

## ENHANCING TRANSPARENCY THROUGH THE USE OF STANDARDISED PROCUREMENT TEMPLATES?

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**ABSTRACT:** In light of severe economic deterioration and dramatically reduced public financial budgets, a standardised suite of public procurement templates were introduced in Ireland to achieve administrative savings and to streamline procurement processes. This paper aims to provide a commentary on the ability or lack thereof to enhance transparency at each stage of a procurement procedure.

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The political, social and economic landscape in Ireland has been dramatically transformed over the last five years. In late 2007, there was a major deterioration in the pace of economic growth largely due to the contraction in the building and construction sector. The economy plummeted into a severe recession in early 2008 and has yet to recover. Economic growth has been further hindered by the difficulties in the domestic and international financial markets and the associated recession in the economies of major trading partner states.<sup>2</sup> In an attempt to redress the budgetary deficit which Ireland was abruptly confronted by, stringent austerity measures were introduced to control public expenditure. Accordingly, a diverse range of initiatives and measures was introduced to streamline and improve efficiencies of governmental bodies. Public procurement was an area targeted by some of these measures and initiatives.

On 17 June 2011, the Irish Minister of State with special responsibility for the Office of Public Works (“OPW”) launched a standardised suite of public procurement documents. The set of standardised legal documents comprises model templates of request for tenders (“RFT”) for supplies, services and goods, which incorporate model template contracts for such supplies and services. The initiative to standardise legal procurement documents was ultimately introduced to drive cost savings in light of the state’s poor financial circumstances and to streamline and improve procurement practices.<sup>3</sup> This paper considers whether this suite of legal documentation is capable of achieving these objectives.

Transparency is one of the fundamental principles in promoting competitive, open and effective procurement operations.<sup>4</sup> The provision of maximum clarity and transparency in procurement

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<sup>2</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>3</sup> Hayes, Brian. (2011) *Time to tackle wayward practices to drive cost savings*. (Press Release) Available at; <http://www.merrionstreet.ie/index.php/2011/06/time-to-tackle-wayward-practices-to-drive-cost-savings-in-public/?cat=12>

<sup>4</sup> Case C-507/03, *Commission v. Ireland* [2007] ECR I-9777

processes has been highlighted as one of the key objectives behind the introduction of the comprehensive suite of legal documentation.<sup>5</sup> The template documentation is divided into three procedural components: compliance and qualification; award; and contract.

### IRELAND AS A CASE STUDY

*The National Recovery Plan 2011-2014*<sup>6</sup> was published in Ireland last year. It outlines the recent reductions in public expenditure and encompasses the national financial plan for a return to sustainable growth in the economy. The detailed blueprint plan concentrates on reducing public expenses whilst protecting small indigenous enterprises, promoting market competitiveness and delivering better services to the citizens at a lower cost. The plan emphasises the need to secure greater efficiency, transparency and effectiveness in the public procurement market.

There is no definitive estimate of the value of the public procurement market in Ireland. It appears from various sources that the value ranges between €9 billion and €14 billion.<sup>7</sup> The true figure may fall somewhere in between these estimates, the National Recovery Plan published the following estimated figures for the Irish procurement market:<sup>8</sup>

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<sup>5</sup> The Office of Public Works. Press Release. Time to Tackle Wayward Practices to Drive Cost Savings in Public Procurement as Minister Hayes launches standardised suite of procurement documents. 17 June 2011

<sup>6</sup> The National Recovery Plan 2011 - 2014. <http://www.budget.gov.ie/The%20National%20Recovery%20Plan%202011-2014.pdf>

<sup>7</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>8</sup> The National Recovery Plan 2011 - 2014. Table 4.1. Current Expenditure Measures.

Composition of Allocations 2009 – 2014					
	Public Expenses accumulated; Administrative Subsidies, Grants and other Schemes and Procurement				
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

However, these figures cannot be relied upon as an accurate reflection of the value of the Irish public procurement market as the procurement financials are not valued in isolation but are calculated in conjunction with allocations for administrative subsidies, grants and other schemes. Notwithstanding the allocations, the table would suggest a downward trend in the value of the Irish public procurement market.

