

Higher Education Authority

Public Procurement Guidelines - Competitive Process

Supplies and Services

Foreword

1. The Higher Education Authority (and the Irish Research Council) as a publicly funded body is required to ensure that it adheres to best practice in relation to public procurement. The main body of existing guidance on public procurement is set out in the following;

Department of Finance/Public Expenditure and Reform Guidelines

- (i) “The Brown Book” guidance on supplies and services (2004) relating to competitive tendering and value for money
- (ii) Circular 10/10 – facilitating SME participation and public procurement (August 2010)
- (iii) Circulars 02/09 and 02/11 concerning ICT procurement
- (iv) Circular 16/13 mandatory use of Central Framework Agreements concluded by the National Procurement Service

EU Treaties and Directives

- (i) Articles in the EU treaties underpinning freedom of movement of goods, freedom of establishment and freedom to provide services
- (2) EU Directives including 89/665 EEC, 2004/18/EC and 2007/66/EC

Copies of these directives are available of the National Procurement Service Website

<http://www.procurement.ie/>

2. This document sets out steps to be followed in conducting an appropriate competitive process under EU and national rules. These guidelines will be updated periodically having regard to EU and national rules.

3. Staff should note that there are specific additional guidelines including the engagement of management consultants in the civil service, appraisal and management of capital expenditure proposals in the public sector, environmental considerations in public procurement and on the engagement of advertising, public relations and creative design

services. These are available on the government’s e-tenders site www.etenders.gov.ie and the National Procurement Service Website <http://www.procurement.ie/>. The NPS has a mandate to centralize the public service procurement arrangements for common goods and services. As these arrangements are rolled out the HEA will purchase goods and services under central framework agreements concluded by the NPS – see circular 16/13.

<http://www.procurement.ie/publications/circular-1613-revision-arrangements-concerning-use-central-contracts-put-place-national>

4. In accordance with the Code of Practice for the Governance of State Bodies the HEA has developed a set of guidelines for capital investment appraisal. A copy is available from Systems Funding – Capital Programmes.

Public Procurement Guidelines - Competitive Process

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1. Key Principles

1.1 It is very important that the public procurement function is discharged honestly, fairly, and in a manner that secures best value for public money. The HEA as a publicly funded body needs to demonstrate that it is cost effective and efficient in the use of resources while upholding the highest standards of probity and integrity. Procurement practices are subject to audit and scrutiny under the Comptroller and Auditor General (Amendment) Act 1993 and the HEA, through its Chief Executive Officer is publicly accountable for expenditure incurred.

1.2 In general, a competitive process carried out in an open, objective and transparent manner can achieve best value for money in public procurement. Specific EU rules apply in respect of contracts over a specific threshold – see Appendix I for thresholds.

1.3 Even in the case of procurement which might not be subject to the full scope of the Directives, such as the ‘non – priority’ services (see appendix IIB) or service concessions, the EU Commission and European Court of Justice (ECJ) have ruled that the Treaty principles of non - discrimination, transparency, freedom of movement, freedom to provide goods and services, must be observed. ECJ case law implies a requirement to publicise and advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

2. Important General Issues

Expertise and Probity

2.1 The HEA is obliged to ensure that staff involved in purchasing or placing contracts are familiar with the EU and international rules that may apply and are aware of the legal and policy framework within which procurement must be conducted. Staff who are responsible for inviting tenders should consult the Head of Corporate Affairs, Management Accountant or SEO Personnel & Accounts if they require clarification in relation to this

policy. The HEA has a procurement section on the staff intranet pages which contains useful information. <http://intranet/>. The aforementioned National Procurement Service and eTenders website also contain very valuable information. Once a tender has been evaluated and recommendation approved, a purchase order will be raised. The member of staff who raised the purchase order will be required to confirm whether an invoice may be paid.

Casual Purchases

3.2 Purchasing profiles should be examined to minimise casual or “once off” purchases. The HEA will monitor recurring or ongoing requirements to ensure appropriate value for money is being achieved. Where necessary, an appropriate contracting arrangement should be put in place for efficient and cost effective delivery of recurring supplies and services.

Subsidised Contracts

3.3 Most works and related services contracts awarded by a private entity, which are subsidised 50% or more by a public body, must be awarded in accordance with the EU Directives if they exceed the EU thresholds. The HEA is required to ensure that this provision is observed.

For contracts below the EU thresholds funded or part-funded from public funds, awarded by private sector entities, the HEA is required to ensure that they are awarded in accordance with the procedures set out in Section 5 of these guidelines to the extent that this is practical and proportionate. Where appropriate, this requirement should be included among the conditions attached to the grant of funds to private sector entities.

Pilot Projects

3.4 Where a procurement process involves a pilot stage, the pilot should be conducted in a manner that allows and encourages the identification of a range of acceptable solutions or options. Care must be taken to avoid the development of relationships with a particular party or parties which could hinder a fair and open process or limit competition.

Sole Suppliers

3.5 Where it is necessary to deal with a sole supplier, service provider or contractor, arrangements which provide best value for money should be negotiated. Care should be taken by contracting authorities when they face a supplier, service provider or contractor with an exclusive right to provide a particular supply or service in a designated territory. Open-ended arrangements with these exclusive distributors should be avoided where

possible. Irish and EU competition law does not prevent an exclusive supplier from providing supplies to customers outside of its designated territory where the exclusive supplier has been requested to do so by that customer.

Better value for money can be achieved by seeking tenders from other suppliers, service providers or contractors, outside the region in which there is an exclusive distributor. It may be appropriate to advertise in the Official Journal of the European Union (OJEU) or otherwise seek non-national suppliers in such cases.

If the HEA is refused supplies on the basis that there is an exclusive supplier supplying goods in the contracting authority's area, the matter will be brought to the attention of the Competition Authority: telephone (01) 804 5400.

Conflicts of Interest

3.6 Staff and members of the HEA should be aware of potential conflicts of interest in the tendering process. Care should be taken to ensure that project specifications and criteria should be as open and generic as possible in order to avoid favouring any one solution or any one party. The HEA's Codes of Conduct for Members and Staff <http://intranet/?q=conduct> specify the need for appropriate tendering guidelines to be applied. The HEA has policies on fraud and good-faith reporting. <http://intranet/?q=2>

Statutory Provisions

3.7 Before awarding a contract, the HEA should ensure that tenderers have regard to statutory provisions relating to minimum pay, legally binding industrial or sectoral agreements, tax compliance and relevant health and safety issues, when preparing tenders. An appropriate reference to the need for compliance with such provisions should be included in tender documents.

Collusive Tendering

3.8 The HEA is required to watch for anti – competitive practices such as collusive tendering. Any evidence of suspected collusion in tendering should be brought to the attention of the Competition Authority : telephone (01) 804 5400.

Criminal Convictions

3.9 In line with the revised procurement Directives, candidates or tenderers who have been convicted of involvement in organised crime, of fraud, corruption or money laundering must be excluded from performing a public contract.

4. Taxation Issues

Value-Added Tax (VAT)

4.1 Tenderers should be invited to express tender prices exclusive of VAT. VAT law provides for equal treatment in the supply of goods and services, therefore no competitive advantage or disadvantage should arise from the correct application of VAT rules.

The HEA is required to pay VAT on goods and services procured and cannot recover VAT paid. In the case of goods and services invoiced from within Ireland, VAT is charged to the contracting authority and remitted to the Revenue Commissioners by the supplier of the goods or services. However, contracting authorities procuring, or likely to procure, in a twelve month period, **goods** above a certain value (€1,000) from other EU Member States, are required to register and pay VAT to the Revenue Commissioners (Collector General) in respect of those procurements.

VAT must be paid by the contracting authority for **all scheduled services** (including the most commonly procured services) invoiced VAT free from abroad, i.e. there is no minimum threshold. If a contracting authority is required to register for VAT because it receives scheduled services from abroad, **all goods** which it receives, irrespective of the level of such acquisitions, are liable to Irish VAT. VAT, calculated at the rate applying in Ireland, must be paid to the Revenue Commissioners by the contracting authority which receives such goods or services.

