

Cork County Council

Procurement Policy



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Version 2.1

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1.0 Executive Summary

This executive summary provides an overview of Procurement Policy within Cork County Council, detailed policy must always be adhered to by buyers and managers in their procurement decision making.

1.2 INTRODUCTION

1.2.1 Purpose of this document

This document sets out Cork County Council's Policy for procuring supplies, services and operates as part of a number of guidance documents to assist buyers within the council to comply with EU, National and local directives. Buyers should also refer to the [Public Spending Code](#) to ensure compliance and good decision making in managing the expenditure of public funds.

This is a live document and subject to change where changes to National Policy are made or interpretation of Directives change as a result of jurisprudence. The latest version will be available on the Procurement Portal. (For ease of navigation each section heading in the executive summary contains a hyperlink to the corresponding detailed section in the main document.)

1.2.2 Guiding Principles

This document has been prepared in accordance with Treaty of Rome Principles, EU and National Procurement Directives and the Public Spending Code.

1.2.3 Legislation

All procurement in Cork County Council must adhere to the following legislation pertaining to the Public Sector

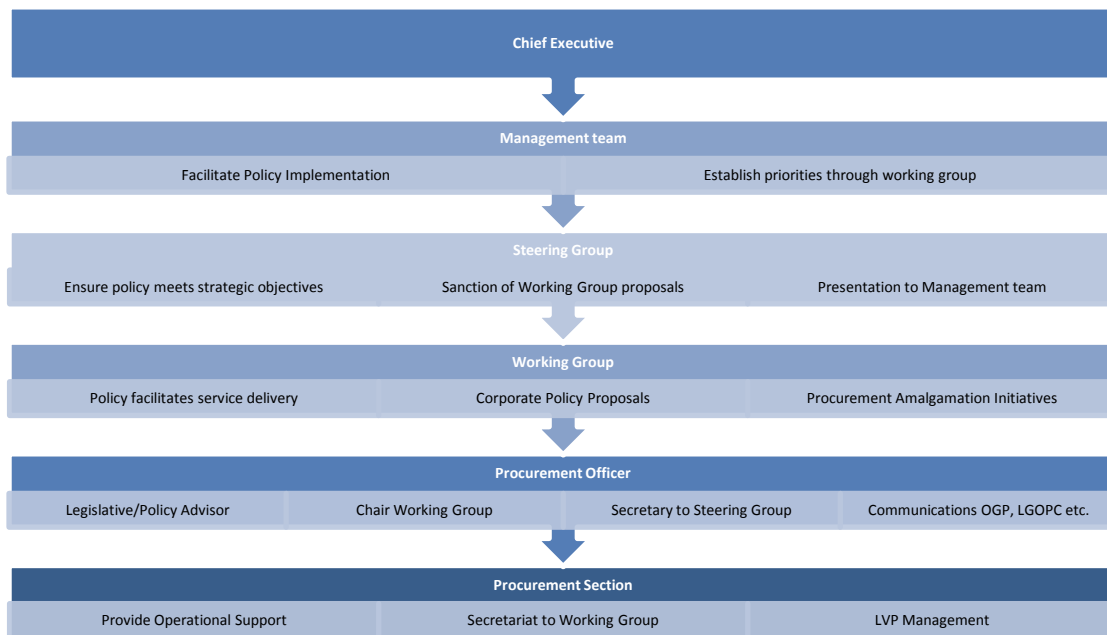
- Directive 2014/24/EU (Public Sector) transposed by SI 284 of 2016
- Directive 2014/23/EU (Concessions) transposed by SI 203 of 2016
- Remedies Directive 89/665 as amended by Directive 2007/66 transposed by Irish Remedies Regulations SI 130 of 2010 (as amended)
- European Union (Award of Public Authority Contracts) Regulations 2016
- Circular 10/14

1.2.4 Procurement Governance

The scale and extent of Cork County Council's procurement activities necessitates a strong governance structure to assist buyers in conducting these activities in accordance with policies and guidelines which are influenced by many stakeholders including EU Member States, the Oireachtas, various Government Departments and the Judiciary.

The Chief Executive (CE) has ultimate responsibility to ensure compliant procurement. The CE delegates significant budgetary and procurement responsibilities to Divisional Managers, Directors of Service and Heads of Function. Each Director/Head of Function has the responsibility to ensure that the budget holders, to whom they in turn delegate, take responsibility for the compliant procurement of all goods, services and works for which they authorise spend.

Our governance structure outlined below seeks to support management and staff in meeting their procurement responsibilities by establishing strong links both internally and externally to deliver quality services in compliance with procurement requirements.



At the centre of this governance structure will be a Steering Group comprising of a core group of Senior Managers, to ensure consistency with Corporate Objectives, and a Working Group, to explore procurement opportunities ensuring where possible that procurement policies support effective service delivery.

1.2.5 Specific exclusions from Public Procurement

The Directives outline a definitive list of exclusions which are specifically exempt from public procurement rules. These cover areas such as land acquisition/rental, certain media services, arbitration/conciliation services, certain legal services, transfer of securities financial services, loans, employment contracts, some services provided by non-profit organisations, public rail and metro services and political campaign services.

Procurement not covered by these exclusions must adhere to Public Procurement Directives.

1.2.6 Use of Negotiated Procedure without prior publication

In exceptional circumstances, below EU Thresholds, buyers are not required to advertise a tender. Articles 32 of the Directives describe the circumstances under which these apply, which must be certified by a Director of Service/Head of Function.

The areas outlined relate to circumstances arising that could not have been foreseen and not of the Council's own making. They also cover opportunities that may arise by way of auction, liquidation and situations where no tenders or suitable tenders were submitted in response to a tender competition.

1.2.7 Concession Contracts

Concession contracts are governed by Directive 2014/23/EU and are subject to separate procurement regimes which are outside the scope of this Procurement Policy. The Procurement Officer should be contacted for specific guidance where it is planned to award a concession contract.

1.3 COMMON PROCUREMENT ELEMENTS

1.3.1 Funding

Sufficient funding must always be secured before conducting procurement competitions thereby agreeing purchase prices before committing the Council to the purchase of supplies or goods.

Revenue expenditure must have an approved budget; Capital expenditure must have a formally authorised departmental allocation approved by the Head of Finance; where a budget does not exist approval must be sought from the Chief Executive (CE) /Director of Service (DOS) and the Head of Finance (HOF).

1.3.2 Roles and responsibilities

These are aligned with standard budgetary roles and responsibilities and the Procurement Governance Structure ranging from CE corporate responsibility to the buyer managing the process.

Buyers and contract managers, who may or may not be the same person, hold the operational responsibilities of ensuring processes are adequately managed including retention of adequate records to demonstrate compliance and ensuring contracts are executed in accordance with specifications to the satisfaction of the Council, taking remedial action when necessary.

1.3.3 Thresholds and associated procedures

The relevant threshold values (exclusive of VAT) and applicable procedures to be used can be found in [Appendix 1](#).

1.3.4 Facilitating SME Participation (Circular 10/14)

Contracting Authorities are expected to encourage participation of Small and Medium Enterprises (SME) in procurement competitions. This can be done by sub-dividing contracts into lots where appropriate or accepting bids from consortiums. We must also ensure that bidder capacity and turnover requirements are proportionate to the contract being awarded while also recognising new and innovative solutions from the sector.

1.3.5 Exclusion Grounds

Article 57 of the Public Services Directive 2014/24/EU specifically sets out various situations whereby an economic operator must be excluded from a Public Procurement Competition. The obligation to exclude an economic operator will also apply where the person, convicted by final judgement, is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

1.3.6 Record Keeping

The ability to provide documentary evidence to support decisions made is imperative to demonstrating compliance with Procurement Directives. Buyers must retain and be in a position to provide contemporaneous documents relevant to the procurement undertaken when requested subsequently.

There is general requirement on Cork County Council, for all procurements, to “keep sufficient documentation to justify decisions taken in all stages of the procurement procedure for example documentation on communications with economic operators and internal deliberations, preparation of procurement documents, dialogue or negotiations if any, selection and award of the contract

1.3.6.1 Above EU Threshold

For all procurement above EU Threshold buyers must complete an Article 84 report which tracks decision making throughout the procurement process. This is a mandatory document and must be retained for EU, local government and internal audit purposes.

1.3.6.2 NATIONAL THRESHOLD

For consistency buyers should keep appropriate records for all elements which apply to record keeping requirements for above EU Thresholds. It is not obligatory to complete and retain an Article 84 report.

1.3.6.3 QUOTATIONS

Buyers must retain adequate records to demonstrate compliance with requirements for seeking [quotations](#) per appendix one and national guidelines.

1.3.6.4 NATIONAL RETENTION POLICY PROCUREMENT RECORDS

In April 2019 a revised national retention policy for Local Authority Records was published by the LGMA which includes agreed retention periods for public procurement records which must be followed.

1.3.7 Conflict of Interest

The concept of conflict of interest covers any situation where a staff member of Cork County Council or of a procurement service provider acting on behalf of the Council, who are involved in the conduct of a procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which may be perceived to compromise their impartiality and independence in the context of the procurement procedure.

In the event of any potential conflict of interest measures must be taken to address same and documented accordingly, with such records being retained for inspection as evidence of actions taken as required under Article 24 of the EU Directives.

1.3.8 Ethical Standards Declaration

In the context of public procurement it is important than any person/company conducting business with Cork County Council understand the obligations placed on officials, under Part 15 of the Local Government Act 2001, but also their responsibility to ensure they do not act in a manner that could be perceived as compromising ethical standards.

A declaration to be signed by economic operators must be included in all tender packs to be signed by economic operators as confirmation they understand their obligations in this regard.

1.3.9 Freedom of Information (FOI)

Public Bodies are obligated to treat all tenders as confidential at least until such time as the contract is awarded. The Information Commissioner's current views are that disclosures, in the public interest, in the context of procurement relate to price, type and quantity of goods supplied once a contract has been awarded. In general terms all other information is regarded as commercially sensitive and should not be disclosed unless it were necessary to explain the nature of goods or services purchased by the public body.

Each FOI request must be assessed on a case by case basis as views may change based on jurisprudence.

1.3.10 Contract Types (Works, Services, Supply)

A decision must always be made at the outset as to the contract type and the rationale applied must be recorded for audit purposes as this determines the procurement rules

which apply. Where the contract has a mixture of elements e.g. supplies and services the type of contract is determined based on whichever is the greater element of the contract.

1.3.11 Insurances

It is important to ensure adequate insurances are in place to protect the Council when awarding contracts. Insurance levels should be proportionate to the levels of risk and value of contract being awarded.

Specific conditions exist under our Corporate Insurance Policy depending on the nature and value of the contract being awarded. Buyers must take particular care that adequate insurances are in place on a case by case basis.

1.3.12 Green Procurement – Promoting use of environmental and Social Considerations

Circular 20/2019 focuses on the priority of Government in promoting green elements in the context of wider commitments under the Climate Action Plan. Under National Policy Green and Social Considerations must be factored for in procurement planning and contract award criteria within tender competitions where possible going forward.

1.3.13 Low value purchases

The introduction of low value purchase cards and virtual purchase cards to make low value purchases has afforded flexibility to facilitate swift operational responses when necessary and reduce overheads by the reduction of purchase order processing for low value items. However it is imperative that all divisions ensure that aggregate spend does not breach procurement thresholds and that procurement mechanisms in place are not circumvented through the use of LVP products.