The National Procurement Service (“NPS”) was established in 2009 to organise the procurement of common goods and services and to implement government policies in relation to procurement practice. The NPS were instrumental in the creation of the standardised legal documents. The publication of these documents was one of the major procurement initiatives introduced in direct response to the current economic climate and intended to improve efficiency in public procurement procedures. The NPS urged all public sector procurers

utilise these documents in order to mitigate the legal risk associated with individual bespoke requests for tenders and contract forms.<sup>9</sup>

The concept of standardised templates and procurement procedures is not entirely new to Ireland. Procedures have become formalised through the implementation of public procurement legislation and sector specific templates have been introduced slowly over the last five years. This paper will briefly explore these developments to uncover their influential impact on the creation of the suite of legal documentation introduced by Minister Hayes and the NPS.

### DEVELOPMENT OF THE STANDARDISED TEMPLATES

The activity of public procurement involves the disbursement of public money aimed at the acquisition of works, supplies and services for consideration.<sup>10</sup> Public procurement activities are used to fulfil stated government policy objectives.<sup>11</sup> There are several sources of public procurement law in Ireland. The primary source is the Directives adopted by the European Parliament and Council – secondary law.<sup>12</sup> The Directives were designed to provide conformity and control of public procurement processes in the single market.<sup>13</sup> They have resulted in the standardisation of public procurement procedures. The legislation sets out detailed procedural rules and remedial rights for contracts with a value over the pre-determined EU financial thresholds (above threshold contracts). The Directives comprise a series of substantive rules which embody the general principles and govern the award of public contracts, public works concessions and design contests.

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<sup>9</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>

<sup>10</sup> Glynn, B. 2012

<sup>11</sup> Pier and McCue, 2009

<sup>12</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

<sup>13</sup> Mori and Doni 2010

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. All procuring activities undertaken by Member State’s public procurers for both above threshold contracts and those that have a value below the EU financial thresholds (below threshold contracts) must conform to the principles derived from the fundamental freedoms. Those principles include: transparency; mutual recognition; proportionality; non-discrimination; and equal treatment.

The Directives were transposed into Irish national law by statutory instruments, providing for the basis of a standardised system in Ireland. The *European Communities (Award of Public Authorities’ Contracts) Regulation 2006*<sup>14</sup> implements *Directive 2004/18/EC* and the *European Communities (Award of Contracts by Utility Undertakings) Regulation 2007*<sup>15</sup> implements *Directive 2004/17/EC*. In March 2010, Ireland transposed the EU public procurement *Remedies Directive 2007/66/EC*. The Remedies Directive further enhances the standardised public procurement procedures by imposing common national review procedures aimed to encourage recourse to rapid, transparent remedies for unsuccessful tenderers. The Directive introduces mandatory standstill periods, structured debriefing requirements and provided for strict rules against illegal direct awards. Ireland has yet to transpose *Directive 2009/81/EC* on the award of contracts in the fields of defence and security into national law.

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<sup>14</sup> SI No. 329 of 2006

<sup>15</sup> SI No. 50 of 2007

Unlike the majority of the European Member States, Ireland only applies the Directives to above threshold contracts.<sup>16</sup> When procuring below threshold contracts, procurers do not have to abide by the structured procedures set out by the Directive (such as specified time limits) but they are subject to the fundamental principles laid out in the TFEU and various national guidance documents published by the Department of Finance. A comprehensive guidance document *Public Procurement Guidelines – Competitive Process*<sup>17</sup> was published in 2004 following the publication of the Directives. This document details the procedure to be adopted by contracting authorities in conducting procurements for both above and below threshold contracts.

A semi-centralised procurement system operates in Ireland with various central government departments, local county councils and semi-state bodies overseeing their individual procurement requirements. There has been a notable movement towards a more centralised system since the introduction of the Directives, this is most evident in the context of the construction and ICT sector. In 2004, the Government sought to address the decentralised diverse public procurement procedures used for large scale construction projects. The government announced two key initiatives intended to provide cost savings to address the concerns about the extent of cost overruns experienced throughout the duration of the contracts and to develop more client-focused and standardised conditions for the employment of construction consultants. In order to implement these initiatives, a *Capital Works Management Framework* system was established. This comprised the following three core objectives: to promote cost efficiency at initial tender award stages; to achieve

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<sup>16</sup> European Commission Internal Market and Services. *EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report 2011*

<sup>17</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)

better value for money in large scale contracts; and to conduct more efficient and effective procurement procedures.<sup>18</sup>