The foregoing is a brief summary of the VAT rules which apply to contracting authorities when procuring supplies and services and the information is not exhaustive. Further information is available in “Value Added Tax Information Leaflet No 11/01” issued by the Revenue Commissioners, which is published on their website www.revenue.ie or can be obtained by contacting VAT Administration, Stamping Building, Dublin Castle, Dublin 2: telephone (01) 647 5000.

Professional Services Withholding Tax

4.2 Professional Services Withholding Tax (PSWT) must be deducted at the standard rate from payments by contracting authorities for professional services. Comprehensive information on PSWT is available in a booklet “A Revenue Guide to Professional Services Withholding Tax (PSWT) for Accountable Persons and Specified Persons” which is published on website www.revenue.ie or can be obtained from the Revenue Commissioners: telephone (01) 878 0100.

Tax Clearance Certificates

4.3 All contracting authorities are reminded of the need for tax clearance of contractors as outlined in Department of Finance ‘*Circular 43/2006 Tax Clearance Procedures - Public Sector Contracts*’ and ‘*Circular 44/2006 Tax Clearance Procedures, Grants, Subsidies and Similar Type Payments*’ or any revised version which will be available on www.revenue.ie.

Tenderers should contact their local Revenue District or Large Cases Division as appropriate. Full contact details can be obtained, and for most cases an online application for Tax Clearance Certificates can currently be made, under ‘What’s New’ on www.revenue.ie.

Non resident tenderers should contact the Collector General, Sarsfield House, Limerick: telephone (061) 310 310 or 1890 203 070.

5. Competitive Process below EU threshold values

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

Low Value Requirements

5.1 In situations where NPS Centralised Framework Agreements do not apply the following is a summary of the current procurement thresholds in the HEA – valid 14/10/13

Threshold (exclusive of VAT)	Procedure
Less than €5,000	At least 1 quotation in writing
€5,000 - €10,000 – IT projects	At least 3 quotations should be sought, quotations to be in writing
€5,000 - €25,000 – all other supplies and services	At least 3 quotations should be sought, quotations to be in writing
€5,000 - €50,000 (inclusive of VAT) building works and engineering services	At least 5 quotations should be sought, quotations to be in writing
IT Projects over €10,000 Supplies and services over €25,000 Building works and engineering services over €50,000	Formal advertising – open procedures using www.etenders.gov.ie (other appropriate media may be used as well)
EU Thresholds – valid to 31/12/15	
Supplies €207,000 +	
Services €207,000 +	
Works €1,186,000 +	
HEA Approval Limits (exclusive of VAT)	
Over €100,000	HEA Board approval
€6001 - €9,999	CEO
€1,001 - €6,000	Head of Corporate Affairs
Up to €1,000	SEO, HR & Accounts

Notwithstanding the above thresholds the HEA reserves the right to advertise tenders over the value of €10,000 on the etenders.gov.ie website. Criteria to be considered would include;

- (1) Availability of a shortlist of known suppliers
- (2) Time available to select a supplier

The HEA will also engage in joint tendering with the other agencies participating in the Education Agencies Shared Services Group (EASSG). The two principle benefits from this

joint tendering approach are (1) possible savings due to the size of the tender and (2) the avoidance of duplication of effort. The HEA may also undertake a joint tendering arrangement with a smaller number of education agencies.

Advertising

5.2 Contracts above **€10,000/€25,000/€50,000** (depending on the nature of goods and services) and up to the value of EU thresholds for advertising in OJEU (see Appendix I), not part of a ‘draw down’ or framework contract, will be advertised on the etenders.gov.ie website.

Summary Guidelines for Engaging Consultants/Services/Goods

5.3 The Chief Executive should determine that there is a case for engaging consultants. This should include the following;

- Purpose and scope of the project
- Deliverables expected from the project
- Evaluation of alternatives to engaging consultants
- Project management arrangements what staff/sections will the consultants engage with.
- Likely costs, an upper limit based on funding available for the year should be included.
- Criteria for selection.

A Request for Tender (RFT) should be drawn up by Head of the Section responsible for the area of work. The Head of Corporate Affairs or Management Accountant should be consulted in drawing up the RFT. They will work with the Section Head or his/her nominee throughout the process. The RFT should be approved by the Chief Executive where the anticipated value of the contract is in excess of €25k. The reason for the award of the contract to a particular consultancy firm in preference to others should be recorded and filed with the other contract papers (i.e memorandum to CEO and evaluation sheet).

Once a particular firm has been selected a contract should be agreed. While the contracting firm may issue its own standard contract, it should include the following terms;

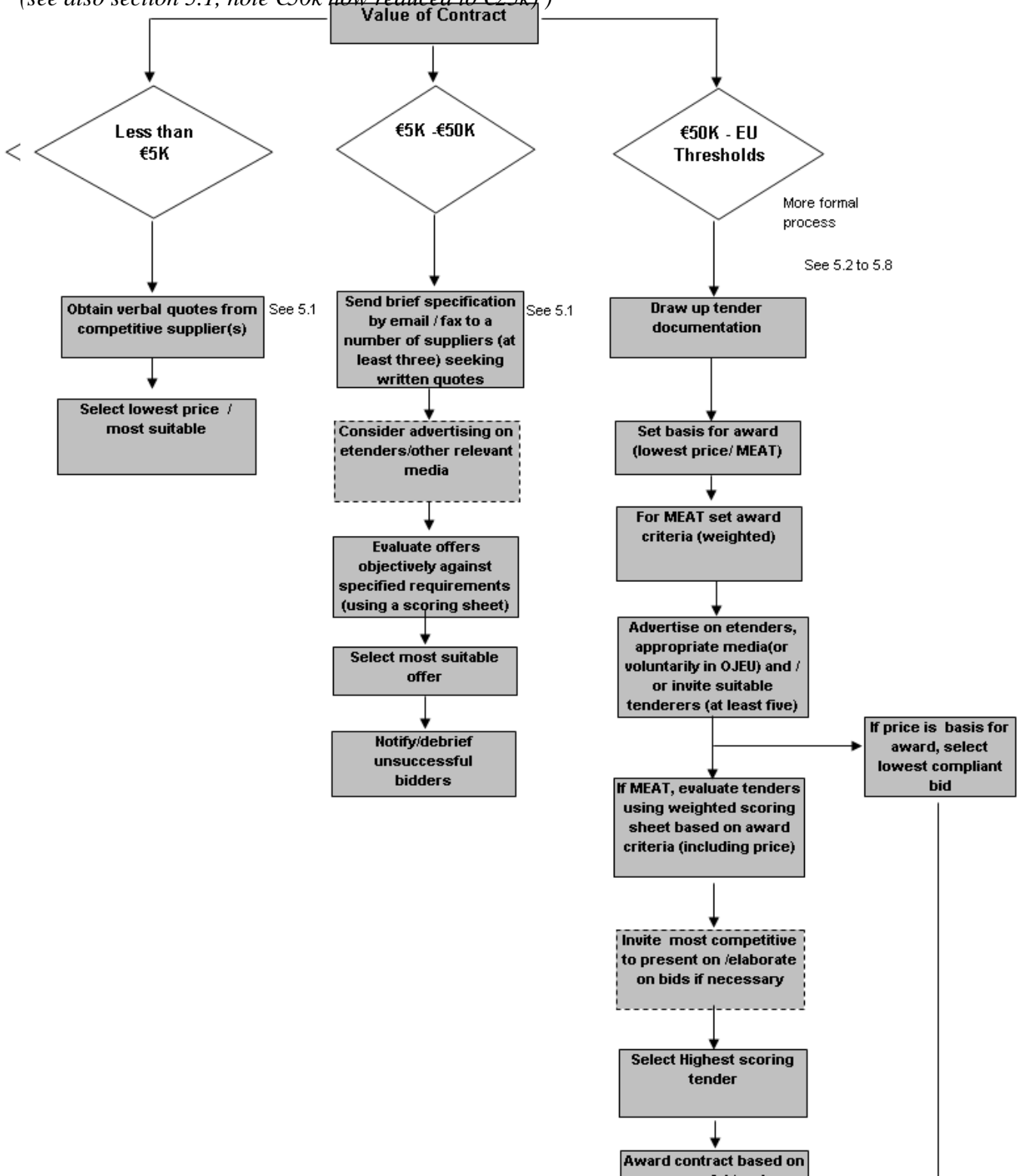
- Clearly specified fee (for global price contracts – where specified outputs are defined)¹

¹ Global Price contracts can be contrasted with fee based contracts where the output is unpredictable, or where the workload to achieve the specified output is impossible to quantify in advance. Therefore it is economically more advantageous to pay the services on the basis of time actually worked. Examples might include project supervision, legal advice. Some projects may contain a mix of fee-based and global price for different phases of the project.

