracts) Regulation 2006<sup>29</sup> implement Directive 2004/18/EC into Irish law. The European Communities (Award of Contracts by Utility Undertakings) Regulation 2007<sup>29</sup> implement Directive 2004/17/EC into Irish law.

contracting authorities to allow applicants to self- declare their capacity to undertake the contract, and should seek verifications or evidence of such capacity only in the event of the tenderer being short-listed or coming under consideration for the award of the contract. The Circular also prohibits contracting authorities from using arrangements that involve potential tenderers having to pay so as to access opportunities to compete for public contracts and promotes accessibility by allowing contracting authorities to avail of the possibility to award contracts in 'lots' where this can be done without compromising efficiency and value for money.<sup>30</sup>

The National Procurement Service (NPS) and the National Public Procurement Policy Unit (NPPPU) within the Department of Finance have also devised a number of reports including '*Improving SME Access to Public Procurement*'<sup>31</sup> and '*Buying Innovation – The 10 Step Guide to Smart Procurement and SME Access to Public Procurement*'<sup>32</sup> which detail best practice for Contracting Authorities to include SME friendly initiatives into their tender designs. Enterprise Ireland has also developed an OpenUp website designed to help SMEs to understand and use IT and e-Business to improve competition and growth sales. The website also contains a procurement section which offers free advice to SMEs.<sup>33</sup>

The Irish Minister of State at the Department of Finance with special responsibility for the Office of Public Works (OPW) launched a standardised suite of public procurement documents on the 17<sup>th</sup> June 2011.<sup>34</sup> The set of standardised legal documents comprise of a model templates of request for tenders (RFT) for

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<sup>30</sup> Circular 10/10 & Guidance on measures to facilitate participation of SMEs in public procurement

<sup>31</sup> Improving SME Access to Public Procurement. 2007. NPPU. Available at; [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=1861](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=1861)

<sup>32</sup> Buying Innovation – The 10 Step Guide to Smart Procurement and SME Access to Public Procurement. Department of Enterprise, Trade and Employment. 2008. Available at;

[http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=2724](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=2724)

<sup>33</sup> Available at; <http://www.openup.ie/>

<sup>34</sup> Department of Public Expenditure and Reform. Circular 1/11 Model Tender and Contract Documents for Public Service and Supplies Contracts <http://www.procurement.ie/suppliers/template-documents-0>

supplies and services that incorporates model template contracts for supplies and services. The initiative to standardise legal procurement documents was ultimately introduced to drive cost savings in light of the state's poor economic growth and austerity agreements and to streamline and improve procurement practices. Contracting authorities and entities are not mandated to use these templates, although the Circular strongly encourages the use of the forms for all above threshold routine, non-bespoke and low to medium risk supplies and services using the open procedure. The Circular envisages that proper use of the model documents will improve buyer efficiencies and reduce risk of breach of the procurement legislation.<sup>35</sup>

The inclusion of SME participation is supported by Regulations, recommendations by government bodies and guidelines designed by business interest groups. Contracting Authorities are encouraged to utilise the applicable guidelines to promote to a competitive and a socially aware economy. However, the recommendations fail to provide or support SMEs' redress rights outlined in the Remedies Directive. The Remedies Directive was transposed into Irish law in March 2010 and is only applicable to above threshold contracts.<sup>36</sup> Ireland at present does not incorporate a centralised review body, an aggrieved tenderer must firstly make the complaint to the contracting authority and if they are not satisfied with the contracting authority's response they can then initiate a proceeding before the High Court. The modern Irish legal system is derived from the traditional English common law system, and as such it does not incorporate administrative courts of first instances. The High Court is a superior court and has original jurisdiction and as well as appellate jurisdiction from courts of local jurisdiction. The introduction of the Remedies Regulations in 2010 in addition to the noticeably increased level of competition for public contracts have resulted in a significant increase in the amount of procurement challenges being initiated before the Courts in the last year. It is estimated that

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<sup>35</sup> Department of Public Expenditure and Reform. Circular 1/11 Model Tender and Contract Documents for Public Service and Supplies Contracts

<sup>36</sup> The European Communities (Award of Public Authorities' Contracts) (Review Procedures) Regulations 2010<sup>36</sup> and the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010<sup>36</sup> implements Directive 2007/66 into Irish law.

approximately ten cases were initiated in the High Court in 2011, of these seven cases were struck out or settled, two cases are pending and one case involved a judgement on a preliminary issue and a cost order in favour of the contracting authority.<sup>37</sup> However, these figures are minuscule in comparison to the figures reported by other EU member states highlighted in the initial section of the paper.<sup>38</sup>