1.4 MANAGING PROCUREMENT

The [Public Spending Code](#) is the set of rules and procedures that apply to ensure that public funds are treated with care ensuring the best possible value for money across the Irish public service, to the highest standard possible. These rules are intrinsically linked to best practice in Public Procurement. Although the public spending code applies to all public service procurement buyers involved in procurement above €500k in value should pay particular attention to the [quality assurance elements](#) required.

1.4.1 The Procurement Cycle

The nature of services we provide means that much of the procurement conducted within the Council is cyclic by nature, which sits well with best procurement practice. All procurement excises can be summarised in three stages;

1.4.2 Planning Phase

The Planning Phase directly links to [Part B of the Public Spending Code](#) which provides guidance on how the Council should demonstrate the business need, estimate cost, anticipate future requirements, undertake technical dialogue with the market if necessary and determine if existing arrangements exist to facilitate the procurement exercise.

Once these key elements have been addressed we are in a position to devise the best procurement strategy in developing high quality technical specifications that meet our need to ensure the best quality outcome, providing us with best value for money. Analysis completed during this stage will allow buyers to select the most appropriate procurement procedure by either utilising an existing national arrangement, running a tender competition or by establishing a framework through tender competition with the option of exercising call-off contracts.

1.4.2.1 IDENTIFY THE NEED

Buyers must first establish whether there is a clear business need for the goods or service, for example by way of preparation of a business case. The procurement must be essential for the conduct of normal business or to improve performance.

Procurement compliance is dependent on establishing a clear need.

1.4.2.2 PRELIMINARY MARKET CONSULTATION

Market consultation should be part of planning for any procurement exercise and where conducted evidence must be retained. However it **must be conducted** by buyers to inform on procurement strategy and the development of specifications where;

- The Market is constantly changing
- There is not enough information available to develop a robust specification
- A number of options may be available
- Delivery of the optimal solution is paramount
- Identification of innovative solutions is required

1.4.2.3 ESTIMATING CONTRACT VALUE

When valuing a contract in order to ascertain the applicable procurement procedure the buyer must make a genuine pre-estimate of the contract value at the date of publication of the Contract Notice, exclusive of VAT, taking into consideration the entire term of the contract, i.e. assuming all extensions and all options under the contract are exercised.

1.4.2.4 PROCUREMENT STRATEGY

Buyers must adopt a procurement strategy that will minimise casual or 'once off' purchases and promote best value. Buyers are obligated under national policy to firstly confirm whether the Office of Government Procurement (OGP) or the Local Government

Operational Procurement Centre (LGOPC) has existing or planned procurement arrangements which may meet their needs for the goods or service. If such an arrangement does exist but is not being used on this occasion, buyers must record and retain a value for money justification to justify the reasons for their decision

1.4.2.5 TIMESCALES

Buyers must ensure that there is an adequate amount of time in the procurement programme and take account of the nature of the specifications and the complexity of the contract when fixing the timescale for submitting responses.

In the case of contracts for goods, services and works above the EU financial thresholds, buyers must also ensure that the timescale complies with the minimum periods specified in the 2016 Regulations outlined in [Appendix 2](#).

1.4.2.6 SELECTING WHAT PROCEDURE TO USE

There are a number of different procedures available to buyers depending on the need to be addressed. Selecting the optimal procedure will deliver better outcomes and buyers should consult the procurement section to seek guidance on the best strategy and procedure to use.

1.4.2.7 FRAMEWORK AGREEMENTS

A framework is an agreement, put in place with a provider (single supplier) or range of providers (multi-supplier), to establish terms governing contracts that may be awarded during the life of the agreement. In other words, it is a general term for agreements that set out terms and conditions for making specific purchases (call-offs). This type of arrangement can benefit Cork County Council in that the framework itself does not create any contractual obligations to spend on establishment; contracts are only awarded at call-off stage or if the framework competition also includes the award of an initial contract.

1.4.3 Competition Phase

Although quotations allow for competition on price this phase focuses on National and EU tendering and in particular using all information available to run a robust, open and transparent procurement process to reduce the risk of legal challenge or other procurement compliance issues.

1.4.3.1 PREPARING SPECIFICATIONS

The directives set down some general rules, which contracting authorities are obligated to observe, when drafting specifications. Specifications can be drawn up in terms of functional performance requirements or by reference to standards; however these can only be for reference purposes and to demonstrate compliance. Equivalents must be permitted in all cases with any form of supporting evidence permitted.

Specifications must not be discriminatory and must afford equal access. Unless justified by the subject matter of the contract, technical specifications cannot refer to specific make, source process, trademark, patent, type, origin or production with the effect of favouring or eliminating certain undertakings or products.

VARIANTS

Are solutions which buyers may accept as an alternative to what has been specified in contract documents subject to certain conditions as specified in the directives and must be factored for when preparing specifications.

SOCIAL/ENVIRONMENTAL/INNOVATION ELEMENTS

The 2016 Regulations permits Cork County Council to take into account social value and innovation considerations when awarding contracts. These include provisions relating to accessibility; reservation of contracts for social value; compliance with environmental, social and labour law; acceptance of environmental or social labels and equivalents and rules regarding full life-cycle costing. Provisions also allow for reservation of contracts for 'Sheltered Workshops' or programmes for disadvantaged workers with separate provision to reserve certain contracts for completion by organisations pursuing a public service mission which meets the definition in the directives.

RESERVED CONTRACTS

Article 20 permits contracting authorities to reserve participation in procurement procedures to economic operators, whose main aim is social and professional integration of disabled or disadvantaged persons, provided at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers, providing the article is specifically referenced in the call for competition.

1.4.3.2 SELECTION CRITERIA

Selection criteria are concerned with the qualities of the contractor, rather than the work to be carried out under the contract being awarded. A minimum requirement, proportionate to the value of the contract being awarded, must be set and stated for the selection criteria which broadly cover

- **Economic operators that are specifically excluded from the competition process** – e.g. tenderers who have been the subject of conviction for participation in a criminal organisation, corruption, fraud, terrorist offences, money laundering, terrorist financing or child labour or other forms of human trafficking.
- **Candidates may be required to meet minimum capacity levels** – based on economic and financial standing; technical and/or professional ability.

1.4.3.3 AWARD CRITERIA

In contrast to selection criteria, award criteria are concerned with the nature of the work being done or the manner in which it is done, to the exclusion of any considerations in relation to the contractor.

Recital 92 under the Directives states '*Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.*'

In the context of award criteria buyers must ensure that qualifying economic operators are in a position of equality both when they draw up their tenders and when Cork County Council evaluates them to ensure that a particular operator is not excluded.

DETERMINING AWARD CRITERIA

Two methods are used as follows;

- a) **Lowest price** - is used when the technical specifications are fully clear and fixed with no variants allowed. Awarded to the tender that is judged to have met the technical specifications and selection criteria laid down at the cheapest cost.

- b) **Most Economically Advantageous Tender (MEAT)** – when a buyer wants to ensure that the contract is awarded to the economic operator that offers the best value for money. The award is based on various criteria related to the scope of the specific contract such as quality, price, technical value, aesthetic and functional characteristics, environmental characteristics, operating costs, efficiency, after-sales support, delivery date, and execution deadline.

QUALITATIVE CRITERIA

As part of the award of contract buyers should take into account the experience, organisation and qualifications of staff that will be responsible for performing the contract provided this can have a significant impact on the level of performance of the contract and has not already been assessed at selection stage and can include: delivery schedule; quality of product or fitness for purpose; technical merit of the team; energy efficiency; environmental characteristics; aesthetic characteristics; accessibility/design for all users; social, environmental and innovative characteristics.

1.4.3.4 COST CRITERIA

Buyers must always use cost rather than price as a single criterion which can factor a combination of elements including life cycle cost, spare parts cost, running costs, training and capital costs etc.

LIFE-CYCLE COSTING

Article 68 of the directives sets out how life-cycle costing should be used in public procurement to allow buyers to identify the cheapest costing solution when assessing value for money. It includes all elements outlined in the Cost Criteria Section above but also elements such as disposal costs at end of life. In simple terms assessing how much it will cost the Council from commissioning to decommissioning.

1.4.3.5 RELIABILITY AND CONTINUITY OF SUPPLY

When attempting to assess a supplier's reliability in these areas buyers must ensure that the criteria being applied relate only to criteria specifically designed to identify the most economically advantageous tender and must be clearly stated in the award criteria. The detailed section in this document has specific guidance on this formulated as a result of judicial decisions.

1.4.3.6 WEIGHTING OF AWARD CRITERIA

Weightings should be set relative to the risk and nature of contract being awarded. However it is Cork County Council policy that cost criterion must not be set below 30% of the overall marks available in any tender competition.

1.4.3.7 RUNNING TENDER COMPETITIONS

All tender competitions must be run on eTenders or Supplygov depending on what type of procurement is being conducted.

1.4.3.8 EVALUATING TENDERS

The evaluation of tenders must always be carried out by a competent team, who possess the appropriate technical knowledge and expertise to fully understand the Council's requirements and to robustly assess responses in accordance with those requirements.

It is important that pass/fail criteria in particular are clearly defined and assessed consistently. Where a response does not adequately meet the requirements then the tender must be excluded from the competition.

1.4.3.9 VERIFICATION AND CLARIFICATION

Buyers should exercise caution during any verification or clarification process to ensure that re-negotiation does not occur and that only aspects of the original tender or Cork County Council's requirements are clarified or supplemented provided this does not result in discrimination or material change of the Council's requirements or adds to the tenderers original response.

1.4.3.10 TENDER ADMINISTRATION ERRORS

A common sense approach, in the context of good business principles as well as equal treatment, regarding missing or unsigned documents should be exercised. The Courts generally have considered that factual and generally available information can be clarified and in general terms should not be grounds for exclusion. However leniency cannot be applied where it specifically states in the tender documents that tenders will be considered inadmissible for the error being adjudicated on. Assessment panels on that basis need to reach consensus on whether exclusion would be excessive given the nature of the error.

1.4.3.11 NOTIFICATIONS AND STANDSTILL

On completion of a tender competition the directives prescribe specific standstill periods and notification obligations on Contracting Authorities which must be observed before a contract is executed. These vary depending on the procurement strategy and procedure used and buyers must ensure they allow adequate time in the process to meet these statutory obligations. Failure here carries the same weight as transgressions in other areas of procurement which could result in collapse of the process, legal proceedings and punitive damages awarded against the Council.

1.4.3.12 REMEDIES FOR DISSATISFIED TENDERERS

PERSONAL DEBRIEFING

In order to mitigate risks of accidental disclosure of new or commercially sensitive information and protect the integrity of the process already completed it is Cork County Council policy not to conduct personal debrief meetings with unsuccessful tenderers. However unsuccessful tenderers must be allowed to submit queries for clarification of comments provided in regret letters which should be addressed to the primary contact of the tender process for reply. Advice should be sought from the Procurement Section regarding responses to such requests.

APPLICATION TO COURTS

Such applications in procurement can result in an order to correct an infringement, prevent further damage or instruction to conduct a review of a decision to award to the preferred tenderer.

Cork County Council must firstly be informed of the alleged infringement, the intention of the applicant to apply to the Court and the reasons that constitute the infringement. We must also be provided with a sealed copy of the motion. Buyers receiving a challenge should refer the matter immediately to both the Procurement Officer and the County Solicitors Office.