- Cost structure, time scale and payment arrangements these should be closely tied to deliverables.
- Schedule of tasks - deliverables
- Project management, reporting arrangements
- Termination clause in the event of the work being unsatisfactory
- Ownership of deliverables/reports/software
- Confidentiality clause

A summary of the tendering process to be followed is outlined below.

Diagram 1. Steps in conducting a Competitive Process for contracts below EU thresholds (see also section 5.1, note €50k now reduced to €25k.)



Depending on the nature of the requirement, it may be appropriate to supplement national website advertising with advertising in other media, in trade publications and / on other websites. An abbreviated notice indicating the publication of tender details on the *etenders* website should be considered in such cases. Details of an advertised tendering procedure may be sent directly to candidates who may be deemed suitably competent to participate.

Direct Invitation (without advertising under €25k)

5.4 Alternatively, a process of direct invitation to tender² may be used. This may involve

- invitation to firms deemed appropriately qualified for a particular project (this may be appropriate for specialised requirements in markets where there is a limited number of suppliers or service providers)

or

- invitation to tender to firms on a list established on an open and objective basis (normally used by contracting authorities which have a frequent or recurring requirement for supplies or services or those wishing to maintain a well organised ongoing procurement system).

5.5 Where direct invitations are issued, firms from which tenders are sought should be a good representative sample of all potential bidders in the market concerned. The number invited to tender should be determined by the size and particular characteristics of the project to be undertaken. The number must be sufficient to ensure adequate competition, and should not be restricted for reasons of administrative convenience. At least five firms should normally be invited to submit tenders.

5.6 The HEA may maintain a list of firms from which they invite tenders. Care should be taken to ensure that such lists are used in an open and non - discriminatory manner. Under direct tendering procedures, contracting authorities should ensure that recently established firms, or firms with no previous experience of public contracts, are not excluded from invitations to tender. It is in the interest of the HEA that the pool of potential suppliers is actively maintained and updated.

5.7 The time and date that written tenders are received should be recorded. It is important that a record of the time/date formal tenders are opened is maintained. This record should be signed by two members of staff.

² Often referred to as selective or restricted tendering

5.8 The methods and criteria for selecting firms and for awarding contracts should be documented and should be objective, transparent and proportionate. It should be clearly understood that whether responses are to an advertisement or to a direct invitation, all parties in the process must be treated on the same fair and objective basis. Decisions on selections for smaller projects or purchases should be recorded with a minimum of formality. The marks for cost should be a minimum of 25% of the total. The request for tender may set out selection criteria which the tenderer must satisfy before their tender can be evaluated for award status. Such selection criteria might include financial and technical criteria and may be assessed on a pass/fail basis. Further details are available from HR & Accounts and on the procurement pages on the intranet.

5.9 The Head of Communications shall be responsible for organizing a tender every three years for the design and print of HEA publicity material, including reports. Staff must avail of the services of the successful firm. Any proposal to avail of the services of another firm for whatever reason should be cleared in advance with the Head of Communications or in his absence the CEO or Head of Corporate Affairs.

5.10 Where possible the HEA will avail of suppliers secured through a Central Framework Agreement arranged by the NPS.

Evaluation and Contract Award

5.11 For larger projects (€25,000 and above) being awarded on the basis of the most economically advantageous tender (MEAT), it should be the normal practice to have the evaluation of tenders carried out by a team with the requisite competency. This may include independent representation, i.e. a competent person from outside the area directly involved with placing the contract. Transparency and objectivity are best demonstrated by the use of a scoring system or marking sheet based on the relevant weighted criteria, including price, indicating a comparative assessment of tenders under each criterion. (See Appendix IV for sample scoring system).

As an aid to understanding and clarity, it may be appropriate to invite the most competitive tenderers to present or elaborate on proposals for technical or consultancy projects. However, any dialogue with tenderers that could be construed as "post tender negotiation" on price or result in significant changes to the published tender specifications must be avoided.

Results of Tendering Process – Approval Procedures

5.12 Once a decision has been approved to award the tender to a particular supplier, the successful tender should be published on the procurement pages on the HEA website or if used, on the Government's eTenders website. All tenderers should be informed of the result of a tendering process without delay. (*See appendix six*). Please note that a 14 day cooling-off period applies between provisional award of the tender and its formal commencement in the case of OJEU tenders

6. Approval of tender process

6.1 See also section 5.1.

Orders in excess of €100,000 – prior approval of the Authority is required (note this threshold applies to related projects whose cumulative value exceeds €100,000).

The Authority is to be notified through the CEO's report of all purchases in excess of €20,000. The Authority is also required to publish this information on its website.

A list of all suppliers who have received business from the HEA with a cumulative value of €100,000 or over in any one year to be provided to the Authority.

6.2 In accordance with the HEA's Authorities Register a Purchase Order must be raised in respect of all purchases of goods and services. Prior to a purchase order being issued the records in italic outlined below should be presented to HR & Accounts.

7. Procurement Records

7.1 It is important that proper records of the procurement process are kept. Where appropriate staff should adhere to the following guidelines in respect of tenders over €25,000;

- Tender for contract which should be advertised appropriately - this should include evaluation criteria as approved by the Section Head or CEO. A copy of E-tenders notice should be kept. A copy of the responses published to queries/clarifications sought in relation to the request for tender. *A copy of the approved case for tendering should be kept.*
- Tendering procedures properly operated especially with reference to deadline
- *Record of tenders received. The opening of tenders should be witnessed by two members of staff who should sign and date the schedule of tenders receive.*
- *Record of score sheet showing how the tenders were evaluated against relevant selection criteria (see appendix one)*

- *Tender evaluation report as approved by the CEO/Board as appropriate*
- *Successful tenderer issued with award notice and acceptance returned (see appendix one)*
- *Unsuccessful tenderers notified in writing (see appendix one)*
- *Award notice issued*
- *Letter of engagement to successful tenderer. This should outline the terms of the contract (or confirm the terms set out in the tender) and be signed by the person responsible for the project in the HEA and an appropriate person in the contracting firm.*
- *A copy of unsuccessful tenders should be kept for a period of two years*

7.2 For contracts whose value exceeds €50,000 and where an advance payment is required, the contracting firm will be required to satisfy the HEA that it is financially stable. The Management Accountant will be responsible for reviewing the company's financial details.

7.3 In the case of certain larger contracts, in excess of €100,000, a service level agreement will be required. The Head of Corporate Affairs and the Management Accountant should be consulted in the drawing up of a SLA.

8. Post contract-award management process

8.1 It is the responsibility of the section who commissioned the procurement to ensure that the contract for the provision of goods/services is carried out in accordance with the agreed terms. This should be managed by the Section Head or an APO in the section. See appendix one for a list of terms that should be included in the agreed contract. HR & Accounts will verify with the responsible person whether it is in order to make payment on an invoice received. Where the responsible person does not agree that payment can be made they should outline the reasons in writing.

8.2 Where a global price has been agreed (see section 5.3) it is important that the agreed contract price is adhered to. There may be unforeseen circumstances where additional work is required. Before any commitment is made, a separate PO outlining the additional work and the reasons why this has arisen should be raised. The PO will require approval in accordance with section 5.1. The additional work should not be more than 20% of the value of the original tender.

