

Chapter 8 Central Government

Public Procurement

Public Procurement

8.1 Procurement of goods and services by departments, offices and agencies must be conducted in accordance with EU and national regulatory requirements, and guided by practical guidance issued from time to time by the Department of Finance. In general, there is an obligation on Government agencies to follow a competitive process, carried out in an open, objective and transparent manner. This is expected to result in best value public procurement.

8.2 EU directives set out advertising requirements and tendering procedures for contracts above certain value thresholds. For contracts or purchases below the threshold values, less formal procedures are allowed. For example

- Supplies or services costing less than €5,000 in value may be purchased on the basis of verbal quotes from one or more competing suppliers.
- Supplies or services contracts between €5,000 and to €50,000 in value may be awarded on the basis of responses to specifications sent by fax or email to at least three suppliers or service providers.

8.3 A reform of procurement procedures in 2002 gave rise to the establishment within the Department of Finance of the National Public Procurement Policy Unit (NPPPU), which deals with procurement policy, legislation and organisation. The NPPPU also analyses returns made to it by departments and offices on the recourse by them to non-competitive tendering. In the course of this, it seeks to identify trends in order to determine the reason for them and to consider if any action might be required. These returns are also submitted to my Office.

Exceptions to Competition

8.4 Exceptional arrangements are allowed under national and EU procurement rules in limited circumstances. Department of Finance Circular 40/2002 outlines the course to be followed in those cases where Government departments and offices propose to award contracts without a competitive process.

8.5 Under the Circular 40/2002 procedure, proposed contracts that exceed €25,000 in value (exclusive of VAT) not subject to a competitive process are required to be reviewed prior to award by the relevant department's/office's Internal Audit or by an appropriate senior officer who was not part of the procurement process.¹⁹ The Circular also requires

- Accounting Officers to complete an annual statement in respect of non-competitive contracts, and to submit it to my Office by 31 March of the following year. This return should give details of the subject or purpose of the contract, its value and the reasons for not having a competitive process
- each department/office to maintain an up-to-date central register of non-competitive contracts
- each department/office to designate a Procurement Officer to collate the information on these contracts.

¹⁹ The Department of Finance issued a supplement to Circular 40/2002 in July 2003, providing guidance for officers reviewing the case for such proposed contract awards.

Audit Focus

This report has been compiled to provide an account of the expenditure declared to have been undertaken in 2008 on foot of contracts entered into without recourse to competitive procurement processes. It also presents an analysis of the declared reasons why a competitive process was not followed in those cases. The views of the NPPPU are set out and recent proposed changes to procurement procedures outlined.

Scope of Application of Circular 40/2002

8.6 The Health Service Executive (HSE) is one of the major State purchasers of supplies and services. Although funded by a vote, it is not included within the scope of Circular 40/2002. Consequently, it is not required to submit annual returns in relation to significant purchases of goods and services where procurement was by non-competitive means.

8.7 In 2006²⁰, the Department of Finance stated that it intended to extend the scope of the Circular to the HSE, and it wrote to the Department of Health and Children proposing the extension. The Department of Health and Children informed the Department of Finance in May 2009 that the HSE had now put in place procedures that incorporate the provisions of the Circular. It was expected that these would apply to procurements undertaken for 2009 and subsequent years. Information was not available about the level of non-competitive procurement by the HSE (and its agencies) in 2008.

Extent of Non-Competitive Procurement

8.8 The annual returns of non-competitive procurement for 2008 from departments and offices show that payments were made in 2008 under 508 contracts concluded without competition. The total value of the contracts reported in 2008 was €82.8 million. Figure 25 shows the number of contracts and the total contract expenditure disclosed in the departmental returns.

8.9 Both the number and value of non-competitive procurement payments reported increased in 2008 relative to previous years. The total number of contracts reported in 2006 was 192, with a combined value of just under €22 million. The increase in the number and value of contracts reported in 2008 is likely to be due, at least in part, to more comprehensive reporting than in earlier years.