THE 'CORRECTIVE MECHANISM'

Prior to a contract being concluded the European Commission may request Cork County Council to make substantive amendments to an award procedure under the 'Corrective Mechanism' by bringing to our attention a situation they consider to be clear and manifest infringements of Community Law in the award of the contract. Such cases should be referred immediately to both the Procurement Officer and the County Solicitors Office.

INEFFECTIVENESS

This is a legal remedy in respect of a public service contract that has already been awarded.

If an eligible person successfully applies to the Court for a declaration that a contract is 'ineffective' any contractual obligations not already performed are cancelled but those performed are not affected. Such cases should be referred immediately to the County Solicitors Office and copied to the Procurement Officer.

1.4.3.13 AWARDING A CONTRACT

For transparency buyers must ensure that the final contract document that will be awarded to the successful tenderer is included in the tender competition documentation to provide a clear understanding of what they will be contractually obligated to deliver. Contracts must be completed before any works commence.

1.4.3.14 CONTRACT AWARD NOTICES

Under EU Directives Cork County Council is obligated to publish specific information on the Official Journal of the EU (OJEU) regarding the award of contract. In accordance with guidance issued in Circular 10/14 to aid SME's it is Cork County Council Policy to publish contract award notices on all competitions run on etenders at National level also.

For competitions on OJEU under the 2016 Regulations we are now obligated to publish an Article 84 report that summarises key information regarding the procurement conducted and decisions made during the process.

1.4.4 Contract Management Phase

The Contract Management Phase directly links to [Part C of the Public Spending Code](#) which provides guidance on how the Council should deal with the Management/Implementation and the review requirements post-implementation. It also incorporates the VFM Policy Review initiative and other evaluation requirements that may be applicable. Once contracts are awarded it is imperative that they are actively and effectively managed to ensure Cork County Council remains compliant with procurement Directives.

1.4.4.1 MINIMUM REQUIREMENTS

Buyers should always have a programme for checking goods and services against the contract specification ensuring regular procedures for reporting and identifying poor performance.

If a contractor fails to take remedial actions agreed to address poor performance the contract should be terminated with guidance from the County Solicitor's Office where necessary.

All procurement cycles must be reviewed to inform on future exercises and lessons learned recorded to improve future procurement processes.

1.4.4.2 MODIFICATIONS TO CONTRACTS

As a result of case law directives have been interpreted to mean that any substantial changes to a contract after its award will require a new tender competition. While there are exceptions to this they are very specific and when interpreting these exceptions courts take a narrow view on them. The detailed policy document outlines these exceptions in full.

2.0 Introduction

Public Procurement refers to the purchase by governments and state-owned enterprises of goods, services and works. As public procurement accounts for a substantial portion of the taxpayers' money Cork County Council, as a contracting authority, is expected to carry it out efficiently and with high standards of conduct in order to ensure high quality of service delivery and safeguard the public interest.

Public Procurement is commonly defined as the acquisition, whether under formal contract or not, of works, supplies and services by public bodies. It ranges from the purchase of routine supplies or services to formal tendering and placing contracts for large infrastructural projects. The procurement process covers the full cycle from the initial concept and definition of business needs and continues through to the end of the useful life of the asset acquired, the service contract or the completion of works. Procurement covers purchase, lease, rent and concession.

2.1 Purpose of this document

This document sets out Cork County Council's Policy for procuring goods, services and works, operating as part of a number of guidance documents to assist buyers within the council to comply with EU, National and local directives. Buyers must also refer to the [Public Spending Code](#) to ensure compliance and good decision making in managing the expenditure of public funds.

Ancillary documents include the Corporate Procurement Plan, which outlines the corporate strategy, which will guide the development of procurement within the Council over the coming years with the publication of this updated policy being the first step in the process. A further document called the Purchase to Pay Procedure contains the specific steps that must be followed to purchase and pay for goods, services and works once they have been procured in accordance with this policy.

Cork County Council, as a sub-central contracting authority, is subject to domestic and EU procurement legislation which forms the basis for much of the policy in this document. In addition to these policies buyers must also take steps to ensure that they are in compliance with any Government Department Circulars or Directives and if in doubt should raise a query with the Procurement Section by emailing procurement@corkcoco.ie.

This is a live document and subject to change where changes to National Policy are made or interpretation of Directives change as a result of jurisprudence. The latest version will be available on the Procurement Portal which also contains supplementary guidance and templates.

2.2 Guiding Principles

The Treaty of Rome signed in 1957 which resulted in the establishment of the European Economic Community (EEC) sets out a number of principles which apply when awarding

contracts, in particular in relation to freedom of movement of goods, freedom of establishment and freedom to provide services.

The specific procurement principles that derive from these basic principles are:

- **Transparency** - Being open and transparent about the procurement process.
- **Equal Treatment** - Applying the same rules to all giving everyone the same rights of access.
- **Proportionality** - Ensuring that all requirements are necessary and appropriate in relation to the contract.
- **Mutual Recognition** - is the principle of European Union (EU) law under which member states must allow goods that are legally sold in another member state also to be sold in their own territory.

A competitive process conducted in accordance with these principles will achieve best value for money in compliance with domestic and EU legislation.

The principle of value for money can be defined as the optimum combination of price and quality to meet the need of the buyer to include;

- Whole life cost
- Sufficient quality
- Fitness for purpose
- After sales service and support
- Green considerations

2.3 Legislation

There has been a number of Directives issued relating to Public Sector and Utilities Procurement the relevant Public Sector Directives have been consolidated to the following

- Directive 2014/24/EU (Public Sector) transposed by SI 284 of 2016
- Directive 2014/23/EU (Concessions) transposed by SI 203 of 2016
- Remedies Directive 89/665 as amended by Directive 2007/66 transposed by Irish Remedies Regulations SI 130 of 2010 (as amended)
- European Union (Award of Public Authority Contracts) Regulations 2016
- Policy circulars issued via the Office of Government Procurement

All procurement decisions made by Cork County Council must demonstrate adherence to the directives and national policy.

2.4 Procurement Governance – Cork County Council

Cork County Council currently operates a devolved procurement function where divisions/directorates run competitions to procure goods for their section/division or on behalf of the entire council. Where national framework agreements are in place for the local government sector then these provisions must be used, unless a clear value for money

justification for deviation and is documented and formally approved by a Director/Head of Function.

The Chief Executive (CE) has ultimate responsibility to ensure compliant procurement. The CE delegates significant budgetary and procurement responsibilities to Divisional Managers, Directors of Service and Heads of Function. Each Director/Head of Function has the responsibility to ensure that the budget holders, to whom they in turn delegate, take responsibility for the compliant procurement of all goods, services and works for which they authorise spend.

In recognition of the need to advance a corporate wide view of procurement a Steering Group will oversee a Working Group in developing procurement policy and corporate strategy to ensure best practice procurement in Cork County Council. The Steering Group will bring proposals, developed by the working group, which meet their approval to management team for implementation across the council.

The Procurement Officer reporting to the Head of Finance has a mainly strategic role; to draft policies/procedures, provide advice and guidance to the steering group, working group individual buyers and pro-actively engage with the OPG, LGSPC/LGMA, and LGOPC representing the council externally in the advancement of good procurement practice.

Buyers are responsible for ensuring that they avail of training provided or seek training where needed. They are also responsible for ensuring that all procurement decisions they make are in accordance with Corporate, National and EU Policy. Where any doubt exists clarification should be sought from the procurement section at procurement@corkcoco.ie.

2.5 Specific exclusions of Public Service Contracts

The following is a definitive list of exclusions covered by the Public Sector Directives. This means the following categories only are specifically exempt from public procurement rules.

- Acquisition or rental of land, existing buildings or other immovable property or concerning rights etc.
- Acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services;
- Arbitration and conciliation services;
- Certain legal services
 - Legal representation in arbitration, conciliation, judicial proceedings;
 - Legal advice in preparation of above;
 - Documentation certification and authentication;
 - Legal services provided by trustees;
 - Other legal services connected with the exercise of official authority;
- Financial services in connection with issue, sale, purchase or transfer of securities and other financial instruments;

- Loans;
- Employment contracts;
- Civil defence, civil protection and danger prevention services provided by non-profit organisations or associations;
- Public passenger transport services by rail and metro;
- Political campaign services; (Public Sector Directive only)

Any procurement not falling under the above must adhere to this policy in addition to National and EU legislation.

2.6 Use of Negotiated Procedure without prior publication

In exceptional circumstances, the requirement to advertise a tender in excess of €25,000 (€50,000 works) and below EU threshold in value need not apply. The circumstances under which these apply, outlined in Article 32 of the Directives, which must be certified by the Director of Service/Head of Function are

- in cases of extreme urgency, brought about by unforeseen circumstances, where an immediate purchase must be made in order to avoid risk to persons, property or significant financial loss to Cork County Council or the Irish State; - this must be unforeseen and not of the Council's own making
- for additional supplies where a previous contract was awarded under a competitive tender and a change of supplier would result in incompatibility or disproportionate technical difficulties in operation and maintenance - this does not apply to contracts for services;
- for additional services not covered in the project initially awarded, but have through unforeseen circumstances, become necessary for the performance of the contract, when such additional services cannot be technically or economically separated from the main contract without great inconvenience to the contracting entity; or when such additional goods or services, although separable from the performance of the original contract, are strictly necessary for its later stages;
- for bargain purchases or purchases under advantageous conditions, e.g. liquidation sale, creditors' agreement, winding-up;
- for supplies quoted and purchased on commodity exchanges;
- when the service contract concerned is part of the follow up to a design contest organised in accordance with the EU Procurement Directive;
- where no tenders or no suitable tenderer has been submitted in response to an open/restricted procedure, provided that the initial conditions of contract are not substantially altered and a report is sent to the European Commission if it so requests;

Prior approval to award a contract pursuant to one of the above reasons must be obtained from the Director of Service/Head of Finance in all cases other than urgent purchases. In the case of urgent purchases a full explanation of the reasons giving rise to the urgency, also

outlining steps that will be taken to avoid recurrence where possible, must be certified by the Director of Service /Head of Function and submitted subsequently in writing to the Procurement Officer for reporting purposes.

2.7 Concession Contracts

It should be noted that concession contracts are governed by Directive 2014/23/EU and are subject to separate procurement regimes which are outside the scope of this Procurement Policy. Buyers wishing to award concession contracts should contact the Procurement Officer for specific guidance.

3.0 Common Procurement elements

When conducting procurement exercises there are certain requirements and responsibilities that must be adhered to in line with general financial policy and the [public spending code](#) that are common to all Thresholds.

3.1 Funding

The procurement of supplies and services is subject, in all cases, to the availability of financial resources which means;

- Revenue expenditure – must have an approved budget
- Capital expenditure – must have a Departmental and/or internal approved budget allocation, which has been authorised by the Chief Executive/Director of Service and the funding availability has been confirmed/approved by the Head of Finance
- If the proposed expenditure does not have an approved budget, prior approval must be sought from the Chief Executive/Director of Services and the Head of Finance.

It is Cork County Council policy that the purchase price always be agreed in advance of placing an order that commits the organisation to the purchase of supplies or services.