8.3 Where possible additional works should be avoided. Contract extensions could deem a whole tender unfair as other tenderers could argue that they might have been able to offer a more economically advantageous tender had they been aware of the size of the tender. It is important that this is taken into consideration when drawing up the tender.

8.4 Where issues arise in relation to performance of the contract or there is disagreement in relation to particular terms this should be referred up to the Section Head or the CEO as appropriate.

Appendix One – sample templates

1. Sample Score Sheet for evaluation of tenders – for the delivery and management of a service – this should be signed and date by two evaluators

Award Criteria	Quality of proposal for providing service detailed at xxxx of RFT.	Management & service structure proposed	Expertise and skills of personnel assigned to this project	Timeframe for delivery	Proposed Cost of providing service	Total marks awarded
Total Marks Available	70	30	30	20	50	200
Company A	60	24	22	12	30	148
Company B	62	30	27	15	42	176
Company C	49	11	12	15	25	112
Company D	55	22	25	14	40	156
Company E	60	25	16	15	40	156

2. Sample letter of engagement on non EU contracts (contact HR & Accounts if contract falls within OJEU thresholds)

Xxxx,
Yyy,
Zzz

Date:

Title of Contract: _____

Dear.....,

I wish to refer to your recent tender for the above contract. The tender evaluation process has now been completed and I am pleased to inform you that you have been selected as the successful tenderer in accordance with the rules of the competition. You should briefly outline the objectives/deliverables of the contract.

The award of this contract is subject to the terms as set out in your proposal (and where appropriate list any variations here – it is important that price, completion date and other keys are clear in the tender).

To avoid a delay in proceeding with your appointment you are requested within the next 7 days to forward to me any outstanding documentation as set out in our request for tender (such as tax clearance certificate, evidence of appropriate insurances, financial records)

I look forward to working with you on this contract. A purchase order will issue upon receipt of any outstanding documentation and your confirmation below of acceptance of the terms of this contract.

Yours sincerely,

X
HEA

I confirm our acceptance of the terms of this contract

Y
Company A

Date:

3. Sample regret letter for non EU contracts (contact HR & Accounts if contract falls within OJEU thresholds)

Xxxx,
Yyy,
Zzz

Date:

Title of Contract: _____

Dear.....,

I wish to refer to your recent tender for the above contract. The tender evaluation process has now been completed and I am regret to inform your tender has not been selected for contract award on this occasion.

The successful tender was.....

For information purposes the following were the scores achieved by your tender against each of the award criteria:

Criterion	Maximum Score	Score achieved by your tender	Score achieved by successful tender
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I would like to take this opportunity to thank you most sincerely for your participation in the tender process and to wish you every success in the future.

Yours sincerely,

X
HEA

Appendix Two

Contacts and Information Sources on Public Procurement

National Procurement Service,
Office of Public Works Headquarters,
Jonathan Swift Street,
Trim,
Co. Meath.

Tel: 1890 213 414

Fax: 046 943 8422

Email: nps@opw.ie
www.procurement.ie

Government eTenders site – <http://www.etenders.gov.ie>

Please email the helpdesk on etenders@eu-supply.com. However, if your technical enquiry is urgent, you can call them on 021 243 92 77 during office hours ONLY (9.00 – 5.30)

EU Procurement website <http://simap.europa.eu>

Appendix Three

EU Public Procurement Procedures

This section summarises the principal features and provisions of the revised EU procurement Directives. Given the size of the HEA's overall budget it is not anticipated that many tenders will fall within the EU procurement thresholds. Informal advice should be sought from the National Procurement Service (contact details are given in Appendix 2) or the HEA staff working on ERDF/ESF audits. For large or complex projects, or in the case of contracts with non - standard features, legal or other professional advice should be obtained if there is any doubt about the correct procedures to be followed.

6.1 The EU Treaties provide for free movement and non - discrimination on the grounds of nationality in the provision of goods and services. The Treaties express these provisions as broad principles. Procurement Directives adopted by the EU set out in law what Member States must do in exercising the public procurement function to give effect to the principles of the Treaty and to realise the benefits of the Internal Market.

6.2 The Directives impose obligations on contracting authorities to:

- advertise their requirements in the Official Journal of the European Union (OJEU);
- use procurement procedures that provide open and transparent competition;
- apply clear and objective criteria, notified to all interested parties, in selecting tenderers and awarding contracts;
- use broadly based non - discriminatory technical specifications;
- allow sufficient time for submission of expressions of interest and tenders.

It is a legal requirement that contracts with estimated values above the thresholds³ set out in the Directives (apart from some defined exceptions) be advertised in the OJEU and that

³ The current value thresholds above which contracts are subject to the Directives are set out in Appendix I

these contracts are awarded in accordance with the provisions of the Directives. Contracting authorities covered by the public sector Directive must also ensure that most works contracts and related services contracts, which they subsidise by 50% or more, are awarded in accordance with the provisions of that Directive. Any infringement of the terms of the Directives can give rise to serious legal or financial sanctions.

Revision of Directives

6.3 A revision of the EU public procurement Directives was completed recently. Three former public sector Directives for works, supplies and services have been consolidated into one text. The revised Directives are 2004/17/EC, covering procurement procedures of entities operating in the utilities sector and 2004/18/EC, covering procurement procedures of public sector bodies. The Directives have been adapted to modern market conditions by providing for measures such as the use of electronic means of procurement and tendering (eprocurement), providing for framework arrangements and for more flexible procedures for awarding complex contracts, such as public private partnership projects (PPPs), in the public sector.

The EU Directives cover contracts for

Works - buildings and civil engineering contracts

Supplies - purchasing of goods and supplies

Services - all of the most commonly procured services, including advertising, property management, cleaning, management consultancy, financial and ICT related services, (See Annex IIA and Annex IIB of the revised public sector Directives).

Criteria for awarding contracts

6.4 Contracting authorities may choose to award contracts on the basis of

- the lowest priced tender **or**
- the most economically advantageous tender (specifying, in addition to price, various other criteria including running costs, servicing costs, level of after sales service, technical assistance, technical merit, environmental characteristics).

When a contract is being awarded on the most economically advantageous basis, the notice or the tender documents must state all of the criteria being applied in the award process, giving the relative weightings for each criterion. If it is not technically possible to indicate

criteria weightings in advance, they must be listed in descending order of importance. New or amended criteria must not be introduced in the course of the contract award procedure. If significant additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

Advertising in the OJEU

6.5 OJEU Notices must be drawn up in accordance with the standard forms set out in EU Directive 2001/78/EC of 13 September 2001 or any revised version which will be published on <http://simap.eu.int>, the EU public procurement website. For economy and efficiency, contracting authorities are strongly advised to publish their notices online via www.etenders.gov.ie or <http://simap.eu.int>. There is guidance for users in completing online publication on both websites.

If forwarding notices manually the standard forms must be used. The forms can be downloaded, completed electronically (in Word format) and emailed to the Publications Office. The *simap* website has a FAQs section which provides comprehensive information on the procedures involved in publishing notices.

6.6 Advertisements in the OJEU should also be published on the *etenders* website. This will be done automatically if *etenders* is used for online OJEU publication. They may be supplemented by advertisements in the national media to ensure the widest possible competition for the contract. However, national advertisements must not appear before the date of dispatch to the OJEU and must not contain any information additional to that in the OJEU advertisement. Where supplementary national media advertising is considered necessary, contracting authorities are advised, in the interests of economy, to place abbreviated notices in the media referring interested parties to the OJEU notice and / or to the *etenders* website for full details.

Prior Information Notices (PINs) and Buyer Profiles

6.7 Contracting authorities with an aggregated procurement requirement in excess of €750,000 for any product area of supplies or category of services are encouraged to publish an annual notice called a Prior Information Notice / Prior Indicative Notice (PIN) in the OJEU. The PIN is normally submitted by the contracting authority at the start of the budgetary year and sets out the categories of products and services likely to be procured during the year.