As part of the research undertaking for the *Winning in Tendering* project, a series of interviews and workshops were conducted with 60 Irish small indigenous suppliers (SISs) and legal experts to assess the impact of the legislation over a six month period. The SISs were asked a series of questions varying from knowledge of the regulations, understanding of standstill and debriefing requirements and perceived barriers to initiating challenges. The overall findings found that the SISs had limited or no knowledge of the Remedies Directive and the redress rights available to them. The suppliers also indicated little knowledge, understanding and experience of standstill periods and were unable to identify what information was available to them during debriefing and feedback sessions. The SISs also highlighted a number of factors which would discourage the aggrieved tenderer from initiating a legal challenge, the factors ranged from high cost of legal representation, time period to initiate a challenge and reputational risk. The main findings are detailed below.

### ***1. Implementation of the Regulations***

An initial finding found from the research indicated that SISs believed the Remedies Directive had no direct impact on them since its transposition as it is only applicable to above threshold contracts. This concern is justified, below threshold contracts are subject to the fundamental principles laid out in the Treaty of the Functioning of the European Union (TFEU), mainly the principles of transparency, mutual recognition, proportionality and non-discrimination, and subject to various national guidance documents published by the Department of Finance. A comprehensive guidance document *Public Procurement*

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<sup>37</sup> A&L Goodbody (2012) In Focus; 2011 Irish Procurement Cases

<sup>38</sup> Figure 1.1

*Guidelines – Competitive Process*<sup>39</sup> was published in 2004 in light of the development of the Public Procurement Directives. The document sets out steps to be followed by contracting authorities and entities in conducting processes for both above and below threshold values. The guidance documents encourage contracting authorities to apply standstill periods and debriefing sessions in their below threshold public procurement procedures. However, contracting authorities and entities are not obliged to apply these principles and the guidance documents fail to outline or provide any remedial rights for aggrieved unsuccessful tenderers.

## **2. Knowledge and Understanding of the Directive**

The SISs were asked to indicate their level of knowledge and understanding of both the Public Procurement Directives<sup>40</sup> and the Remedies Directive.

Approximately 45% of the SISs had limited or good awareness of the Public Procurement Directives, while only 20% had a limited to good awareness of the Remedies Directive. The participants who expressed an awareness of the Remedies legislation indicated that they were made aware of its existence by attending public procurement training seminars or reading the Directive in its entirety. Only two participants indicated that they had an extensive knowledge and understanding of the Directive. A link to the Remedies Directive is available on the National Procurement Service<sup>41</sup> and e-Tenders website.<sup>42</sup> However, no informal guidance document on this piece of legislation is available from either site.

## **3. Standstill Period**

The standstill period forms a principle part of the Remedies Directive. However the primary research undertaking indicates that the initial remedial right may be under exposed and limitedly used. Only 25% of the participants interviewed indicated a basic knowledge of the standstill principle and experienced the inclusion of this principle in a tender competition. As previously

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<sup>39</sup> Public Procurement Guidelines – Competitive Process Supplies and Services. 2004. (Updated 2010) Available at;

[http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=3004](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=3004)

<sup>40</sup> Directive 2004/18/EC of 31 March 2004 OJ (2004) L 134/114, Directive 2004/17/EC of 31 March 2004 OJ (2004) L 134/1

<sup>41</sup> Available at; [www.procurement.ie](http://www.procurement.ie)

<sup>42</sup> Available at; [www.e-tenders.ie](http://www.e-tenders.ie)

mentioned, the contracting authorities are only obliged to apply a standstill period to above threshold contracts and are only encouraged to do so for below threshold contracts by the national guidance documents.

#### **4. Debriefing**

The Remedies Directive also requires contracting authorities and entities to provide unsuccessful tenderers with adequate reasons to why they were not selected.

While 60% of the participants interviewed indicated that they were aware of their right to debriefing information, they were not able to identify what information they were entitled to seek.