3.2 Roles and Responsibilities

Roles and responsibilities within procurement are in line with standard budgetary roles and responsibilities which include;

Role	Description of main procurement responsibilities
Chief Executive	Corporate responsibility for procurement.
Head of Finance	Oversight responsibility for the procurement of goods and services and associated expenditure.
Director of Service/ Head of Function	Secure appropriate budget/funding. Ensure adherence to policy within their remit. Certify conditions for derogation.
Procurement Steering Group	Corporate Oversight of procurement policy and ratification of working group proposals for submission to Senior Management Team for final approval and adoption.
Procurement Working Group	Review procurement issues that may be presented for consideration and make recommendations regarding the deployment of the procurement function in CCC.

Procurement Officer	Corporate procurement guidance Update policy Monitoring and reporting Information dissemination Relations management – OGP, LGOPC, LGMA etc.
Buyer	Manage and document all aspects the procurement process Conduct competitions on behalf of Cork County Council Ensure adherence to purchase to pay policy, managers orders etc. Ensure contracts are managed

3.3 Thresholds and associated procedures

The relevant threshold values (exclusive of VAT) and applicable procedures to be used can be found in [Appendix 1](#). These will be elaborated on later in this document

3.4 Facilitating SME Participation (Circular 10/14)

Circular 10/14 promoting measures to improve SME Participation in public procurement applies to all public sector bodies. However the Capital Works Management Framework (CWMF) suite of guidance, standard contracts and generic template documents will continue to apply to works and works related services as set out in Circular 06/10.

When planning and conducting procurement buyers are obligated where practical to use the following to facilitate SME participation when running competitions locally

- **Market Analysis** - Buyers must undertake market analysis prior to tendering in order to better understand the range of goods and services on offer, market developments and innovation, what commercial models are available, the competitive landscape, and the specific capabilities of SMEs etc.
- **Sub-dividing Contracts into Lots** - Buyers must, where reasonable and without compromising efficiency and value for money, consider breaking contracts into lots, enabling smaller businesses to compete for these elements;
- **Consortium Bids** - SMEs are encouraged to consider using consortia and tender and contract documents allowing for consortia to tender for public procurement opportunities should be used;
- **Less use of “restricted” tendering and greater use of “open” tendering** – Buyers must use the open tendering procedure for contracts below EU Thresholds in the case of advertised contracts for general goods and services in accordance with National Policy;
- **Capacity Requirements** - Buyers must ensure that any capacity levels set for candidates/tenderers are relevant and proportionate to the circumstances of a particular contract. Buyers may consider the previous experience of individuals who have formed a start-up SME that has yet to establish a track record as a company. Documentary evidence of financial capacity to undertake a project should not be sought by buyers early on in the procurement process;
- **Turnover requirements** - Buyers frequently use the ratio “company’s turnover to contract value” as a measure in deciding whether a business has the financial

capacity and strength to perform a contract. In assessing the financial capacity of a supplier to , buyers, as a matter of general policy, should not for routine (e.g. low-value, high volume) goods and services competitions set company turnover requirements at more than twice the estimated contract value. This is in line with revised EU rules and is designed to support SME involvement;

- **Innovation** - The Government recognises that creative ideas for new and innovative solutions and products often come from SMEs. Buyers should, where possible and appropriate, encourage new and innovative solutions by indicating in tender documents where they are prepared to accept reasonable variants to the specifications;
- **Framework Agreements** - Breaking framework agreements into lots can be an effective way of opening up opportunities to SMEs. Depending upon requirements, framework agreements can be divided into lots on the basis of geography, specialism and/or value. This can encourage a range of SMEs to bid for business appropriate to their capacity, specialism and location;

Cork County Council buyers must seek to improve participation of SME's particularly in areas where it has been traditionally difficult to procure certain services in accordance with 'Circular 10/14 Initiatives to assist SMEs in Public Procurement'.

3.5 Exclusion Grounds

Article 57 of the Directive 2014/24/EU specifically deals with grounds for exclusion of an economic operator from participation in a public procurement procedure and must be complied with in all cases.

The most common exclusion grounds are covered in Scenario 1 and 2.

Scenario 1

A buyer must exclude any economic operator that has been the subject of a conviction by final judgement for one of the following reasons

- Participation in a criminal organisation;
- Corruption;
- Fraud;
- Terrorist offences or offences linked to terrorist activities;
- Money laundering or terrorist financing;
- Child labour and other forms of trafficking in human beings;

The obligation to exclude an economic operator shall also apply where the person convicted by final judgement is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

Scenario 2

- Contracting authorities in Ireland are required to exclude from participation in a procurement procedure any economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This article of the legislation contains an exhaustive list of exclusion grounds however the sections above cover the most common areas. If a buyer has any doubt about possible exclusion grounds not covered above they should refer to Article 57 of the legislation or raise a query with the Procurement Section.

3.6 Record Keeping

The ability to provide documentary evidence to support decisions made is imperative to demonstrating compliance with Procurement Directives. Buyers must retain and be in a position to provide contemporaneous documents relevant to the procurement undertaken when requested subsequently.

3.6.1 Above EU Threshold

Article 84 of the Public Sector Directive requires that Cork County Council maintain the following information relating to procurement above EU Threshold.

- (a) The name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or Dynamic Purchasing System;
- (b) Where applicable, the results of the qualitative selection and/or reduction of numbers pursuant to Articles 65 and 66, namely:
 - (i) The names of the selected candidates or tenderers and the reasons for their selection;
 - (ii) The names of the candidates or tenderers rejected and the reasons for their rejection;
- (c) The reasons for the rejection of tenders found to be abnormally low;
- (d) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties; and, where known at this point in time, the names of the main contractor's subcontractors, if any;
- (e) for competitive procedures with negotiations and competitive dialogues, the circumstances as laid down in Article 26 Section 4 which justify the use of those procedures;
- (f) For negotiated procedures without prior publication, the circumstances referred to in Article 32 which justify the use of this procedure;

(g) Where applicable, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;

(h) Where applicable, the reasons why other means of communication than electronic means have been used for the submission of tenders;

(i) Where applicable, conflicts of interests detected and subsequent measures taken.

In addition there is general requirement on Cork County Council to “keep sufficient documentation to justify decisions taken in all stages of the procurement procedure for example documentation on communications with economic operators and internal deliberations, preparation of procurement documents, dialogue or negotiations if any, selection and award of the contract.”

3.6.2 National Threshold

For consistency buyers should keep appropriate records for all elements which apply to record keeping requirements for above EU Thresholds commensurate with the level of expenditure being undertaken at National Threshold levels.

3.6.3 Quotations

Buyers must retain adequate records to demonstrate compliance with the requirements for [quotations](#) outlined in the selecting what procedure to use section later in this document.

3.6.4 National Retention Policy Procurement records

In April 2019 a revised national retention policy for Local Authority Records was published by the LGMA which includes agreed retention periods for public procurement records.

For all procurement exercises buyers must consult the guidance and procurement retention schedule available in the record keeping section on the procurement portal to establish how long buyers are obligated to retain records. Where it states that records must be offered to the County Archivist buyers must ensure that this done and any decisions/outcomes recorded.

3.7 Conflict of Interest and Confidentiality

The concept of conflicts of interest at least covers any situation where a staff member of Cork County Council or of a procurement service provider acting on behalf of the Council who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which may be perceived to compromise their impartiality and independence in the context of the procurement procedure.

In the event of any potential conflict of interest measures must be taken to address same and documented accordingly, with such records being retained for inspection as evidence of actions taken as required under Article 24 of the EU Directives.

With regard to confidentiality it is important that it is made clear to all tender board members that any information provided by tenderers must not be disclosed or used by board members for any purpose other than the assessment process itself.

As part of all tender assessment processes all board members must agree to and sign a conflict of interest and confidentiality agreement. This document is available in the procurement planning section of the procurement portal. Any emerging conflicts of interest must be addressed and mitigation measures undertaken recorded on the procurement file.

3.8 Ethical Standards Declaration

Part 15 of the Local Government Act 2001 sets out an ethical framework for all those involved in the local government service, including Chief Executives, other local authority staff, councillors and non-councillor (external members) of local authority committees that must be adhered to in the public interest.

In the context of public procurement it is important that any person/company conducting business with Cork County Council understand the obligations placed on officials but also their responsibility to ensure they do not act in a manner that could be perceived as compromising ethical standards.

As standard in all procurement competitions buyers must include in their tender pack a Economic Operators - Ethical Standards Declaration, located here on the portal, which must be signed and returned as part of the tender response by economic operators as confirmation that they understand their obligations in this regard.

3.9 Freedom of Information

Below is a summary of the Information Commissioner views regarding disclosure of records relating to a tender competition given at the conclusion of a ruling under Section 34(2)m of the Freedom of Information Act 1997 in Case 98188. On receiving an FOI request relating to a tender process the summary views of the commissioner quoted below should be considered when making a decision on a case by case basis

- *“First, public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.*
- *Second, tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances, would historic prices remain trade secrets, As a general proposition, however, I accept that tender documents which “would reveal detailed information about a company’s current pricing strategy” or about otherwise unavailable product information could fall within the scope of Section 27(1)(a) of the FOI Act even following the conclusion of a tender competition.*
- *Third, tender prices generally qualify as commercially sensitive information for the purposes of Sections 27(1)(b) and (c) of the FOI Act, Depending on the circumstances,*

product information can also be considered commercially sensitive under Section 27(1)(b).

- *Fourth, when a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. The public interest also favours the release of such information, but exceptions may arise (see Telecom Eireann and Mr Mark Henry, Case Number 98114).*
- *Fifth, other successful tender information which is commercially sensitive (for example, details of the internal organisation of a tenderer's business, analysis of the requirements of the public body, or detailed explanations as to how the tenderer proposed to meet these requirements) may remain confidential. Disclosure in the public interest ordinarily would not be required, unless it were necessary to explain the nature of goods or services purchased by the public body.*
- *Sixth, unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract, and the public interest lies in protecting that information from disclosure.*

I must stress, however, that no tender-related records are subject to either release or exemption as a class. Therefore, each record must be examined on its own merits in light of the relevant circumstances."

3.10 Contract Types (Works, Services, Supply)

Sometimes a contract will be a mixed contract (e.g. the supply and maintenance of computers). Where it is, buyers must determine which element (e.g. the supply element or the service element) is the predominant element and, therefore, which set of rules will apply. This is extremely important to get right as the rules vary slightly depending on the type of contract (e.g. lower financial thresholds apply to services and supplies contracts than to works contracts). In the context of works if any element falls within eTenders CPV code category 45 it must be treated as works. A decision must always be made at the outset as to the contract type and the rationale applied recorded for audit purposes.

3.11 Insurances

It is important to ensure adequate insurances are in place to protect the Council when awarding contracts. Insurance levels should be proportionate to the levels of risk and value of contract being awarded.

When planning procurement competitions buyers must ensure that they are seeking the correct levels of insurance at tender publication stage and ensure policy evidence is sought and retained at contract award stage. Guidance drafted in collaboration with our insurance section is available here on the procurement portal and must be consulted by buyers every time they are planning a procurement as the guidance may be subject to change based on modifications that may be made to our policy conditions by our insurer.

Buyers must also ensure that the specific conditions of our insurance provider for contract awards in excess of €10m are adhered to as follows;

- In advance of publication of a tender competition validate award criteria with an independent procurement specialist. IPB have confirmed that they interpret “procurement specialists” as any service provider who purports to have experience and expertise in this area.
- During tender assessment where a tenderer is being excluded, IPB require Cork County Council to secure an opinion from an independent legal expert with procurement expertise. Again they interpret a legal expert as someone who purports to have experience and expertise in the area of procurement.