Contracting authorities are also encouraged to publish ‘buyer profiles’ on their websites with general information on their procurement requirements and to publicise the existence of these profiles in a PIN.

Insertion of a PIN does not commit contracting authorities to purchasing or proceeding with a project if circumstances change. It is intended as an aid to transparency and is for the benefit of suppliers. Publication of a PIN permits a contracting authority to reduce the minimum time for tendering if the PIN, with the necessary amount of information specified, has been dispatched to the OJEU at least 52 days before, and within twelve months of, dispatching the contract notice (see 6.14 on ‘Time limits for Replies’).

Contract Award Notice

6.8 It is a requirement that contracting authorities publish certain information on contracts awarded within 48 days of the award in the OJEU. Particulars, including the type of contract, the procedure and award criteria used, the number of tenders received, the name of the successful tenderer, the value of the contract or the range of tender prices, justification for the negotiated procedure, if used, are published. The necessary information can be submitted online to the OJEU or electronically on the standard ‘Contract Award Notice’.

Common Procurement Vocabulary

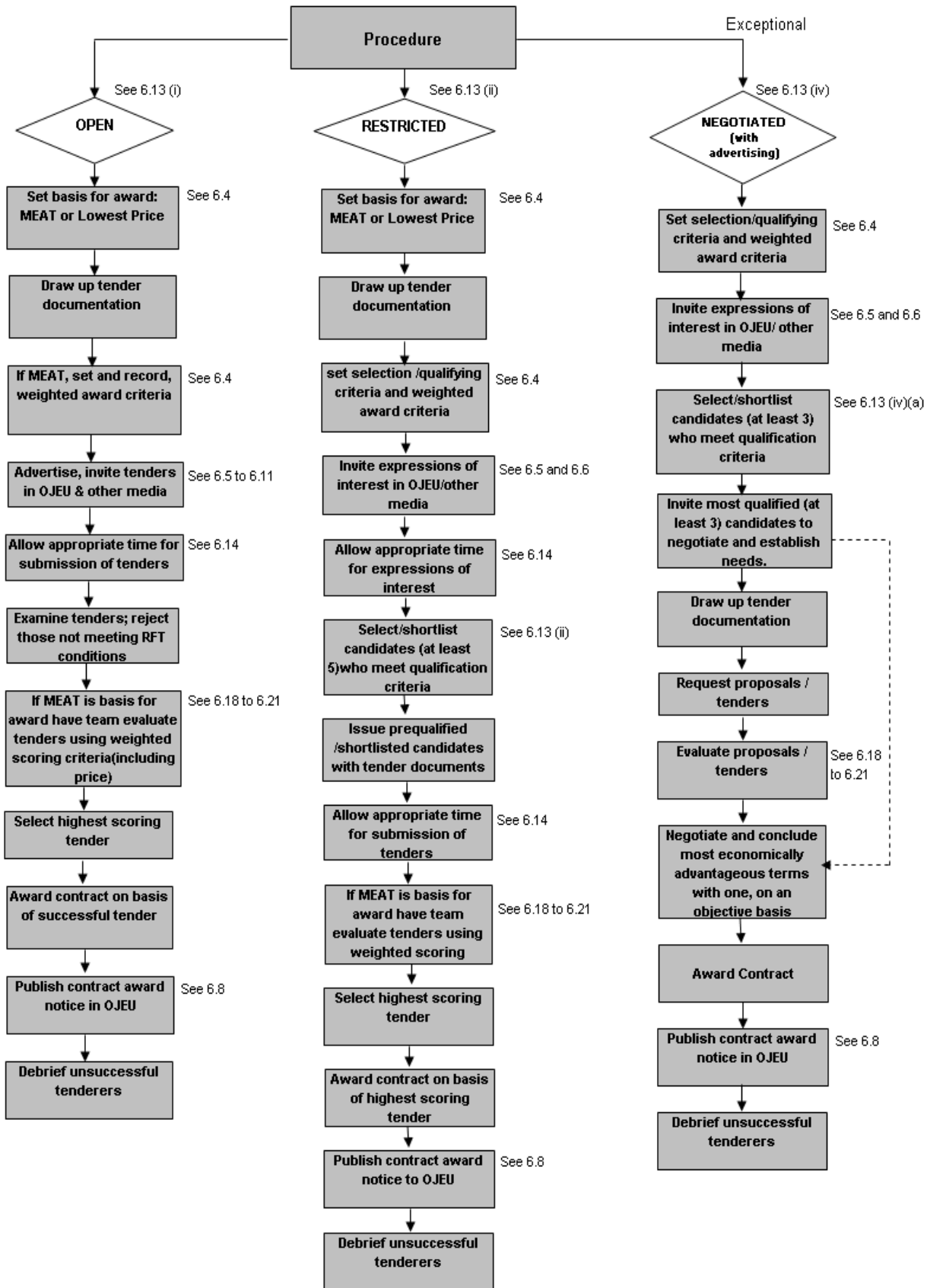
6.9 The Common Procurement Vocabulary (CPV) is a classification code developed by the EU Commission to describe thousands of types of works, supplies and services. It is being adopted as the official code for classifying public contracts and is maintained and revised by the Commission as markets evolve and develop. The CPV can be accessed on the <http://simap.eu.int> website and the appropriate code should be used for describing the subject of the contract on the standard forms when advertising in the OJEU.

Thresholds

Any contract placed by a public body over the financial threshold set out in the Directive must be processed and awarded in accordance with the procedures of the Directive, unless it is covered by a clearly defined exception.

6.10 The current EU thresholds apply for the period 1 January 2011 to 31st December 2013 and are available on www.etenders.gov.ie. The thresholds in the Directives are revised by the Commission, under the terms of the Directives, at two-yearly intervals. The revised thresholds are published on the EU procurement website <http://simap.eu.int> and the national procurement website www.etenders.gov.ie. The Department of Finance will notify Departments of these changes as they occur.

Diagram 2. Steps in conducting a Competitive Process for contracts above EU thresholds



Estimation of contract values

6.11 Estimation of contract values for OJEU publication purposes must be realistic. If a contract, not advertised in the OJEU, attracts tenders in excess of the EU thresholds, there is a risk that the award could be subject to infringement proceedings. In such an event, a contracting authority would be required to justify the original estimation.

No project or purchase may be sub-divided to prevent it coming within the scope of the Directives. Where a project or purchase involves separate lots the value of all lots must be included in estimating the value of the contract.

Priority and Non – Priority Services

6.12 Under the procurement Directives, services are divided into two categories described as 'priority' and 'non-priority' services (set out in Annex IIA and Annex IIB of the revised public sector Directive). The two categories of services are listed in Appendix IIA and Appendix IIB of these guidelines.

The 'priority' services are subject to the full provisions of the Directive. In the case of 'non-priority' services, the requirement is that they should be awarded without using restrictive technical specifications. For example the use of specifically branded products should be avoided. In addition, information on 'non-priority' contracts awarded should be notified to the Commission in the form of an Award Notice, indicating whether the notice should be published in the OJEU. The purpose of this provision is to help determine whether some or all of those services might be made subject to the full provisions of the Directive at a future date.

While the full procedures of the Directives do not apply to the award of contracts for 'non – priority' services, the European Court has ruled that Treaty principles such as non - discrimination, transparency, freedom of movement and freedom to provide goods and services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

Tendering Procedures

6.13 The revised EU public sector Directives permit four tendering procedures:-

(i) **Open.** Under this procedure all interested parties may submit tenders. Information on tenderers' capacity and expertise may be sought and only the tenders of those deemed to meet minimum levels of technical and financial capacity and expertise are evaluated. If

there are minimum requirements it is important that they be made clear in the notice or the request for tenders (RFT) to avoid unqualified bidders incurring the expense of preparing and submitting tenders.