A dedicated construction procurement reform website was launched and it provides guidance in relation to contractual provisions and on the use of the technical templates and procedures.<sup>19</sup> In 2007 the Minister for Finance launched four new forms of construction contracts for public works, including templates for employer designed contracts, for civil engineering and building works and templates for the design and build contracts for civil engineering and building works. A suite of contract templates for minor construction contracts was published in 2008.<sup>20</sup>

These template contracts differed greatly from the previous national construction contracts, namely, the *Government Department and Local Authorities Contract (GDLA) (1982) for building works* and the *Institute of Engineers Contract (1990) (1993) for civil engineering works*. The new contracts attempted to reduce the contracting authorities' financial risk by ensuring that as much of the construction costs would be reflected in the tender price and by eliminating the ability of the contractor to deviate from the agreed costing throughout the duration of the contract.<sup>21</sup>

The introduction of the templates marked a significant departure from the traditional tendering approach to public sector construction contracts. A report published in January 2011 by the Department of Finance on the *Value for Money and Policy Review of the Construction Procurement Reform Initiative* announced early financial benefits from the implementation of the initiatives. The report

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<sup>18</sup><http://constructionprocurement.gov.ie/wp-content/uploads/Value-for-Money-Review-of-Construction-Procurement-Reform-Initiative.pdf>

<sup>19</sup> <http://constructionprocurement.gov.ie>

<sup>20</sup> Circular 33/06; Construction Procurement Reform – Revision of Arrangements for the procurement of public works projects and for the engagement and payment of construction consultants. Available at; <http://www.finance.gov.ie/documents/circulars/c330.pdf>

<sup>21</sup> <http://constructionprocurement.gov.ie/wp-content/uploads/Value-for-Money-Review-of-Construction-Procurement-Reform-Initiative.pdf>



estimated that a total of €0.4 million was spent on the design and drafting of the template documents from the period 2004-2008 and an overall cost savings from all of the initiatives combined totalled between €75 million and €150 million. The Department of Finance praised the templates for enhancing the level of certainty, competition and transparency in the procurement processes.<sup>22</sup>

Standardised Request for Tender (“**RFT**”) and contract templates are also widely used and promoted in the ICT sector in Ireland. This sector is becoming increasingly centralised with seven national ICT frameworks currently in operation.<sup>23</sup> The ICT sector is also becoming centralised at an EU level with the Commission currently reviewing and constructing detailed guidelines on how best to utilise ICT standards in tender specifications.<sup>24</sup> Standardised templates are also extensively used in private sector procurement. For example, Oracle Corporation use centralised contracts across the entire organisation and claim that the introduction of the templates has established contractual control, reduced legal risk, reduced time to contract and enhanced contract compliance.<sup>25</sup>

The standardised RFT and contract templates launched in July 2011 aim to achieve similar goals on a national basis. Rather than focussing on industry specific standards, this latest suite of documents aims to promote transparency and efficiency in the procurement of all low - medium risk goods, supplies and services across the board.

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<sup>22</sup> Department of Finance. Value for Money and Policy Reform Review of the Construction Procurement Reform Initiative 2011. Available at; <http://constructionprocurement.gov.ie/wp-content/uploads/Value-for-Money-Review-of-Construction-Procurement-Reform-Initiative.pdf>

<sup>23</sup> The seven national ICT frameworks include; Personal Computer Framework, Notebook Computer Framework, Monochrome Laser Printer Framework, Colour Laser Printer Framework, Mobile Telephone Framework, Fixed Line and VOIP Framework and the Software Asset Management Framework

<sup>24</sup> Sheppard, S. 2012

<sup>25</sup> Oracle Data Sheet. 2009

### STANDARDISED SUITE OF DOCUMENTS

The Department of Public Expenditure and Reform introduced the suite of legal documentation through *Circular 1/11* on 17 June 2011. Contracting authorities are not mandated to use these templates. The Circular does however encourage the use of the forms for all routine, non-bespoke above threshold contracts which deal with 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 the risk of breaches of the procurement legislation.<sup>26</sup>

The suite of documents includes model templates of request for tenders (RFTs) for supplies, goods and services and model template of contracts for such supplies, goods and services. The documents is supported with guidance notes on the use of the templates which are all freely available to both suppliers and buyers on two national websites, the NPS website<sup>27</sup> and the national electronic tender advertisement site<sup>28</sup>.