Evidence of the above must be retained on file and will be sought in the event of a claim being made under CCC’s insurance policy. IPB also confirm that they do not consider the Office of Government Procurement (OGP) as independent for this purpose.

In both instances buyers must ensure that the person/entity providing the advice has adequate professional indemnity cover in place. IPB deem adequate professional indemnity cover to be at minimum equal to one fifth of the value of the contract being awarded under the tender competition.

3.12 Green Procurement - Circular 20/2019: Promoting the use of Environmental and Social Considerations in Public Procurement

The above circular focuses on the priority of Government in promoting green elements in the context of wider commitments under the Climate Action Plan. Under National Policy Green and Social Considerations must be factored for in procurement planning and contract award criteria within tender competitions where possible going forward.

The Government is keen to explore the scope for the inclusion of social considerations in public contracts where they are suited to the objective of the contract and would have the greatest impact. The purpose of this circular is to help policy makers and practitioners understand how procurement can be used to facilitate the advancement of existing social policy objectives as well as the wider context and implications of including them in particular procurement projects. There are a wide range of policy areas which come under the heading of social considerations including: environmental sustainability, disability access, training for young or disadvantaged people. The OGP cannot decide for other contracting authorities or at a whole-of-Government level what social considerations should be included in the frameworks and contracts that it puts in place on their behalf. However, it can help facilitate the process of incorporating those objectives, once agreed, into planned procurement projects.

The full circular text, which outlines policy including links to guidance and information on where buyers can seek assistance, can be found here on our procurement portal.

Buyers must consider the above and in particular Cork County Council's climate action plan where appropriate when conducting procurement.

3.13 Low Value Purchases

The introduction of low value purchase cards and virtual purchase cards to make low value purchases has afforded flexibility to facilitate swift operational responses when necessary and reduce overheads by the reduction of purchase order processing for low value items to meet the needs of the Council.

However in the context of Public Procurement it is imperative that CCC spend in this area is monitored to ensure LVPC are not used to avoid the use of purchasing arrangements put in place by the Council or Central Purchasing Mechanisms put in place by the OGP/LGOPC which have been activated for use by the Council. In certain circumstances use of low value purchases cards may not appear to represent value based on purchase cost alone however it must be remembered that value in the context of procurement is based on total cost of ownership and often travelling to purchase goods and/or purchasing via P.O. adds additional overheads which ultimately mean more cost. However in such cases the Council must identify the section of the directives being relied upon and be in a position to demonstrate the rationale to justify the decision from a compliance perspective.

Cork County Council has a separate Policy for Low Value Purchases (LVP) available here on our portal which outlines roles and responsibilities in the administration of LVP products.

4.0 Managing procurement

Contracting authorities may award contracts or framework agreements when they have a requirement to appoint a provider of supplies, works or services. It is important therefore that buyers in Cork County Council plan procurement exercises appropriately in the context of value for money but also the strategic importance of the procurement to service delivery. Buyers must ensure they allow sufficient time to manage all procurement elements and retain appropriate records as evidence. The [Public Spending Code](#), which applies to all public service procurement, provides comprehensive guidance in managing spending. Buyers involved in procurement above €500k in value must pay particular attention to the [quality assurance elements](#) required under the Public Spending Code.

- b. Procedure to use – open, restricted, competitive dialogue, competitive procedure with negotiation, etc
 - c. Award a contract, contract with options, framework (single or multi-party)
 - d. Duration
- 3. Develop the tender documentation including**
 - a. Specification
 - b. Selection criteria (as part of the tender document or a separate questionnaire – depending on the procedure)
 - c. Award criteria.
 - d. Pricing document/Form of Tender
 - e. Contracting terms and conditions
 - f. Service level agreement
 - 4. Advertise and Publish the documents on eTenders and/or the OJEU**
 - 5. Evaluate applications/ tenders**
 - 6. Clarify and Verify, if required**
 - 7. Identify winner and issue notification letters to successful/ unsuccessful tenderers.**
 - 8. Conclude contract (i.e. award contract after standstill period has expired if OJEU tender)**
 - a. Publish award notice on eTenders/OJEU
 - b. Complete Article 84 Report
 - 9. Manage the contract – watching for any Material Change.**
 - 10. Review the contract at the end and ensure that lessons learned feed into the renewal of the contract or any future contracts where applicable.**

Buyers conducting procurement on behalf of Cork County Council must retain adequate records and/or evidence on file for each of the steps above as this forms the basis of key decisions made and may be relied upon to justify actions later for audit or cases of legal challenge.

4.2 Planning Phase (Steps 1-2)

This phase of the procurement cycle is of critical importance in establishing the need to be addressed. Adequate time, depending on the scale of the procurement, must be assigned to ensure the need is accurately identified and best quality specifications are produced to demonstrate the need as part of the subsequent competition stage. This will also assist in establishing during contract execution whether the goods/services have been delivered to the required standard.

4.2.1 Identify the need

Buyers must first establish whether there is a clear business need for the goods or service, for example by way of preparation of a business case. The procurement must be essential for the conduct of normal business or to improve performance. Stating that the need for the procurement ‘is a good idea’ is not a sufficient business case. Buyers must ensure that the

business case addresses future phases of the service or purchase of goods that may be required in order to determine total lifecycle costs.

[Part B of The Public Spending Code](#) provides guidance on the Appraisal and Planning Stages of public projects before expenditure is incurred and must be referred and adhered to by Cork County Council buyers.

Appropriate written justification must be certified as required based on the level of expenditure being incurred and retained for inspection as may be required later.

4.2.2 Preliminary Market Consultation

Market consultation should be part of planning for any procurement exercise and where conducted evidence must be retained. However it must be conducted by buyers to inform on procurement strategy and the development of specifications where;

- The Market is constantly changing
- There is not enough information available to develop a robust specification
- A number of options may be available
- Delivery of the optimal solution is paramount
- Identification of innovative solutions is required

Articles 40 and 41 of the 2016 Regulations explicitly allow a contracting authority to conduct market consultations with economic operators and expert bodies before the start of a procurement process which may facilitate improved specifications, better outcomes and shorter procurement timelines. Preliminary market consultation can provide insights about the capacity of the market to deliver on our requirements and the risks involved. It may reduce procurement timescales during the formal procurement process and/or reduce the need for complex and sometimes costly procedures such as competitive dialogue. In addition, it has the potential to drive a more responsive market and allow suppliers to ask questions at an earlier stage prior to the commencement of the formal process.

It is essential, however, that this practice does not create advantages for certain market operators or result in specifications and tender documents being drafted in their favour. Cork County Council buyers must endeavour to ensure that market consultation is sufficiently broad to provide meaningful feedback on the relevant market. Requests for information can be issued via eTenders to a wide number of suppliers.

If the market consultation is followed by a tender competition, buyers must ensure that there is no basis for any assertion of bias, unfairness, discrimination or lack of transparency. Therefore, the process adopted and information received during market consultation must be clearly recorded on file.

Buyers must take appropriate measures to ensure that participation by potential tenderers in pre-market consultation does not distort competition, that any relevant information

exchanged in the context of, or resulting from, the involvement of a tenderer in the pre-market consultation be made available to all other participating tenderers, and that adequate time limits for receipt of tenders are fixed to ensure each tenderer has the opportunity to submit a tender.

Buyers should take particular note that compliance with the obligation of transparency requires that the process of obtaining market intelligence must be kept separate from the tendering and award phase of the competition.

4.2.3 Estimating Contract Value

It is essential that buyers ensure that a realistic estimate of the value of all phases of the service or goods to be procured is calculated as this will determine the rules applicable and the procurement procedure to be followed and is important for budgeting purposes.

When valuing a contract in order to ascertain the applicable procurement procedure the buyer must make a genuine pre-estimate of the contract value at the date of publication of the Contract Notice, exclusive of VAT, taking into consideration the entire term of the contract, i.e. assuming all extensions and all options under the contract are exercised. Contracts without a fixed term should generally be valued on the basis of four years anticipated supply. No project or purchase may be artificially split or sub-divided to prevent it coming within the scope of the National Guidelines or EU Directives. The valuation of Framework Agreements and Dynamic Purchasing Systems must take into account the value of all potential call-off contracts under these agreements/systems over their lifetime. Where a project or purchase involves separate lots, the value of all lots must be included in estimating the value of the procurement.

Buyers must retain supporting information/evidence that supports and validates their estimate. The information and evidence must be sufficient to adequately allow buyers to defend the validity of their estimate should it be necessary later in the tender process.

4.2.4 Procurement Strategy

Buyers must adopt a procurement strategy that will minimise casual or 'once off' purchases and promote best value. Buyers are obligated under national policy to firstly confirm whether the Office of Government Procurement (OGP) or the Local Government Operational Procurement Centre (LGOPC) has existing or planned procurement arrangements which may meet their needs for the goods or service. If such an arrangement does exist but is not being used on this occasion, buyers must record and retain a value for money justification to justify the reasons for their decision, which may also be based on quality criteria, for the purposes of audit and replying to compliance queries subsequently.

The Procurement Section will regularly update information on OGP and LGOPC purchasing arrangements and frameworks on the intranet portal. If buyers are unsure as to whether suitable arrangements exist to meet their need they should seek clarification directly from the OGP/LGOPC support desks or by emailing procurement@corkcoco.ie.

4.2.5 Timescales

Buyers must ensure that there is an adequate amount of time in the procurement programme and take account of the nature of the specifications and the complexity of the contract when fixing the timescale for submitting responses. This will allow suppliers reasonable and sufficient time for submitting the necessary information and preparing the tenders (taking into account holiday periods etc.).

In the case of contracts for goods, services and works above the EU financial thresholds, buyers must also ensure that the timescale complies with the minimum periods specified in the 2016 Regulations outlined in [Appendix 2](#).

Although directives allow for very short time limits in certain cases buyers should endeavour to provide as much time as possible for bidders to review requirements and prepare high quality tenders. More time allowed should also result in more competition and provide better access for SME's.

4.2.6 Selecting what procedure to use

There are a number of different procedures available to buyers depending on the need to be addressed.

Quotations

Public Sector / publicly funded organisations are required to seek quotations for contracts below the National Threshold as outlined in [Appendix 1](#).

Cork County Council buyers seeking quotations must ensure;

- Companies invited to submit quotations, who can be firms know to us, should be capable of providing a competitive quote to ensure value for money.
- Invites and responses must be in writing. (email is sufficient)
- The invitation to quote document must include;
 - Specification of requirements
 - Award decision criteria (price or quality & price)
 - Closing date for receipt
 - Method of submission (written or email)
 - General terms around tax, insurance, other statutory requirements
- Full records are kept of quotations sought.
- Firms must be informed of the evaluation process. i.e. cost or quality/cost criteria
- Unsuccessful firms must be notified that their quotation has not been successful and told who won.
- Records must be kept for audit on the key stages of the process.

Note: Buyers must monitor where quotations are requested frequently over time from the same firms for the same goods, service or works and consider whether an aggregated tender process should be conducted

Tenders

Tendering is a more formal process involving receipt of sealed tenders, either electronically via a secure 'Tender Post-Box' or in hard copy in sealed packages/envelopes. The most common process in Ireland is through <http://www.etenders.gov.ie/> and <https://www.supplygov.ie/>. The method by which tender documents can be sourced and tenders submitted must be clearly stated in the tender documents.