(ii) **Restricted.** This is a two-stage process where only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

- As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed questionnaire to interested parties.
- The second step involves issuing the complete specifications and tender documents (RFT) with an invitation to submit tenders only to those who possess the requisite level of professional, technical and financial expertise and capacity. It is important to note that, as a basis for pre - qualifying candidates, only the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of candidates set out in the revised Directive (Articles 45 to 48 of 2004/18/EC) are permissible. The European Court of Justice and the EU Commission have ruled clearly on this.

Contracting authorities may opt to shortlist qualified candidates if this intention is indicated in the contract notice and the number or range of candidates indicated. Shortlisting of candidates who meet the minimum qualification criteria must be carried out by non - discriminatory and transparent rules and criteria made known to candidates. The Directives require that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five (provided there is at least this number who meet the qualification criteria) and up to a total of 20.

(iii) **Competitive Dialogue.** This is a procedure, introduced under Article 29 of the revised public sector Directive 2004/18/EC, designed to provide more flexibility in the tendering process for more complex contracts, for example public private partnerships (PPPs). Contracting authorities must advertise their requirements and enter dialogue with interested parties, (pre – qualified on the same basis as for restricted procedure described at 6.13 (ii) above). Through the process of dialogue with a range of candidates, a contracting authority may identify arrangements or solutions which meet its requirements. Provided its intention is indicated in the contract notice or in descriptive documents supplied to candidates, a contracting authority may provide for the procedure to take place in

successive stages in order to reduce the number of solutions or proposals being discussed. The reduction must be achieved by reference to the award criteria for the contract. In conducting the dialogue, contracting authorities must ensure equality of treatment and respect for the intellectual property rights of all candidates. When satisfied about the best means of meeting its requirements, the contracting authority must specify them and invite at least three candidates to submit tenders. The most economically advantageous tender will then be selected. Aspects of tenders may be clarified or fine tuned provided that there is no distortion of competition or discrimination against any tenderer.

(iv) **Negotiated.** This is an exceptional procedure, which may be used only in the limited circumstances set out in Articles 30 and 31 of the revised public sector Directive. There are two types of negotiated procedure:

(a) *Contracting authorities advertise and negotiate the terms of the contract.* This process should normally involve the submission of formal tenders by at least three candidates (pre-qualified on the same basis as for the restricted procedure described at 6.13 (ii) above, provided there are at least this number who meet the minimum qualification criteria) with negotiation on final terms in a competitive process. This procedure may be used mainly:

- where the nature of the requirement does not permit overall pricing;
- where it is not possible to specify requirements for a service with sufficient precision to enable tenderers to respond with priced tenders;
- where an open, restricted or competitive dialogue procedure has not attracted acceptable tenders.

(b) *Contracting authorities negotiate, without advertising, the terms of the contract directly with one or more parties.* This is a departure from the core principles of openness, transparency and competition and is a very exceptional procedure. The main instances where this procedure may be used are:

- in cases of extreme urgency, note this is narrowly interpreted by the EU, funding deadlines are not considered urgent;
- when, for technical or artistic reasons or due to the existence of special or exclusive rights, there is only one possible supplier or service provider;
- when an open or restricted procedure has not attracted appropriate tenders (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially);
- extension of existing contracts and repeat contracts subject to certain conditions;

- for the purchase of supplies on particularly advantageous terms, from either a supplier definitively winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure.

Contracting authorities should ensure that the precise circumstances justifying negotiation, as set out in the public sector Directive, exist before deciding on the use of this procedure. It should be noted that definitions of ‘exceptions’ and ‘urgency’ are strictly interpreted by the Commission and the Courts. Factors giving rise to urgency must be unforeseeable and outside the control of the contracting authority. Where one of these exemptions is invoked, the contracting authority must be able to justify the use of the exemption. Candidates must always be treated fairly and objectively in negotiations.

Time-limits for Replies

6.14 Minimum time-limits are set down for the different stages of the particular contract award procedure chosen. In all cases, the times specified in days relate to calendar days. When fixing the timescale for submitting expressions of interest / requests to participate or tenders, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders.

The main **minimum** time-limits, which are reckoned from the date of dispatching the notice to the OJEU, are as follows.

Open Procedure

- for receipt of tenders: **52 days**
- if a PIN has been published (see 6.7 above): as a general rule the minimum time may be reduced to **36 days** but in no circumstances less than **22 days**.

Restricted, Negotiated and Competitive Dialogue Procedures

- for receipt of expressions of interest / requests to participate: **37 days**;
- for receipt of tenders under restricted procedures: **40 days** from date of issue of invitation to tender;
- if a PIN has been published: as a general rule the minimum time for receipt of tenders under the restricted procedure may be reduced to **36 days** but in no circumstances less than **22 days** (*no reduction in times for receipt of expressions of interest*).
- Under a negotiated procedure or in competitive dialogue the time allowed for receipt of tenders may be agreed between the parties involved.

Where **genuine** urgency⁴ renders these time limits impracticable, shorter time-limits may be applied as follows

- for receipt of expressions of interest, not less than **15 days** from the date of dispatching the notice and
- for receipt of tenders, not less than **10 days** from the date of issue of invitation to tender.

Electronic / online transmission: minimum times for responses may be reduced where contract notices are transmitted electronically to the OJEU and all tender documentation is made available electronically in accordance with the provisions of the revised Directives. The reduction can be up to a cumulative 12 days, reflecting the potential for time saving if up - to - date technological methods of communication and transmission are used at the various stages of the process. Conditions for availing of these potential time reductions are set out in Article 38 (5) and (6) of the revised public sector Directive.

Issue of Documents

6.15 Responses to requests for information, requests for tender documents and other supporting documentation (if not made available electronically) must be issued without delay and in any event within a maximum of six days of the request. Additional information, requested in good time, must be issued at least six days before the latest date for receipt of tenders. In order to avoid giving unfair advantage, additional information supplied to one party in response to a request should be supplied to all interested parties if it could be significant in the context of preparing a tender.

Receipt and Opening of Tenders

6.16 Contracting authorities should ensure that proper procedures are in place for opening tenders to prevent abuse or impropriety at this stage. All tenders should be opened together as soon as possible after the designated latest time and date set for receipt of tenders. Internal procedures should require that opening of tenders takes place in the presence of at least two officials of the contracting authority. The procedure adopted should ensure that, in the case of any dispute, there is a clear and formal independently vouched report of the tenders received. Tenders received after the closing time for receipt of tenders should not be accepted.

⁴ The use of the urgent procedures, or accelerated procedures, as referred to in the Directives, must be justified and have been caused by unforeseeable events outside the control of the contracting authority. The EU Commission and ECJ interpret ‘urgency’ very strictly. Delay or inaction on the part of the contracting authority is not sufficient reason for applying exceptional procedures.

Clarification of Tenders

6.17 Contracting authorities may seek additional information in clarifying submitted tenders. However, substantive alterations to bids after the deadline for submission has passed are not permissible under the open or restricted procedures. In particular, any adjustment to price which could improve the competitive position of a bid is not permitted⁵.

Evaluation of tenders and award of contract

Evaluation of tenders should be carried out by a suitably competent team. The evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. This is best achieved by the use of a scoring system based on all the relevant weighted criteria, indicating a comparative assessment of tenders under each criterion.

6.18 The evaluation process for tenders above EU thresholds will be similar in many respects to that for larger projects below thresholds described at 5.8. Examination of tenders should be carried out by a team with the necessary competence. The team may include independent representation. Tenders which do not comply with the requirements specified in the RFT should be rejected.

The evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. Price should be evaluated exclusive of VAT.

(i) Where price is the sole criterion, the contract will be awarded to the lowest priced bid complying with the specified requirements.

(ii) Where ‘most economically advantageous tender’ is the basis, the contract must be awarded to the tender which best meets the relevant criteria. In addition to price they will include other criteria relevant to the subject of the contract. For example, they may include running costs, servicing costs, level of after sales service, technical assistance, technical merit, environmental characteristics. The criteria, with the relevant weighting, will have been pre – established and made known to the tenderers, either in the contract notice or the tender documentation (RFT) as set out at 6.4.