The RFT templates are divided into four sections: the introduction; the instruction to tenderers; the qualification and award criteria; and appendices. Similar to the construction templates, the contract forms a key part of the RFT conditions on which the tenderers bid. This again is an effort to promote greater transparency in the process and to limit the possibility of costs over-runs. As these templates are in place less than a year, it is premature to assess the financial benefits derived from their implementation. The documents can however be assessed in light of their capacity to enhance transparency in the procurement procedures.

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<sup>26</sup> Department of Public Expenditure and Reform. Circular 1/11 Model Tender and Contract Documents for Public Service and Supplies Contracts

<sup>27</sup> <http://www.procurement.ie/> National Procurement Service

<sup>28</sup> <http://www.etenders.gov.ie/> e-Tenders national tender advertisement site

All contracting authorities are obliged to conduct each procurement in a transparent and open manner. This is enshrined in EU and national legislation and has been rigidly enforced by the Court of Justice of the European Union. The Court's ruling in the prominent *Teleaustria*<sup>29</sup> confirmed that the principle of transparency requires at the very least an obligation to advertise the proposed contract contemplated. In *Unitron Scandinavia and 3-S*<sup>30</sup>, the Court ruled that in order to comply with the principle of transparency, a contracting authority is required to adequately advertise the procurement competition and ensure that the competition is conducted in an open and impartial manner throughout. The Court reiterated the importance of upholding the fundamental principles in all aspects of procurement procedures regardless of the cross-border interest and estimated value of the project.<sup>31</sup>

A recent English judgement questioned whether the use of a standardised contract could satisfy the transparency provisions outlined in the public procurement Directives. In the *Law Society and Legal Services Commission* case<sup>32</sup>, the Law Society argued that a provision contained in the Legal Services Commission's standardised Unified Contract constituted a breach of the transparency rules. The principal argument centred on a provision that gave the Legal Services Commission a broad power to make unilateral amendments to the contract terms, including the technical specifications. The Court found in favour of the Law Society, agreeing that the provision in the Unified Contract had breached the principles of transparency by reserving to itself a virtually unlimited power of amendment, subject only to some limited procedural conditions. The Court however, stated the remainder of the Unified Contract had been designed in an open and transparent manner, allowing a reasonable tenderer to clearly understand each term and condition.

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<sup>29</sup> Case C-324/98 *Teleaustria Verlags Gesellschaft mbH v. Post & Telekom Austria* [2000] ECR I-10745

<sup>30</sup> [1999] ECR I-8291

<sup>31</sup> Case C-507/03, *Commission v. Ireland* [2007] ECR I-9777

<sup>32</sup> *The Queen on the application of the Law Society and Legal Services Commission* [2007] EWCA Civ 1264

It is now worth considering whether the Irish standardised documents comply with the fundamental principle of transparency in low-medium risk procurement procedures.

### ***Compliance and Qualification Criteria***

The initial section of the RFT templates outlines the legal and procedural obligations placed on both contracting authorities and tenderers. Tender applications that fail to meet the compliance requirements may be rejected at this stage at the discretion of the contracting authority<sup>33</sup>. The criteria are assessed on a mandatory pass or fail basis. The list of compliant criteria can be classified as follows:

#### ***1. Legal Compliance***

Tenderers are firstly assessed on their ability to comply with financial and social policy legislative requirements deriving from both EU and national legislation. Tenderers are requested to state they are compliant with current financial, tax, and employment protection legislation including, but not limited to, the *Competition Act 2002*, the *Ethics in Public Office Act 1995*, and the *Freedom of Information Acts 1997 and 2003*.

Tenderers must sign a *Declaration as to Personal Circumstances of Tenderer* declaring that the tenderer is not subject to proceedings for a declaration of bankruptcy, that neither the tenderer, nor any of its directors or partners has been convicted of an offence concerning professional conduct by a judgement which has the force of *res judicata* or has been convicted of fraud, money laundering, corruption, and the Tenderer has fulfilled its obligations relating to the payment of taxes, social security contributions in its country of establishment or any other state in which the tenderer is located.<sup>34</sup>

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<sup>33</sup> 2.2 RFT for Services / 2.2 RFT for Goods

<sup>34</sup> Appendix 5; Declaration as to Personal Circumstances of Tenderer. RFT for Goods / RFT for Services. Note these exclusion criteria have been derived from Art. 45 Directive 2004/18/EC

In addition, tenderers are also required to state that they are compliant with all EU and domestic taxation legislation including conditions outlined in the Department of Finance's Circular guidance documents and are obliged to provide requisite evidence thereof upon progression to the award stage of the competition. The benefit of the inclusion of the declaration as to the personal circumstances of the tenderer is twofold:

- (a) it highlights the tenderers' responsibilities and duties in relation to employment and financial legislation compliance in a direct, open and transparent manner; and
- (b) it fulfils the contracting authorities' responsibility to assess a tenderer's ability to comply with these terms.