Generally tenders fall into two basic categories standard procedures and procedures available with justification as follows

Standard Procedures	Procedures available with justification
<ul style="list-style-type: none">○ Open○ Restricted	<ul style="list-style-type: none">○ Competitive procedure with negotiation○ Competitive Dialogue○ Innovation Partnership○ Negotiated procedure without a call for competition

In the vast majority of cases Open and Restricted procedures will be used however there may be a need to utilise others from time to time. An overview of all of the above procedures is available in [Appendix 3](#).

Buyers must ensure that the correct procedure is selected as remedies are available particularly at OJEU level even after the contract has been awarded. (Refer to the [ineffectiveness](#) section for further information).

4.2.7 Framework Agreements

A framework is an agreement, put in place with a provider (single supplier) or range of providers (multi-supplier), to establish terms governing contracts that may be awarded during the life of the agreement. In other words, it is a general term for agreements that set out terms and conditions for making specific purchases (call-offs). This type of arrangement can benefit Cork County Council in that the framework itself does not create any contractual obligations to spend on establishment; contracts are only awarded at call-off stage or if the framework competition also includes the award of an initial contract.

Frameworks are established on foot of a tender competition most commonly run under the Open or Restricted procedures and can be used for supplies, works or services. Frameworks are based on large volume buying and are therefore used at both National and EU levels.

Once established correctly Procurement Framework Agreements are procurement compliant, removing the need to independently undertake a full tender process, as this has already been done as part of setting up the framework. Agreed terms and conditions are provided so buyers can simply 'call-off' the framework to meet their own local requirements.

Framework Types

Buyers can put in place frameworks that operate in a number of different ways as follows

- **Single Supplier** – this is when a single supplier is selected as the preferred tenderer to supply the goods/service for the duration of the agreement.
- **Multi Supplier** – this is where a number of suppliers, specified at tender stage, are admitted to the framework. The framework agreement sets out the conditions under which call-off contracts will be award through a number of methods as follows;
 - **Mini-Competition** – Competition is run between the various Framework Operators based on price.
 - **Cascade** - Under this method, the award of a contract will be made on the basis of the ranking of tenders on foot of the framework competition. Starting with the highest ranking Framework Member, the Contracting Authority will request in writing a statement of their capability and interest for the Contract. If this Framework Member is not interested in or incapable of carrying out the contract, the Contracting Authority will proceed in ranking order to the next Framework Member.

4.3 Competition Phase (Steps 3 – 8)

The competition phase focuses on tendering which applies to National and OJEU procurement. It is important that buyers conduct competitions in accordance with directives in an open and transparent manner to avoid legal challenge and the risk of being forced to abandon a competition later.

Template documentation available on the Procurement Portal under ‘Managing Procurement’ should be used depending on the competition being conducted.

For construction procurement guidance and template documentation available from <http://constructionprocurement.gov.ie/> must be used.

4.3.1 Preparing Specifications

Buyers must prepare well-designed technical specifications. Where this is not possible they should seek a technical dialogue with a suitable party in order to assist in drafting a specification. (See [4.2.2 Preliminary Market Consultation](#)) The competitive dialogue procedure can be chosen if it is considered that the procurement is particularly complex and the solution is not capable of resolution through a technical specification and using an open or restricted procedure.

General Specification Rules

Buyers must observe the following general rules when drafting specifications;

- Technical specifications must not be discriminatory and must afford equal access.

- Specifications can be drawn up in terms of functional performance requirements or by reference to standards, but these can only be used for reference purposes and to demonstrate compliance buyers must ensure that the phrase 'or equivalent' is always used in such cases.
- Tenders based on equivalents must be considered and any form of evidence must be permitted.
- Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make, source, process, trademark, patent, type, origin or production with the effect of favouring or eliminating certain undertakings or products. However on an exceptional basis this is permitted where sufficiently intelligible and precise description of the subject matter is not possible. Such reference must be accompanied by the words 'or equivalent'

Note: Some authorities in the past have used the phrase 'equally approved' this is not allowed as the 'approval' is generally biased and not objectively/independently measured or assessed.

Variants

A variant is a solution which buyers may accept as an alternative to what has been specified in the contract documents. The following rules must be complied with if variants are acceptable

- Acceptance of variants must be stated in the call for competition and tender documents.
- The minimum requirements must be stated in tender documents i.e. specification must be drafted in terms of minimum requirements.
- Only variants meeting the minimum requirements may be considered.
- Award criteria must be used that enable the assessment of variants (i.e. Qualitative Criteria must be specific)

Variants cannot be rejected on the grounds that it changes the nature of the contract from a supply to a service or vice versa.

Social/Environmental/Innovation elements

Revised legislation now permits Cork County Council to take into account environmental, social value and innovation considerations when awarding contracts, changes include;

- It is now mandatory to include accessibility for disabled persons/design for all users in specifications for any procurement to be used by natural persons (i.e. an 'individual human being' as opposed to a legal person who may be a private business entity under law), unless exceptionally justified; Buyers should refer to the National Disability Authority website www.nda.ie for guidance.

- Selection criteria, technical specifications, award criteria and contract performance clauses may all address environmental, social or innovation aspects but only where these are linked to the subject matter of the contract. They must also meet the specific requirements which apply to each of these elements under the procurement directives.
- Greater provisions regarding the reservation of contracts for Sheltered Workshops or programmes/organisations employing disadvantaged workers.
- A separate option is available to reserve certain contracts for completion by organisations pursuing a public service mission which meet the definition set out in the directives.
- A requirement to ensure compliance with applicable environmental, social and labour law in the performance of public contracts and to reject an abnormally low tender which does not meet these obligations.
- With regard to environmental and social labels buyers must accept all labels, equivalent labels and accept equivalence evidence where it is not possible for the economic operator to acquire the label.
- New rules regarding life-cycle costing mean that buyers must ensure the cost of buying, installing, operating, maintaining and upgrading, and any waste during the asset's economic life are tracked to determine the lowest cost of ownership of a fixed asset as a part of procurement.

Reserved Contracts

Article 20 states

'Member States may reserve the right to participate in procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.'

This represents an opportunity for buyers in the context of social value to support such organisations where it is practical to do so. Buyers should ensure when undertaking such procurement that the article is referenced in the call for competition.

4.3.2 Selection criteria

Selection criteria are concerned with the qualities of the contractor, rather than the work to be carried out under the contract to be awarded.

EU and domestic legislation sets out the instances where potential tenderers must be excluded from the full tender evaluation process. These can be broadly divided as follows;

- **Economic operators that are specifically excluded from the competition process**

- *Personal situation of the candidate:* any tenderer who has been the subject of a conviction in respect of participation in a criminal organisation, corruption, fraud, terrorist offences, money laundering or terrorist financing or child labour or other forms of trafficking in human beings is excluded from involvement in a public contract. A similar exclusion applies to those who are / have been bankrupted, have been convicted of professional misconduct or have not fulfilled obligations in respect of social insurance and /or taxation.
 - *Suitability to pursue the professional activity:* any tenderer may be asked to produce evidence that they are members of a professional organisation or trade register. This may require a declaration on oath or a certificate details of which are set out in the EU directive.
- **Candidates may be required to meet minimum capacity levels.**
 - *Economic and financial standing:* proof of the economic entity's standing may be furnished by one or more of the following and must be stated in the contract notice or invitation to tender:
 - Banker's reference and / or professional indemnity insurance
 - Published balance sheet or extract thereof
 - A statement of undertakings, overall turnover, or turnover in the area covered by the contract for the last three years.
 - *Technical and/or professional ability:* evidence that the economic entity has the ability to perform the contract shall be gathered from one or more of the following means according to the nature or importance of the contract:
 - Skills, efficiency, experience and reliability as measured by track record in delivering previous contracts
 - Educational and professional qualifications
 - Details of plant and equipment,
 - References
 - Quality assurance system
 - Details of order book
 - Health and Safety record
 - Average annual manpower

Prior to advertising the tender or the invitation of expression of interest a minimum requirement must be set and stated for the selection criteria. These must be proportionate to the value of the contract being awarded.

Selection Criteria are used differently depending on the procedure being used as follows;

- In the case of Open Procedure this criteria is used to select those tenders meeting the minimum requirements
- In Restricted and Negotiated Procedures they are used to select which candidates will be invited to submit tenders.

- In restricted, negotiated and competitive dialogue procedures with publication of a contract notice, suitable candidates can be short listed provided a sufficient number of suitable candidates are available. In this case the contract notice must set out clearly;
 - the objective and non-discriminatory criteria or rules that will be applied.
 - the minimum number of candidates that it is intended to invite and, where appropriate, the maximum number.
 - In the restricted procedure the minimum shall be five.
 - In the negotiated procedure with publication of a contract notice and the competitive dialogue procedure the minimum shall be three.

In any event the number of candidates invited must be sufficient to ensure genuine competition.

Certain standard elements per the procurement directives outlined above must be included as part of selection criteria for all competitions. These standard elements are contained in the 'European Single Procurement Document' (ESPD) which is a standard declaration form to satisfy requirements for these elements. Contracting authorities are obligated to accept the ESPD in tender competitions for these elements of selection criteria.

Standard elements within tender competitions themselves are now assessed by way of declaration by the tenderer that they meet selection criteria requirements. Supporting evidence to confirm declarations are then sought from the preferred tenderer in advance of contract award. Failure to provide supporting evidence within a prescribed time period will result in the exclusion of the preferred tender and the contract being awarded to the next placed tender.

4.3.3 Award Criteria

In contrast to selection criteria, award criteria are concerned with the nature of the work to be done or the manner in which it is done, to the exclusion of any considerations in relation to the contractor.

Recital 92 under the 2014 Directive states;

'Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.'

Article 67.2 further expands on this to guide buyers and states;

'The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.'

It is important that buyers note that the European Court has declared that contracting authorities are entitled to apply whichever option they choose from the above for a particular contract award and cannot be subject to a general and abstract rule requiring them to apply one or other of these options.

In the context of award criteria buyers must ensure equal treatment meaning tenderers must be in a position of equality both when they draw up their tenders and when Cork County Council evaluates them. i.e. award criteria that excludes a particular operator must not be used.

Determining Award Criteria

The means by which Cork County Council award public contracts above National Threshold are:

a) Exclusively the lowest price.

This criterion is used when the technical specifications are fully clear and fixed, and no variants are allowed. In this case, the contract is awarded to the tenderer who was not excluded from the tender procedure during the qualitative selection procedure and whose tender was not rejected in the technical evaluation stage (i.e. it was judged that it meets the technical specifications and other requirements laid down) and, in the cost evaluation stage, was established as the tender offering the cheapest price.

Or

b) The most economically advantageous tender (MEAT).

This criterion is used when a buyer wants to ensure that the contract is awarded to the economic operator whose tender offers the best value for money. In this case:

- We have the opportunity to determine the specifications for the contract placing greater emphasis on functional performance rather than on strict technical requirements.
- Submission of variants may be allowed, provided that these meet the minimum requirements specified.
- Desirable specifications may also be determined, in addition to the mandatory requirements and specifications. Failure to meet the desirable specifications does not lead to the rejection of the tender; meeting them, however, may lead to an advantage in the evaluation procedure.

When the contract is awarded to the most economically advantageous tender, the award takes place based on various criteria related to the scope of the specific contract, such as the quality, price, technical value, aesthetic and functional characteristics, environmental characteristics, operating cost, efficiency, after-sales support and technical assistance, delivery date and delivery or execution deadline.