⁵ In regard to the open and restricted procedures, the EU Council and Commission has stated that “all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, in particular on prices, shall be ruled out”.

Tenders must be evaluated objectively and transparently against the published weighted criteria. Objectivity and transparency is best achieved by the use of a scoring system or marking sheet based on the weighted criteria, indicating a comparative assessment of tenders under each criterion. The scoring system must include price and not ‘value for money’ or ‘cost effectiveness’ as a specific criterion. Value for money / cost effectiveness / economic advantage is largely the outcome of the completed evaluation. (See Appendix III for sample of a basic scoring system). The criteria may be sub divided for the purpose of scoring if it assists in the evaluation but this must not involve a departure from the pre - established criteria and weighting.

6.19 Under the restricted procedure, care should be taken to ensure that the pre-qualification criteria are not used inappropriately in the tender evaluation process. Tenderers will be deemed to have met the minimum requirements in regard to their capacity to perform the contract. Therefore, criteria relating to past experience and track record of the company will not feature at the evaluation stage. Tenders should be assessed solely on the basis of how they meet the award criteria related to the actual project (See also 6.13 (ii) above).

6.20 In open or restricted procedures, the most competitive or advantageous tenderers are frequently asked to make a presentation on their proposals for technical or consultancy projects. These presentations are used as an aid to understanding and for purposes of elaboration and clarification. Any dialogue with tenderers that could be construed as "post tender negotiation" on price, or result in significant changes to criteria or tender specifications, is to be avoided. Such negotiations, outside the exceptional and clearly defined circumstances where EU rules permit, could contravene the EU procurement Directives.

Abnormally Low Tenders

6.21 A tender which might be regarded as abnormally low may not be rejected without investigation and consideration of the relevant elements that gave rise to a particularly low bid. Such elements might include an innovative technical solution or exceptionally favourable conditions available to the tenderer. The tenderer should be given the opportunity to explain the basis of the tender.

Tax Clearance

6.22 Before a contract is awarded, the successful tenderer must be required to produce a valid Tax Clearance Certificate from the Revenue Commissioners. (Please see Section 4.3 for further details).

Framework Agreements

6.23 The revised public sector Directive provides for “framework agreements” under which contracting authorities enter into arrangements with suppliers or service providers to supply goods or services under agreed conditions for a period of time, normally not more than four years. Under these agreements, some elements of the requirement, for example quantity, price, precise product specification, will generally not be fully established at the start of the agreement. Advertising for framework agreements should set out the precise nature of the proposed procurements to the highest degree possible.

Framework agreements can be with one supplier or service provider, selected following a competitive process, to fulfil orders or supply services over the period of the agreement. Alternatively, they may be with a number of (at least three) pre - qualified suppliers or service providers. In the latter case, a contract may be awarded to one party to the agreement if the terms of the agreement so permit, or a contract may be the subject of a sub - competition between parties to the framework agreement.

The fundamental requirement is that non – discriminatory and transparent competition prevails in establishing framework agreements and in awarding contracts on the basis of such arrangements. The provisions of the revised Directive (Article 32) are designed to ensure this. Framework agreements may be used for requirements under the EU thresholds.

Utilities Sector

6.24 Separate procurement Directives cover the public sector and the utilities sector. The revised utilities Directive 2004/17/EC covers entities operating in the water, energy, transport and postal services sectors. Private sector entities which operate under special or exclusive rights in the utilities sector are also covered by the utilities Directive. Most features of the Directives are common to both sectors. However, the utilities Directive provides more flexibility in tendering procedures, reflecting the more commercial remit of the entities it covers. For example, higher thresholds apply to supplies and service contracts under the utilities Directive (see Appendix I) and there is wider scope to negotiate contracts. Therefore a “competitive dialogue” procedure is not considered necessary.

Under the utilities Directive there is a facility to establish lists of qualified candidates under specific conditions relating to openness and regular advertising for admission to the lists. Entities in the utilities covered are not required to advertise individual contracts where a qualification system has been established and is used in accordance with the terms of the utilities Directive.

The utilities Directive provides for the removal of sectors as and when markets become sufficiently liberalised.

Priority Services (i.e. Services subject to the full scope of EU procurement Directives).

1. Maintenance and repair services
2. Land transport services, including armoured car services and courier services, except transport of mail and transport by rail
3. Air transport services of passengers and freight, except transport of mail
4. Transport of mail by land (except by rail) and by air
5. Telecommunications services
6. Financial services (a) Insurance services (b) Banking and investment services
7. Computer and related services
8. Certain Research and Development services
9. Accounting, auditing and book-keeping services
10. Market research and public opinion polling services
11. Management consultant services and related services
12. Architectural services: engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services
13. Advertising services
14. Building-cleaning services and property management services
15. Publishing and printing services on a fee or contract basis
16. Sewage and refuse disposal services sanitation and similar services

Non-Priority Services (i.e. Services not subject to the full scope of the EU procurement Directives : contracts must be awarded using non - restrictive technical specifications and EU Commission informed of award of contract).

17. Hotel and restaurant services
18. Rail transport services
19. Water transport services
20. Supporting and auxiliary transport services

21. Legal services
22. Personnel placement and supply services (but not employment contracts)
23. Investigation and security services (except armoured car services)
24. Education and vocational education services
25. Health and social services
26. Recreational, cultural and sporting services
27. Other services

Appendix Four

Glossary of Terms

Contracting Authority : a Government Department or Office; local or regional authority; any public body, commercial or non commercial; a subsidiary or body established by a public body; any institution or entity funded largely from public funds.

Public Contract : a contract for the provision of works, supplies or services to a contracting authority. It includes all procurements, not just those which are undertaken on the basis of a full tendering process and formal signing of a contract

RFT (Request for Tenders) : all the documentation related to the tendering process. It normally includes a general overview of the tender requirements, a detailed specification of requirements, the format and structure for submission of tenders, how tenders will be examined and the criteria on which they will be evaluated, and some general conditions of tendering. The RFT should normally include a set of conditions for a contract which will be concluded with the successful tenderer.

Direct Tendering : (sometimes referred to as restricted or selective tendering) a tendering process where a number of suitable contractors, suppliers or service providers are invited to submit tenders for contracts below EU thresholds without public advertising.

Restricted Procedure : a procedure under EU procurement Directives whereby expressions of interest are invited through a notice in the OJEU (and other appropriate media) and only those who meet certain qualification criteria are issued with the full tender documentation and invited to submit tenders.

Qualification Criteria : exhaustive criteria (set out in Articles 45 to 48 of Directive 2004/18/EC) to be used in pre-qualifying / pre-selecting candidates who are invited to submit tenders. The criteria relate to a candidates professional conduct and standing, professional or technical expertise, financial or economic standing, general capacity and competency, i.e. criteria which relate to a candidate's character and capability to perform a particular contract. Proposals in relation to a particular project are not sought and are not a consideration at this stage.

Award Criteria : criteria, set out in tender documentation, on which tenders will be evaluated and the award of the contract will be based, i.e. relating to how a tenderer addresses and proposes to perform or deliver the object of the contract and at what cost.

NOTE: Qualification criteria should not be repeated in the award criteria.

OJEU : Official Journal of the European Union.

Appendix Five

Frequently Asked Questions

Question 1: To whom do the public procurement guidelines and rules apply?

They apply to procurement by all public sector bodies, such as Government Departments / Offices, local and regional authorities, health authorities, commercial and non-commercial State bodies. Also, most works and related services contracts awarded by a private entity, which are subsidised 50% or more by a public body, are covered by the EU Directives if they exceed the EU thresholds. Contracts below the EU thresholds which are funded or part-funded from public funds, awarded by private sector entities, should, as far as possible, be awarded in accordance with the national guidelines.

Question 2: When do I have to tender for the purchase of supplies and services?

The basic principle of public procurement is that there should be a competitive process. The type of process will depend on the value and nature of the requirement. Section 5 of the Competitive Process guidelines indicates procedures that might be used for lower value requirements, i.e. below EU thresholds.