The templates therefore provide transparency and clarity on the requisite legal compliance requirements for both public procurers and tenderers.

## 2. *Procedural Compliance*

In order for a tender to be comprehensively assessed, the tender application must be completed in the correct template format, with no sections amended, altered or deleted. A tender application will only be assessed once it is received on time with all specified documentation attached. The public procurers are also prohibited from amending or altering the templates or accepting a late tender without firstly requiring special permission from the National Procurement Service.<sup>35</sup> The templates clearly present the procedural compliance requirements in an open and transparent manner.

The compliance section forms an essential component of the RFTs. The compliance section, both legal and procedural, assists the public procurers by streamlining their legislative duties and in turn mitigating legal risk. This section appears to enhance transparency in the initial stages of the procurement process. Any reasonable

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<sup>35</sup> 2.2 Compliant Tenders RFT for Goods / RFT for Supplies

tenderer can clearly appreciate its responsibilities and duties to comply with the specified procedures and legislation.

A minor point of contention is the fact that public procurers are not required to automatically reject tender applications which fail to comply with the stated requirements. The public procurers may, at their discretion, progress non-compliant tender applications to the next stage of the qualification procedure. A greater degree of transparency would be achieved if this discretion was not afforded to the public procurer. There may be an argument to be made that this discretion is necessary to protect fair competition.

A more progressive and proportionate approach could be adopted whereby the documents include an exhaustive list of circumstances in which a non-compliant tenderer may be given an opportunity to progress to the qualification stage of the competition. Included in this list could, for example, be a provision allowing tenderers an opportunity to rectify procedural mistakes (such as signature of a declaration form or accepting late tender submission in exceptional circumstances). If such a list were included, it would enhance the openness of the procedure for both suppliers and procurers and would incorporate a greater degree of commercial flexibility within defined parameters without conferring an unfettered discretion on contracting authorities.

The UK courts however have displayed a disinclination for allowing the rectification of errors after the submission of tenders.<sup>36</sup> In *Re Hoole*<sup>37</sup>, the English High Court rejected an application to allow a tenderer to rectify an unfortunate procedural error made in the application. The court found that a tenderer would only be allowed to rectify such an error in exceptional cases and in particular where the contracting authority had made an error. A similar ruling was also

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<sup>36</sup> Brunning, S. 2011

<sup>37</sup> *R. (on the application of Hoole & Co.) v. Legal Services Commission* [2011] EWHC 886 (Admin) (QBD (Admin))

delivered in *Re Harrow*<sup>38</sup>, where the High Court stated its reluctance to interfere with a contracting authority's discretion to reject a tender in cases where the fault lies with the tenderer. The High Court in *JR Jones*<sup>39</sup> also ruled against any amendments being made post tender submission, suggesting that these forms of amendments would create practical and real risks of abuse.

However, if a list of permissible changes and amendments are drafted carefully it could mitigate against risk of abuse and could enhance competition by providing a degree of flexibility to small and medium enterprises which struggle to competently complete the cumbersome tender application forms. The RFTs should attempt to facilitate small and medium enterprises and be responsive to the practical and commercial realities faced by such entities in difficult economic times.

#### *Qualification Criteria*

Once a tenderer progresses from the compliance stage, the application is assessed in accordance with the *Qualification* and *Award Criteria* set out in the RFTs. The qualification criteria are divided into two sections;

##### *1. Economic and Financial Standing*

The tenderers must demonstrate that they can meet the financial and economic requirements specified in the individual RFTs. This section is assessed on a pass/fail basis.

The templates incorporate the Department of Finance's guidelines for facilitating participation of SMEs in public procurement.<sup>40</sup> The

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<sup>38</sup> *R. (on the application of Harrow Solicitors and Advocates) v Legal Services Commission* [2011] EWHC 1087 (Admin); (2011) 108 (20) L.S.G. 20(QBD (Admin))

<sup>39</sup> *JR Jones v Legal Service Commission* [2010] EWHC 3671

<sup>40</sup> The Department of Finance Circular 10/10: 'Guidance for Contracting Authorities; Facilitating Participation of SMEs in Public Procurement'

templates incorporating the guidelines include the provision for self-certification by tenderers for economic and financial qualification criteria. Only the identified preferred tenderers are required to furnish the requisite supporting and evidentiary documentation at the end of the evaluation process.<sup>41</sup> This reduces somewhat the administrative burden on tenderers.