Qualitative award criteria

Cork County Council buyers should take the experience, organisation and qualifications of staff that will be responsible for performing the contract into account at award stage,

provided this can have a significant impact on the level of performance of the contract and has not already been assessed at selection stage. These can include;

- Delivery schedule proposed.
- Quality of product or fitness for purpose
 - The ISO Definition of Quality – *The totality of features and characteristics of a product or service which bear on its ability to meet stated or implied needs.*
- The technical merit of the team proposed.
- Energy efficiency.
- Environmental characteristics.
- Aesthetic characteristics – Functional characteristics, technical merit, after sales service, spare parts, technical assistance, reliability and continuity of supply.
- Accessibility of/Design for all users.
- Social, environmental and innovative characteristics.

4.3.4 Cost Criteria

When assessing the financial element of tenders buyers must always use cost rather than price. In relation to cost there should only ever be one criterion however it can be a combination of various elements including life cycle cost, spare parts cost, running costs, training costs, capital costs etc.

Life cycle costing

In a procurement exercise using price alone when assessing tenders often leads to usage costs that mean the overall cost represents poor value for Cork County Council.

Article 68.1 sets out a definition of life cycle costing as follows;

‘Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works:

(a) costs, borne by the contracting authority or other users, such as:

- (i) costs relating to acquisition,*
- (ii) costs of use, such as consumption of energy and other resources,*
- (iii) maintenance costs,*
- (iv) end of life costs, such as collection and recycling costs.*

(b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.’

Buyers must always endeavour to factor for full life cycle costs when assessing cost. (Guidance to assist buyers is available from the Procurement Portal in the ‘Procurement Planning’ section)

For Construction Procurement a comprehensive guide to costing is available at <http://constructionprocurement.gov.ie/standard-forms-for-cost-planning-cost-control/>.

4.3.5 Reliability and Continuity of Supply

In assessing quality of service delivery buyers often wish to assess reliability and continuity of supply. This has been tested in court a number of times and has resulted in the criterion being delivered by jurisprudence.

In general terms buyers must ensure that the criteria which they intend to apply relate only to criteria specifically designed to identify the most economically advantageous tender. In circumstances where this is used it must be clearly stated as an award criteria. The following suggested explanation text may be used to describe the criterion where used

The purpose of this criterion is to establish the extent to which Cork County Council may place due confidence in the tenderers ability to deliver the services as specified. Cork County Council will take into account the references received independently from previous clients of the tenderer, in addition to those from within the authority over previous contracts, where applicable and objectively available. Cork County Council also reserves the right to conduct site visits if it deems such visits to be appropriate in accordance with this criterion.

Where this criterion is used a weighting of not more than 10% should be used with a minimum score required to avoid elimination from the competition.

4.3.6 Weighting of award criteria

It is a requirement in tender documentation to inform the market about the weightings that will be applied in each criterion. The cost element weighting can range from 100% (price only) where the contract deliverable can be precisely specified down to the minimum weighting outlined below as policy. In MEAT competitions the weightings between cost and quality should be based on the priorities and risk exposure of the Council determined at the planning phase. In complex projects where the quality of the outcome is most important by assigning higher marks for quality it allows for better outcomes and allows the identification of abnormally low tenders which can be a considerable risk in large scale projects.

Weightings should be set relative to the risk and nature of contract being awarded however it is Cork County Council policy that **cost criterion must never be set below 30%** of the overall marks available.

4.3.7 Running tender competitions

All tender competitions must be run electronically through either <http://www.etenders.gov.ie/> or <https://www.supplygov.ie/> depending on what type of procurement is being conducted in order to protect the Council from procedural risks associated with non-electronic means of conducting tender competitions.

Under the directives Cork County Council is now obligated to accept tenders electronically and using etenders allows us to automatically meet this obligation in addition to ensuring we satisfy and can easily demonstrate procedural compliance with procurement principles through its automatic audit function..

Access to Cork County Council's etenders is available to council staff only. Publication and management of all tender process **must be conducted by Council staff only**. Therefore access to etenders to run competitions on behalf of Cork County Council will not be granted to external operators.

Guidance documentation is available to help buyers navigate the process of running competitions on these platforms on both websites with supplementary guidance available on our Procurement Portal.

4.3.8 Evaluating Tenders

The evaluation of tenders must be carried out by a competent team, who possess the appropriate technical knowledge/expertise to fully understand the subject matter being assessed and the Council's requirements to robustly assess responses in accordance with those requirements.

The evaluation process must be conducted in the following stages;

Stage 1: Check Administrative Requirements - Signed form of tender, all required documents present, received on time, competition closed for receipt of applications etc.

Stage 2: Check compliance with Specification - Pass/Fail criteria

Stage 3: Technical evaluation – Qualitative award criteria

Stage 4: Commercial Evaluation –only tenders that comply with specification and achieve minimum scores of the relevant qualitative criteria.

Stage 5: Scoring of Tenders – identify winning offer.

Tenders failing at any stage must be excluded at that stage and no further evaluation of the tender conducted.

Buyers may exclude a tender which is considered abnormally low but only following investigation and adequate consideration of the elements that give rise to a particularly low price. These elements may include;

- An innovative technical solution
- Favourable conditions available to the tenderer.

The tenderer therefore must be given the opportunity to explain the basis of the tender price before a decision is made on whether to exclude. Buyers must also endeavour to

protect the integrity of the process by respecting the commercial and competitive position of the tenderers by keeping details confidential at least until the end of the evaluation process.

4.3.9 Verification and clarification

In some tender competitions buyers may wish to use a verification/clarification meeting as part of the final selection process, during evaluation, before awarding a contract. If this is the case it must be indicated as part of the award criteria that award of contract will be subject to attendance at a verification/clarification meeting.

A verification/clarification meeting should encompass the following;

- Purpose is to clarify content of tenders prior to finalising scores
- Used to verify tender contents and/or tenderers understanding of requirements. May be used to adjust scores when justified.
- Same evaluation team that evaluates the written tenders must attend.
- Selection of tenderers invited for clarification must take procurement principles of equal treatment, non-discrimination and proportionality into account.
- Only tenderers who have a chance of being awarded the contract, based on the original scoring, should be invited for clarification. Tenderers excluded at evaluation stage must not be invited.
- 'Performance at interview' cannot be a separate award criteria.

It is important to ensure that re-negotiation does not occur and that only aspects of the original tender or Cork County Council's requirements are clarified or supplemented provided this does not result in discrimination or material change of the Council's requirements or adds to the tenderers original response.

4.3.10 Tenderer Administration errors

It is important that buyers practice good business principles as well as equal treatment when handling issues regarding missing or unsigned documents. In previous rulings the Courts generally considered that information which is factual and generally available can be clarified. e.g. if a tender submission omits a tax clearance cert, this is factual and can be clarified. Also situations such as submitting two copies of tenders instead of three should be considered as minor and not lead to the exclusion of a tender.

However leniency cannot be applied if it specifically states in the tender documents that failures such as those outlined above will result in the tender being considered inadmissible. In these cases the tender must be excluded.

4.3.11 Notifications & Standstill

A standstill period, a time period in calendar days, applies between the decision to award a contract and the signing of the contract. A minimum period of 14 days applies when the notice is sent electronically and 16 days when sent by other means. The standstill period

commences at midnight on the date of notification with each day consisting of a 24 hour period. Buyers can choose a longer standstill period if they wish.

Current regulations require contracting authorities to;

- Inform tenderers concerned of the decisions reached on awarding the contract, including grounds for a decision not to award a contract where applicable.
- State the exact standstill period.
- Provide a summary of reasons for the rejection of tenders to unsuccessful tenderers which are meaningful with sufficient information to enable them to understand where the features of the winning tender were better.

Template letters are available for the various Thresholds from the procurement section on the intranet which can be adapted to suit various requirements. '[Appendix 4 – Notification requirements Framework Agreements](#)' outlines the differing notification requirements for frameworks depending on the type of framework used.

When establishing a framework standstill periods must be adhered to under the regulations. Although there is no standstill period required under the regulations for contracts awarded on the basis of a framework agreement it is recommended that a voluntary standstill of 14 days is applied to award of all contracts above EU Threshold. Issuing such notifications alone reduces the time limit for unsuccessful operators seeking a claim of ineffectiveness from 6 months down to 30 days thereby reducing risk to the Council considerably.

4.3.12 Remedies for dissatisfied Tenderers

Personal Debriefing

It is Cork County Council Policy not to conduct personal debrief meetings with unsuccessful tenderers to preserve the integrity of the tender process and in particular the commercially sensitive of information provided by commercial operators. The possible risks associated with inadvertently disclosing commercially sensitive information or the provision of 'New' information impacting the standstill period is difficult to manage effectively in such meetings.

However should unsuccessful tenderers require further information regarding the contents of the regret letters issued they must submit such queries in writing to the primary contact for the tender. Advice must be sought from the Procurement Officer regarding responses to such requests as jurisprudence may change interpretation of requirements in this area. If the Procurement Officer is unavailable then the County Solicitors Office must be consulted.

Application to the Courts

An eligible person may apply to the High Court for;

- An order to correct an alleged infringement or prevent further damage, including suspension or ensure suspension of a procedure.

- A review of a decision to award to the preferred tenderer.

An applicant must firstly inform Cork County Council of the alleged infringement, their intention to apply to the Court and the reasons that constitute the infringement. A sealed copy of the motion must also be provided to Cork County Council.

The normal timeframe for seeking review is within 30 days of knowing the information. However buyers contacted at any stage regarding challenge to a procurement competition should refer the matter to the Procurement Officer and County Solicitors Office immediately.

The “Corrective Mechanism”

A contracting authority may be requested by the European Commission to make substantive amendments to an award procedure under the ‘Corrective Mechanism’ of the remedies Directives, by bringing to the attention of the competent authorities of the Member States situations which they consider to be clear and manifest infringements of Community Law in the award of public contracts, prior to a contract being concluded.

In all such cases the matter should be referred to the Procurement Officer and County Solicitors Office immediately.

Ineffectiveness

This is a legal remedy in respect of a reviewable public service contract that has already been awarded. It can be granted in addition to the setting aside of a contract or the imposing of alternative penalties.

If an eligible person successfully applies to the Court for a declaration that a contract is ‘ineffective’ any contractual obligations not already performed are cancelled but those performed are not affected.

It is important that buyers are aware of the scenarios whereby ineffectiveness may be declared and ensure that these **serious breaches** of the procurement directives do not arise;

- Non-publication of a contract notice in the OJEU when required
- When the contract is awarded
 - Before expiry of the standstill period, or
 - Before the Court has made a decision on a review application
- For certain contracts awarded under a framework agreement or dynamic purchasing system.

In all cases where notification of an application for a declaration of ineffectiveness is received the matter must be immediately referred to the County Solicitors Office and copied to the Procurement Officer.

4.3.13 Awarding a contract

For transparency purposes buyers must ensure that documentation for all competitions include a copy of the final contract that will or may be awarded to the successful tender as a result of the competition. This provides tenderers with a clear understanding of what they will be contractually bound to deliver and facilitates clarification if a question arises regarding modification to a contract post award.