²⁰ Annual Report 2006, Chapter 1.2 – Exceptions to General Procedures in Public Procurement

Figure 25 Reported Contracts Awarded without Competition, 2008

Department/Office	Number of cases	Total Contract Expenditure €m
Prison Service	193	27.7
Agriculture, Fisheries and Food	6	13.4
Justice, Equality and Law Reform	61	7.7
Garda Síochána	38	7.7
Defence	42	4.4
Community, Rural and Gaeltacht Affairs	4	2.8
Courts Service	21	2.6
Revenue Commissioners	17	2.6
Office of Public Works	18	1.9
Finance	2	1.7
Enterprise, Trade and Employment	13	1.6
Communications, Energy and Natural Resources	11	1.2
Health and Children	8	1.2
Arts, Sport and Tourism	9	1.0
Foreign Affairs	8	1.0
Others ^a	57	4.3
Total	508	82.8

Note:

a There were 13 nil returns by departments and offices.

Reasons for Non-Competitive Procurement

8.10 Figure 26 sets out the main reasons given in the returns by departments and offices explaining why competitive processes were not used in the procurement process.

Figure 26 Reasons Cited for Departure from Use of Competitive Process

Reason	Number of Cases	Value of Contracts €m
Urgency	23	13.8
Purchase of proprietary goods	121	18.8
Single suitable supplier	83	12.5
Expert service/recent experience with supplier	52	9.1
Extension/rollover of existing contract	127	17.5
Security considerations	11	1.5
Other reasons	91	9.6
Total	508	82.8

Urgency Exception — €13.8 million

8.11 Circumstances can arise from time to time where departments and offices are required to respond urgently to events. The rationale for the exception in these cases is that where there is a requirement to procure goods and services, there may not be time to set up a competitive procurement process. It may also be the case for confidentiality reasons that a public or

widespread procurement process may not be consistent with optimum management of the public business involved.

8.12 Significant recourse to non-competitive procurement under this exception in 2008 included the following

- Payments were made by Department of Agriculture, Fisheries and Food in respect of services to deal with dioxin-contaminated pork supplies in late 2008. The collection, rendering and destruction of material under the pigmeat recall scheme and the pig and cattle disposal scheme cost €10.2 million.
- The engagement by the Department of Finance of legal advisors to assist in the development of banking stabilisation measures and the preparation of related legislation cost approximately €1.6 million in 2008.
- The engagement by the Department of Enterprise, Trade and Employment of financial consultants to advise in relation to an application for provision of State aid for the Waterford-Wedgewood company, at a cost of €226,000.

Proprietary Goods Exception — €18.8 million

8.13 Generally speaking, non-competitive purchases of proprietary goods relate to branded or named products or exclusive services. In some instances, these procurements include maintenance of previously acquired goods or services, upgrades or additional purchases. This accords with EU Directive 2004/18/EC which allows contracting authorities to award public contracts by a negotiated procedure when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator. Procurement of so-called proprietary goods arises when specific branded goods are selected to meet a need. It can also arise when there is a desire to restrict the number of different products in use for simplicity of maintenance or carriage of spares.

8.14 Of the 121 instances of purchasing of proprietary goods contained in the 2008 departmental returns, 32 were in respect of purchases by the Prison Service to a value of €6.8 million; 28 were in respect of purchases by the Garda Síochána to a value of €5.1 million and 24 were in respect of purchases by the Defence Forces which cost €2.2 million. The proprietary goods purchased, in general, related to information and communications technology or to technical systems including those associated with weapons systems or special vehicles. Where departments and offices specify proprietary goods, the potential of a competitive procurement process to result in value for money may be lost. The scale of purchasing of proprietary goods also emphasises the importance of considering whole-life costs when planning technical procurements.

Single Suitable Supplier Exception — €12.5 million

8.15 This category relates to procurements where departments and offices consider there is only one suitable supplier of the required service. In 2008, expenditure was incurred under 83 single supplier contracts, at a combined cost of €12.5 million.