## 2. *Technical and Professional Ability*

Tenderers' ability to fulfil technical and professional requirements and provide evidence of same are also assessed at the qualification stage.

The qualification criteria as drafted, are relatively straightforward and transparent. The criteria and the scoring method is clearly communicated to the tenderer from the outset which is commendable. However, contracting authorities need to exercise caution when setting out the levels of ability and capacity which they require. They must specify levels of ability and capacity which they deem necessary and proportionate to the proper execution of the contract in question. Contracting authorities must also avoid any conflict with or duplication of any of the compliance or award criteria. The Court of Justice and the Irish and UK courts have been very vocal in recent cases on the importance of accurately outlining the selection and qualification criteria for tenderers and clearly recording the evaluation bodies' decisions. In the early 2012 Northern Ireland *Clinton*<sup>42</sup> case, the plaintiff contested the inclusion of one of the selection criteria and questioned whether it was necessary. The Court, in reaching its decision, referred to the earlier Court of Justice *SIAC*<sup>43</sup> decision, which stated that information disclosed by the contracting authority should be clear and precise enough to permit all

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<sup>41</sup> Appendix 3. RFTs for Goods / RFTs for Services

<sup>42</sup> *Clinton t/a Oriel Training Services v Department for Employment and Personnel NIQB 2*, Northern Ireland High Court, McCloskey J, QBD, 24 January 2012

<sup>43</sup> *SIAC Limited v Mayo County Council* [2002] J ILRM 41



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reasonably well informed and normally diligent tenderers to interpret it uniformly. In *Clinton*, McCloskey J using the SIAC test stated that;

*“The SIAC hypothetical tenderer is a terrestrial, rather than celestial being, hailing from earth not heaven... The Court should approach the matter not as an exercise in statutory construction or as one involving the interpretation of a deed or contract or other legal instrument... Rather, the Courts’ attention must focus very much on the “industry concerned” in which the professionals and practitioners are not lawyers”.*<sup>44</sup>

Contracting authorities should therefore be mindful to ensure that they utilise the RFTs in a manner that is transparent and proportionate to the objectives sought to be achieved.

#### **AWARD**

Once a tender application has complied with the initial legislative and procedural aspects, it will be evaluated in accordance with the award criteria set out in the RFT. The highest ranked tenderer will then be requested to provide evidence of previously stated qualifications. If the tenderer fails to produce the evidentiary documentation, they will automatically be eliminated and notified of their disqualification. The next highest ranked tenderer must then produce such evidence. Once the successful compliant tenderer is identified and nominated, a standstill notice is issued to both that party and to all unsuccessful tenderers. The contract may only be executed once the standstill period has elapsed.<sup>45</sup>

A contracting authority has the option to use either *Lowest Price* or *Most Economically Advantageous Tender (MEAT)* as the basis on

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<sup>44</sup> *Clinton t/a Oriel Training Services v Department for Employment and Personnel NIQB 2*, Northern Ireland High Court, McCloskey J, QBD, 24 January 2012

<sup>45</sup> 3.5 RFTs for Goods / RFTs for Services.

which to assess the tenderers. The RFTs contain alternative text for each option. If the contracting authority chooses to use the *MEAT* criterion it can then include additional award criteria. The contracting authority must indicate the additional award criteria and the associating marks available clearly.<sup>46</sup> The additional criteria must be linked closely to the subject matter of the overall contract.<sup>47</sup>

The award section appears to encourage an open and transparent assessment procedure by requiring full disclosure of the criteria and the scoring methodology. In theory, this should result in the conduct of a transparent procedure once the instructions are followed closely by the contracting authority. However, the RFTs could have encouraged a greater form of transparency, openness and fairness by including guidelines on the use of the *Lowest price* and *MEAT* criteria, in particular guidance on the use of maximum pricing methodologies in the *MEAT* criterion.