Final contracts must be completed and signed before any goods, services or works are delivered. Terms and conditions included in the signed contracts must be in the terms of those included in the RFT and not the terms of the economic operator who is being awarded the contract to ensure compliance and protect the Council. Commitments made by the economic operator in their tender response must also be reflected in the final contract.

Cork County Council buyers must use contract templates outlined as follows

- Goods and Services – OGP templates which can be accessed via the procurement portal which have been approved as the standard form of contract to be used by CCC buyers.
- Works – relevant Capital Works Management Framework template for the form of contract being used for the procurement.

4.3.14 Contract Award Notices

For contracts above EU thresholds, buyers are required to publish certain information in the OJEU on contracts awarded within 48 days of the award. For contracts below EU thresholds, it is Cork County Council policy to publish a notice on the eTenders website, in accordance with Circular 10/14 to aid SME's and the transparency of the procurement process (and, possibly, reduce or eliminate enquiries from non-participants about the award of a contract) and to facilitate the compilation of statistical information required by the EU Commission.

Publication of award notices on eTenders is a guided process similar to other steps within the process. Buyers should refer to eTenders guidance documents for further assistance.

Under Directives buyers are now required to publish an Article 84 report (template available on the intranet) for above EU Threshold competitions which must be completed through the various stages of the tender process to capture key information outlined in the [record keeping section](#) in this document for above EU Threshold.

4.4 Contract Management Phase (Steps 9 & 10)

Once a contract has been awarded under public procurement it is imperative that the contract is actively and effectively managed to ensure that Cork County Council remain compliant with procurement directives and get value for money. If contracts are not well managed it can bring decisions made during the initial phases under scrutiny, questioning their basis and validity.

4.4.1 Minimum Requirements

The following is a summary of standard steps that should be followed in managing a contract:

- have a programme of checking goods or services against the contract specification
- ensure that there are regular procedures for reporting and for identifying inadequacies/poor performance and take appropriate remedial action
- maintain a record of supplier performance
- review the whole procurement process at the conclusion of the contract

Contract managers should also refer to [Section C of the Public Spending Code](#) for guidance in how to manage and evaluate contract performance.

It is imperative that contract managers engage properly with contractors who fail to deliver on the specifications of the contract awarded. Such engagements should occur immediately once issues arise clearly and formally outlining the contractor's failings and requesting the contractor to formally outline how they propose to remedy these failings.

If the contractor fails to take the necessary remedial actions the contract should be terminated in accordance with the contract with advice from the County Solicitors office. The Procurement Officer should also be informed as such contract failures can form a basis for exclusion from subsequent competitions.

4.4.2 Modifications to contracts

The basic principle, as a result of case law, is that substantial changes to a contract after its award will require a new tender competition, unless it can be brought within one of the exceptions set out in the Directives.

The exceptions are as follows;

- De minimis* exemption – if the value of the modification is below threshold and less than 10% of the initial contract value (services, supplies) or less than 15% for works AND does not alter the overall nature of the contract/framework. (These value limits are cumulative based on the initial value of the contract/framework. i.e. If more than one change the total value of all changes cannot exceed 10/15% of the original price)
- Safe harbour* - If the change is provided for in a clear, precise and unequivocal manner; contract review clause included in the initial procurement documents. The scope and conditions for availing of these must be clear and cannot alter the overall nature of the contract. General provisions are not acceptable;
- Additional works, services or supplies where a change of contractor cannot be made for economic or technical reasons AND would cause significant inconvenience or duplication of costs up to a maximum value of 50% of the initial contract value. (Note: Very similar to one of the grounds for using a negotiated procedure in that context the Courts have taken a very narrow view of the type of 'economic or technical reasons' which can be used to justify this);

- iv. The need for change arises due to circumstances which a diligent authority could not foresee AND the change does not alter the overall nature of the contract up to a maximum value of 50%;
- v. *Corporate succession* – (cases of takeover, merger, acquisition or insolvency) IF the replacement contractor would have met the original selection criteria AND this does not entail other substantial changes OR where Cork County Council steps in to deliver the contract;
- vi. The modification, irrespective of value, is not substantial. Buyers should note a substantial modification is defined as one which ‘Renders the contract or the framework agreement materially different to the one initially concluded’ This can include but is not limited to the following scenarios where the modification;
 - a. Would have allowed for the selection of different candidates or award to a different economic operator or would have attracted additional operators;
 - b. Changes the economic balance of the contract in favour of the operator (i.e. increase in price or reduction of service);
 - c. Extends the scope of the contract/framework considerably;
 - d. Replaces the contractor other than by succession per above.

The scenarios a-d outlined above all necessitate a new tender

Circumstances being relied upon to justify modifications to contracts must be documented in detail and formal approval sought from the appropriate Directors of Service and forwarded to the Procurement Section for reporting purposes.

¹Appendix 1 Thresholds (ex VAT) January 2020, Procedures and OGP Guidance

THRESHOLDS FOR GOODS AND NON-ENGINEERING SERVICES		
See Public Procurement Guidelines for Goods and Services for guidance for all levels in this category		
Value	Type of Contract	Procedure
QUOTATIONS (Limited to firms selected by the buyer on behalf of CCC)		
Less than €5k	Supplies/Services	Invite at least three quotes no specification necessary email is sufficient
Between €5k and €25k	Supplies/Services	Invite at least 3 written quotes with brief specification (email if sufficient)
TENDERS For the award of contracts, frameworks and DPS		
Between €25k and €139,000	Supplies/Services	eTenders using NON-OJEU notice. Use OPEN procedure per Circular 10/14)
Between €144k and €214,000	All general supplies/services	eTenders using NON-OJEU notice choice of procedure
Over €214,000	All general supplies/services	eTenders using OJEU Notice choice of procedure as relevant
THRESHOLDS FOR WORKS AND ENGINEERING SERVICES		
Value	Type of Contract	Procedure/OGP Guidance
QUOTATIONS (Limited to firms selected by the buyer on behalf of CCC)		
Less than €5k	Engineering Services / Works	Invite at least three verbal quotes
Between €5k and €50k	Engineering Services / Works	Invite at least 5 written quotes <u>Engineering Guidance</u> GN 1.6 – Procurement Process for Consultancy Services (Technical) <u>Works Guidance</u> GN 2.3 - Procurement

¹ Based on format used in Achilles Procurement Services Training Material and OGP guidance

		<u>Process for Works Contractors</u>
TENDERS		
For the award of contracts, frameworks and DPS		
Between €50k and €214,000	Engineering Services	eTenders using NON-OJEU notice. Use OPEN procedure per Circular 10/14) <u>GN 1.6 – Procurement Process for Consultancy Services (Technical)</u>
Between €50k and €250k	Works	eTenders using NON-OJEU notice. Use OPEN procedure per Circular 10/14) <u>GN 2.3 - Procurement Process for Works Contractors</u>
Between €250k and €5,350,000	Works	eTenders - choice of procedure <u>GN 2.3 - Procurement Process for Works Contractors</u>
Over €214K	Engineering Services	eTenders using OJEU Notice choice of procedure as relevant
Over €5,350,000	Works	eTenders using OJEU Notice choice of procedure as relevant

²Appendix 2 – Minimum timescales in Calendar Days

NATIONAL (Recommended)					
Procedure	Receipt of expressions of interest		Receipt of tenders		
Open – National	N/a		21 days		
Restricted – National	21 days		21 days		
EU (MINIMUM MANDATORY)					
Procedure	Minimum days for Expressions of Interest	Minimum days for Tenders	Minimum days for Tenders w/ electronic submission	Minimum days for Tenders w/ PINt	Minimum days for Tenders If urgency invoked
Open	N/A	35	30	15*	15
Restricted	30 (15)**	30***	25***	10*	10
Competitive procedure w/ negotiation (PS)	30 (15)**	30***	25***	10*	10
Competitive dialogue	30	None	None	None	None
Innovation partnership	30	None	None	None	None
Dynamic purchasing system	30	10	10	10	10
Concessions	30	30 (if single stage) 22 (if 2nd part of multi-stage)	17	17	17

* Provided the PIN is published at least 35 days and no more than 12 months in advance of the contract notice, and contains all relevant information such as estimated start date for the procedure, CPV codes and short description of the contract.

** The reduction to 15 days is available for the public sector in ‘urgent situations duly substantiated by the contracting authority’ – and not for the competitive dialogue or innovation partnership.

² Based on format used in Achilles Procurement Services Training Material

*** Time limits for receipt of tenders may be set by agreement with all tenderers if provided for in national implementation legislation.

³Appendix 3 - Overview of procedures

Procedure	Process	Comment
Open	Single Stage – anyone who wants to submit a tender	Required for all contracts National level below EU Threshold
Open post PIN	Timescales for receipt of tender can be reduced refer to Appendix 2	
Urgent Open (EU Only)	Can be used when justified urgency and normal timescales cannot be complied with. Care should be exercised and circumstances very exceptional	
Restricted	Two Stage – anyone who wants to can apply, with at least 5 having to be invited to tender	Suitable where large volumes of interest in market; where tendering is expensive; where buyer needs to manage risk
Restricted with PIN	Timescales for receipt of tender can be reduced refer to Appendix 2. N.B. Qualification stage must remain at 30 days cannot be reduced	
Urgent Restricted (EU only)	For Urgent Procurements – where urgency renders impractical the normal times for Open and Restricted. Care should be exercised and circumstances very exceptional	
Competitive Dialogue	Two stage - anyone who wants to can apply, with at least 3 invited to dialogue stage; followed by tender stage with participants who offer a suitable solution.	For complex projects where the Open or Restricted procedure would not be suitable to deliver the contract.
Competitive Procedure with Negotiation	Two Stage – anyone who wants can apply; only 3 have to be invited to negotiate (can include negotiation on all aspects including costs).	Available to Public Sector in certain circumstances
Competitive Procedure with Negotiation with PIN	Timescales for receipt of tender can be reduced refer to Appendix 2. N.B. Qualification stage must remain at 30 days cannot be reduced	
Competitive Procedure with Negotiation URGENT	Can be used when justified urgency and normal timescales <u>cannot</u> be complied with – reduction applies to qualification and tender stage per Appendix 2	
Negotiated Procedure without a Call for Competition	Available in very limited circumstances	See Article 32 of Directives 2014/24
Dynamic Purchasing	A list of qualified firms – access open at all times; fully electronic. When	

³ Based on format used in Achilles Procurement Services Training Material

Systems	a contract is being tendered ALL on DPS are invited to tender.
Innovation Partnership	Multi-stage procedure – suitable for design adaptation or innovation (not suitable for 'off-the-shelf' solutions)

Appendix 4 – Notification requirements Framework Agreements

Framework Type	Notification Details
Single Supplier Framework	Standard successful and regret letters
Multi Supplier Framework – no initial contract and all contracts awarded by mini-competition	Standard successful and regret letters. In regret letters debriefed against the <u>lowest scoring tenderer admitted to the framework</u>
Multi Supplier Framework – initial contract and subsequent contracts awarded by mini-competition	<p>Winner – standard letter re initial contract</p> <p>Unsuccessful for initial competition but included on the framework – part success/part regret debriefed against winning tender.</p> <p>Unsuccessful for initial competition and framework – debriefed against lowest scoring tenderer admitted to the Framework.</p>
Multi Supplier Framework – Cascade	<p>1st Ranked – standard letter of admittance to the framework.</p> <p>Others ranked – debriefed against winning tender</p> <p>Unsuccessful - debriefed against lowest scoring tenderer admitted to the Framework.</p>