There is a legal obligation to tender for contracts above EU thresholds and award them in accordance with procedures set out in EU public procurement Directives.

Question 3: Can I invite parties to tender directly?

Yes. Particularly suitable suppliers or service providers may be invited to compete for contracts below EU thresholds. A number sufficient to ensure adequate competition, selected on an objective and non-discriminatory basis, should be invited to tender (see Section 5 of the Competitive Process Guidelines). It is also acceptable to supplement advertising by issuing details of a competition directly to particular suppliers of service providers after publication of notices.

Question 4: Must requests for tenders be advertised in national newspapers?

It is not obligatory to advertise in national newspapers. There is a legal obligation to advertise contracts above the EU thresholds in the OJEU. All public contracts above

€25,000, and some below this value, should be published on *etenders.gov.ie*. and the National Procurement Service website *www.procurement.ie*. This threshold varies depending on the category of goods/service (see section 5.1). These websites are the main point of reference for entities interested in public sector contracts. If newspaper or other media advertising is considered necessary it is recommended that an abbreviated notice be published referring to full details on the *etenders* site.

Question 5: Why the €25,000 threshold for advertising on etenders?

This is not intended to be prescriptive; it is merely a guide for contracting authorities. In recent experience, contracting authorities found that notices for many relatively small requirements published on the website were receiving very large responses. This resulted in disproportionate administrative costs for contracting authorities in processing a large number of bids and for large numbers of tenderers preparing bids.

If the number of suppliers in the market is unknown, or known to be relatively small, it is recommended that requirements below €25,000 be published on the website to ensure adequate competition, and opportunity for suppliers and service providers.

Question 6: Is there a list of contractors/ suppliers/ service providers used by public bodies?

You should consult the National Procurement Service – details appendix V.

Question 7: Is there a minimum time to be allowed for the submission of tenders?

For contracts below the EU thresholds there are no prescribed time limits but sufficient time must be allowed for preparation and submission of tenders. The complexity of a project and other relevant factors relating to the preparation of tenders should be taken into account.

Question 8: How do I prepare a Request for Tenders (RFT)?

A sample RFT can be viewed on *etenders.gov.ie*. Contract notices on the website will also have tender documentation attached which can be viewed for guidance.

Question 9: What is the National Procurement Service and what are National Framework Agreements?

The National Procurement Service (NPS) was established by Government decision in 2009 to ensure maximum efficiency in the area of public service procurement of goods and services. The main objectives of the NPS are to ensure optimum efficiency and value for money in the public procurement process. In all of its activities the NPS seeks to work in a partnership manner with public service clients to ensure maximum efficiency. Through a well-developed series of public service networks the NPS can assist clients in identifying procurement solutions to specific business needs. The NPS will organise the procurement of common goods and services (e.g. office equipment, furniture, vehicles, fuel, electricity) across the public service. The NPS aims to ensure that contracts, framework agreements and competition documents, once developed, will be available for use by the whole public service community.

Question 10: Do I need approval to award a contract to a firm approved under a National Framework Agreement?

Yes, the usual internal HEA approval procedures apply as does the requirement for contract management.

EU Directives:

Question 11: What are procurement Directives / thresholds?

Public procurement Directives are EU rules which impose legal obligations on public bodies (contracting authorities) in Member States to advertise contracts for works, supplies and services, above certain ***thresholds***, in the Official Journal of the EU. The Directives set out procedures for awarding contracts designed to ensure open, transparent and fair competition. The relevant thresholds are set out under “Current EU Thresholds” in this section of the website.

Question 12: Are there any exemptions from the Directives?

The vast majority of public contracts above the relevant thresholds are subject to the provisions of the EU public procurement Directives. There are very limited exceptions, for example in the area of Defence and State security. Some services, annexed to the Directives and listed in Appendix IIB of the Competitive process guidelines, are not subject to the full provisions of the Directive and advertising in the OJEU is not obligatory. However, it is

national policy to advertise such contracts of significant value as part of a competitive process. They must also be awarded in accordance with EU Treaty principles of transparency (this implies appropriate advertising), non – discrimination on the grounds of nationality, freedom to provide services, freedom of establishment.

Question 13: How do I get my contract notices / advertisements published in the OJEU?

Contracting authorities are strongly advised to publish their notices online via etenders.gov.ie or the EU public procurement website <http://SIMAP.europa.eu> . There is guidance for users in completing online publication on both websites. If forwarding notices manually there are standard forms which must be used. The forms can be downloaded, completed electronically (in Word format) and emailed to the Publications Office. (SIMAP has a FAQs section which provides comprehensive information on the procedures involved in publishing notices).

Question 14: The OJEU form requires that the language or languages in which tenders can be drawn up be indicated. What should I indicate here?

Responses must be accepted in one of the official language of the EU, for example English. However, under national policy, responses in the Irish language must also be accepted; therefore the indication must normally be Irish or English.

Question 15: Is publication of a Prior Information Notice (PIN) in the OJEU mandatory?

Under the revised Directives publication of a PIN is not mandatory. However, where estimated annual requirements are in excess of €750,000 for similar categories of supplies or services, publication is encouraged as an aid to transparency and as a means of enabling suppliers and service providers to prepare in advance to tender for upcoming contracts. Contracting authorities who publish a PIN with the required amount of information can avail of shortened minimum times for submitting expressions of interest or tenders. A “purchaser profile” with the necessary amount of information published on a website and notified via a brief notice in the OJEU fulfils the same function as a PIN published in the OJEU.

Question 16: If I haven't advertised in the OJ EU and tenders received are above the EU thresholds, what can I do?

Estimates of costs must be realistic and it is advisable to take a conservative approach. If tenders received are priced above EU thresholds, a contracting authority must be able to justify its original estimate if it awards a contract without OJEU advertising.

Question 17: My contract is urgent – do I have to advertise in the OJEU and adhere to the minimum times for responses set out in the Directives?

The Directives make provisions for negotiating a contract (without advertising) and for accelerating an advertised procedure in urgent and exceptional circumstances. However, 'urgency' and 'exceptional circumstances' are very narrowly interpreted by the European Court and the EU Commission. The instances where resort to these provisions is justified will be very rare and maximum care must be taken before availing of them. The exceptional circumstances / urgency must have been unforeseeable and must not have arisen due to any action or inaction on the part of the contracting authority.

Question 18: Can I try to negotiate a better deal on a tender price to get better value for money?

Post - tender negotiation is prohibited under EU rules as it diminishes transparency and can give rise to abuses in the tendering process. The system is designed to operate on the basis that tenderers submit their most competitive bid in response to the specifications set out in an RFT.

Where contracting authorities cannot specify requirements precisely enough allow the submission of priced tenders, the rules permit the use of a negotiated procedure. Negotiation must be carried out on a fair basis with the highest possible degree of transparency.

Question 19: Is it possible to extend contracts?

It is possible to extend contracts in certain circumstances contracts up to 20% of the original value. A case must be made in advance and approved by the CEO. The rates should adhere to those set out in the original tender. There is no scope for contract extensions in the case of ERDF funded projects.

Question 20: What is the CPV?

The ‘Common Procurement Vocabulary’ (CPV) is a code for describing works, supplies and services to be advertised in the OJEU. It is available on <http://SIMAP.europa.eu> . It can be best viewed or downloaded in ‘Excel’. (There is a link to the EU site on the *etenders*).

Question 21: What is the GPA?

The GPA (Government Procurement Agreement) is a formal agreement concluded by a number of member States of the World Trade Organisation, including the EU, to observe an open and non - discriminatory public procurement policy and practice among its signatories. The provisions of the EU Directives and the GPA are closely harmonized. Almost all public contracts are covered by the GPA. The principal exceptions are service contracts of public bodies for research and development and contracts placed by entities in certain utility sectors (i.e. gas, heat, oil and railways), which are covered by the EU Directives only. The slight variation in coverage gives rise to the application of different thresholds, as indicated in Appendix I of the Competitive Process guidelines.