The Remedies Directive provides for the mandatory use of a ‘*standstill period*’ for above threshold contracts. The Directive aims to protect tenderers’ rights and to create competitive, fair tendering processes by imposing a ‘*standstill period*’ and strict rules against illegal direct awards. The ‘*standstill period*’ requires the contracting authority to refrain from executing the proposed contract for a specified period after the winning tenderer has been identified. The purpose of the standstill period is to give unsuccessful tenderers sufficient time to assess whether it is appropriate to initiate a review procedure. Once review proceedings are initiated, the procurement

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<sup>46</sup> Note; As with the compliance and qualification criteria, the Courts require all information disclosed to be clear, precise and accurate, this was reiterated in *Resource (NI) Limited v Northern Ireland Courts and Tribunal Service* [2011] NIQB 121, McCloskey J and in *Release Speech Therapy Ltd v Health Service Executive* [2011] IEHC 57, McMahon J

<sup>47</sup> Guidance Note on the use of the Model Goods Request for Tender / Guidance Note on the use of the Model Supplies Request for Tender

process is automatically suspended and the contract cannot be entered into until the review is concluded or discontinued.<sup>48</sup>

The requirement to maintain a standstill period places responsibility onto the contracting authority to swiftly inform the tenderers of the winning tender and to provide the reasons as to why the other participants were not selected.<sup>49</sup> The Irish Remedies Regulations provide for a minimum standstill period of 14 days if the notice is sent by fax or electronic means, and a minimum of 16 days if the notification is posted.<sup>50</sup> The standstill period provision attempts to discourage the illegal direct award of contracts and enhance the transparent nature of the award process as a whole. However, it is not clear whether the provision applies to below threshold contracts.

The Remedies Regulation itself only applies to above threshold contracts. The standardised suite of procurement templates was designed for procuring low to medium risk goods, supplies and services in relation to above threshold contracts, but can also be used for below threshold contracts. The reference to the standstill period in the suite of templates is therefore inappropriate in respect of below threshold contracts as a contracting authority is not legally obliged to hold a standstill period in respect of below threshold contracts.

The RFTs and Guidance Documents indicate clearly that a contracting authority must not sign or execute the contract until the standstill period has elapsed or until such time as any issues which arise

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<sup>48</sup> Directive 2007/66/EC of the 11<sup>th</sup> December 2007 with regard to improving the effectiveness of review procedures concerning the award of public contracts. Article 2.2(a)

<sup>49</sup> Note; The requirement for an authorising agent to provide sufficient information to the tenderer explaining the reasons why they were not successful was quickly applied in the judgment of *European Commission v Cyprus* (C-251-09) The Court of Justice applied this rule when examining the undisclosed evaluation criteria and failure to appropriately notify reasons for rejection of a tender for Vassilikos power station.

<sup>50</sup> S.I. No. 130 of 2010 Arrangements of Regulations 5. / S.I. no. 131 of 2010 Arrangements of Regulations 5.

during that period have been resolved. However, the documents fail to distinguish between the obligations on a contracting authority in relation to above threshold contracts and below threshold contracts.

It may have been useful if the RFTs had included guidance on the information that should be included in the standstill letter and been clearer in respect of the remedies available to tenderers in relation to above and below threshold contracts.<sup>51</sup>

### CONTRACT

Model goods, supplies and services contracts are issued and form part of the model RFTs. Contracting authorities are required to draft provisions for the contract and RFTs simultaneously. The contracts clearly outline the terms and conditions, the specifications, charges and special conditions relating the operation of the contract in an open and transparent manner. Similar to the RFTs, the contracting authorities cannot amend any provisions without firstly requesting written permission from the NPS. This introduces an element of rigidity and inflexibility, which may reduce the administrative savings and incentives for public procurers to use these templates.

These concerns have been 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 annual 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

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<sup>51</sup> Note; 63% of public procurers surveyed indicated a belief that a lack of knowledge of the public procurement rules act as a barrier for unsuccessful suppliers to initiate a challenge under the Remedies Directive. *Opportunities in Public Sector Procurement* The National Procurement Service Annual Survey 2012

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.

As part of the survey 608 public procurers were asked if they were using the standardised suite of documents in their organisation. The public procurers represented a variety of public organisations, including central government departments, local authorities, state agencies, utilities sector, semi-state companies and educational institutions. Of the 608 respondents, only **52%** stated they were using the standardised documents. The remaining **48%** of the respondents were questioned on the reasons why they were not utilising the templates. The three most popular responses were as follows:

1. unawareness of the documents existence;
2. difficulty of use;
3. belief that individual organisations' existent procurement templates were better suited to their procurement needs.