#### **5. Unintended consequences of the Remedies Directive**

The participants through both the interviews and workshops highlighted a number of concerns and consequences relating to the implementation of the Remedies Directive. The most commonly commented on include;

- A. Cost of Legal Representation
- B. Reputational Risk
- C. Duration of Legal Proceedings
- D. Time period to initiate a Challenge
- E. Time period to initiate a Legal Proceeding

These concerns may also be justified, if an aggrieved tenderer wishes to initiate a challenge to an above threshold contract, they are restricted to the standstill period time limitations, if the tenderer is not satisfied with the contracting authorities' response to the challenge they must initiate legal proceedings within a 30 day period. The proceedings must only be initiated before the High Court.<sup>43</sup> The objective of the Remedies Directive is to provide rapid, transparent and effective redress rights to unsuccessful tenderers, it is questionable whether this has been achieved and promoted through the implementation of the rules in Ireland. Rapid and transparent review procedures are available to

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<sup>43</sup> S.I. No. 130 of 2010 Arrangements of Regulations 8/9/13. / S.I. no. 131 of 2010 Arrangements of Regulations 8/9/13. / Public Contracts (Amendment) Regulations 2009 and the Utilities Contracts (Amendment) Regulations 2009. Amendments of the Principle Regulations. 3(C) 47c / 47f / 47n

aggrieved tenderers in above threshold competitions, but they are costly and time consuming. The Remedies Directive is applied through soft law mechanisms for below threshold competitions, however the government guidance documentation makes no reference to the redress procedures for tenderers.

These views have been reflected and voiced in recent national research undertaken in Ireland by the NPS and Dublin City University. A major new *Report on Opportunities in Public Sector Procurement* was published on the 7<sup>th</sup> March 2012, the Report, is a result of Ireland's first national survey of public procurement practice, carried out by the NPS and Dublin City University, with over 4,000 suppliers and 600 public procurers contributing to the research. The report, the first in an annualised series, provides a panoramic view of the workings of the public procurement market in Ireland. Prior to the "*Opportunities Report*" little in the way of grounded data was available to guide policy and allow for informed debate. The "*Opportunities Report*" provides a unique insight into the current behaviours and opinions of both buyers and suppliers in the Irish public procurement market. The survey asked suppliers to indicate the factors they perceived to be acting as a barrier for unsuccessful tenderers to initiate a legal challenge under the Remedies Regulations, the findings listed below mirror and support the findings undertaken by the Winning in Tendering project.

Factors acting as a barrier for unsuccessful tenderers to initiate a legal challenge under the Remedies legislation	% of Respondents
Cost of Legal Representation	71%
Reputational Risk	63%
Duration of legal proceedings	51%
Time Period to initiate a challenge	36%
Lack of knowledge of the Remedies legislation	63%

It is strikingly clear that the Remedies Directive is not being effectively utilised in Ireland, it appears to discriminate against small to medium size businesses, it is costly, time consuming and pertains a risk of reputational damage for the supplier. These views are clearly depicted in the number of cases arising before

the High Court in 2011 and in the research undertaken by the Winning in Tendering project, DCU and the NPS.

### **WOULD SMES SELLING INTO THE IRISH PUBLIC PROCUREMENT MARKET BENEFIT FROM THE INTRODUCTION OF A SPECIALISED PROCUREMENT REVIEW BODY**

Ireland should consider adopting an effective redress model in the form of a centralised procurement review body. An effective specialised public procurement review body would provide tenderers with a simple and quick means of redress, whilst also deterring contracting authorities from breaching the rules during each stage of the procurement process. An effective body should also concentrate on encouraging contracting authorities to focus on making economically and socially viable award decisions rather than concentrating on designing competitions which are primarily concerned with being legally compliant. The Irish documentation supporting SME access should be reviewed to incorporate substantive guidance on the redress procedures available for below threshold contracts. SMEs will continue to play a central role in the Irish economic recovery and should not be excluded from procurement redress procedures on the basis that it is too expensive and cumbersome. The Irish state needs to rectify this discriminatory practice and should consider implementing a redress model based on the procurement review bodies operating in the European member states.

If a body was to be created, it should embody the traits of the current review bodies operating across the member states. The body should be established to be independent in nature, have the power to investigate, allow complaints from all interested parties, have the power to award the remedies outlined in the Directive with the exception of the power to award damages and should allow for appeals to the High Court.

It is unclear whether the adoption of such a body would enhance the redress rights available to aggrieved tenderers in Ireland. At present, tenderers can avail of each of the remedial rights provided for in the European legislation. The High Court also operates as an independent body, which is vested with the powers to review complaints and award damages. It could be contented that the introduction of a specialised review body would

imitate the High Court's function without providing any further assistance to SMEs.

The state should address the current complaints with the domestic constraints, in particular the costs associated with applications to the High Court.

Ireland can certainly learn from the member states examples, the Remedies Directive appears to have little impact on the Irish public procurement landscape. Ireland could greatly enhance the successfulness of public procurement procedures by adopting an independent review body similar to those operating across the European states or by addressing the current restraints.

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