It is interesting to note, that less than half of these 608 public procurers have undertaken training in public sector procurement in the last 3 years. Only **10%** of the public procurers declared that they are active members of a procurement professionals' association. It could be assumed, that just under half of the procurers interviewed did not receive any training on the correct usage of the standardised documents. In order for the objectives of the standardised templates to be effectively achieved, the Department of Finance and the NPS will have to examine and investigate these results carefully. This commentary has included some broad recommendations that could lead to greater, more significant cost-savings and promote more streamlined and effective procedures.

## RECOMMENDATIONS

Whilst the standardised templates enhances familiarity with the documents templates should be substantially simplified and brought back to the bear necessity allowing more flexibility to contracting authorities. It is finding the right balance between familiarity and flexibility that needs to be the next emphasis. As currently drafted the standard templates are dealing with all the possible eventualities (i.e. are giving a full 'a la carte menu' of what the contracting authority can ask). This approach does not require the contracting authority to consider precisely what emphasis it wishes to put on the pre-qualification and RFI. Contracting authority feel, when given the choice, that they should 'tick all the boxes' for fear of not asking for the full menu. However, when a contracting is not hungry (to continue the analogy) and merely wants a starter, then they should be given the possibility to do so. Perhaps, this can be explained to candidates through training and education. Whilst this is a possible solution, it will still be necessary for contracting authorities to get the maximum flexibility and as such the standard documents should not be issued in PDF format and be restrictive in the number of changes that can be made to it. Again, a right balance is required to be a full success.

Furthermore, the suite of legal documentation appears largely concerned with complying with the public procurement rules and mitigating legal risk, rather than on promoting the production of good award decisions. The templates attention should focus on specification design rather than compliance adherence, concentrating on encouraging accurate specifications and award criteria design to stimulate market competition and innovative product development. A level of freedom to draft specification schedules which are directly related to the subject matter of the contract needs to become embedded in the documents to guarantee sensible cost effective purchasing results. Further training should be provided to public procurers on the economic and administrative benefits to be gained from conducting effective procurement regimes, from initial market testing to contract delivery. The template documents can encourage such improvements, by highlighting the importance of producing clear contractual requirements at the initial advertising stage, offering clear guidance and explanations as to

specific requirements to be catered for in the methodology and explaining in the documents the information and redress procedures available to suppliers after the award decision.

There are some positive initiatives included in the documentation that could be replicated in other member states. Member states could take inspiration from the SME supportive inclusions, the documents require the use of the open procedure, only require suppliers to declare that they meet the financial and insurance capacity requirements at the initial tendering stage and they encourage the division of large contracts into 'lots'. The majority of the EU member states encourage the use of sector specific templates and promote best practice guidance through centralised procurement bodies, such as the Public Procurement Commission in Estonia, Public Procurement Office in Poland, Procurement Review Chambers in Germany, and the Public Procurement Advisory Unit in Finland.

However, at present there are no significant findings, which could be replicated in other states. The author plans to continue this research by examining the financial savings gained over the initial year by specific case study groups. The research will also take into account the impact the introduction of the documentation had on the public procurers' workload, the time spent by suppliers completing the requests and will record the number of challenges initiated before the courts for competitions that used the standardised documents. This research will be fruitful for any state that wishes to introduce or update generic procurement templates.

## CONCLUSION

The suite of standardised procurement templates is a welcome addition and from the outset they do appear to enhance transparency in the public procurement procedures. The templates encourage clear specifications from the advertising stage and once they become embedded by contracting authorities they have the potential to streamline open and transparent cost effective procurement

procedures. However, the templates currently pose a number of difficulties. They still appear cumbersome and administratively difficult to use. They need to be revised in light of the lack of public procurer uptake and reviewed to include more flexible and simplified provisions. The templates should be supported with further training and more detailed guidance notes. The suite of documentation should be used to promote innovative and productive procurement processes which have the ability to adapt to the current economic climate. In order for the documents to achieve their basic goal of promoting the efficient use of public spending, the documents should be revised to remove the focus from compliance concentration to specification and award criteria design. Public procurers should enjoy the freedom to select criteria which directly relates to the function and performance to the subject matter of the contract. The introduction of greater flexible procedures would encourage cost efficient purchasing results and foster market competition. In essence, these standardised documents are a good beginning, but a greater flexibility now needs to be build into same and a substantially simplified documents should be produced to be accepted by small and medium enterprises and other tenderers in general.

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