8.16 An example of the kind of services procured in this way was the hiring by the Department of Social and Family Affairs of the Economic and Social Research Institute, at a cost of €30,000, to supply a variety of services including analysis of the impact of budget changes on poverty levels, using the Institute's tax-benefit model, profiling of people on the live register and analysis of the National Employment Action Plan.

8.17 The Department of Agriculture, Fisheries and Food hired a contractor to provide a range of services over five years at a total cost of €3 million for the development and running of the

National Rural Network²¹. Even though a competitive process had technically been initiated, it was appropriate because of the single offer for the Department to treat it as a contract coming within the terms of the Circular.

Expert or Recent Experience Exception — €9.1 million

8.18 A considerable number of cases were reported where departments and offices took the view that their interest was best served by entering contracts where they had used the services of individuals or firms in the recent past or had identified, without recourse to competitive processes, persons or firms whose expertise coincides with their requirements. This does not exclude the possibility that there might be other suitable suppliers. Examples include

- The hiring of retired public servants to carry out consultancies for the Department of Justice, Equality and Law Reform (at a cost of €107,000) and the Department of Health (at a cost of €45,000), based on their previous professional experience.
- The hiring by the Office of Public Works of an internationally renowned company to restore the organ in the Chapel Royal in Dublin Castle at a cost of €36,000.
- The hiring by the Department of the Environment, Heritage and Local Government, at a cost of €103,000, of a consultant to complete the design of phase 1 of a specialist National Parks and Wildlife Service database, to finalise data transfer and to deliver tested software products.

Extension/Rollover Contracts Exception — €17.5 million

8.19 A significant number of contracts reported involved the extension or rolling-over of existing contracts for goods and services. Some of the contracts extended or rolled over had been in place for several years.

8.20 Justifications reported by departments and agencies for continuing with existing contractual arrangements included

- the contractor had relevant experience gained from prior involvement with the department
- the contractor was best placed to provide the required goods/services without undue extra cost to the Exchequer
- it was not possible to go to the market due to staffing difficulties.

8.21 Almost all of the contracts in this category are for the provision of services. Examples include

- the extension by the Department of Education and Science, at a cost of €150,000, of a consultancy contract for the provision of the professional services of an accountant to work on the Department's financial management system
- the award of an extension, at a cost of €437,000, by the Department of Justice, Equality and Law Reform to carry out further work on the Department's human resources management system.

8.22 The extent to which the contracts being rolled over had originally been subject to competitive processes is not captured in the returns. The key risk that arises in this category is that failure to test the market on a regular basis may lead to poor value for money being achieved.

²¹ The National Rural Network is a component of the Rural Development Programme (RDP) for Ireland 2007-2013. Its purpose is to link organisations involved in rural development to facilitate exchange of experience and information.

Security Considerations — €1.5 million

8.23 Competition was limited in the interests of security in a number of instances reported in the returns, including cases where

- the Office of Public Works engaged contractors to carry out security works on the private residences of a number of judges, at a total cost of €347,000
- the Department of Justice, Equality and Law Reform engaged plant hire contractors and site surveying experts, at a total cost of €303,000, to carry out site surveys and excavations in Monaghan and Wicklow on behalf of the Location of Victims' Remains Commission.

Other Reasons — €9.6 million

8.24 There were 91 reported instances of contracts being awarded for a variety of other reasons. Of these, 81 contracts at a total cost of €8.5 million, were awarded by the Prison Service. A large number of these were in respect of the local purchase of various goods and services such as cleaning, catering and transport services as well as the purchase of televisions and electrical equipment.

Views of the National Public Procurement Policy Unit

8.25 Based on its analysis of the 2008 returns, the NPPPU noted that some of the non-competitive procurement could be attributed to clearly exceptional circumstances but that the high level of non-competitive procurement and extension of contracts gave rise to concern.

8.26 The NPPPU has stated that there would often be an element of judgment in regard to what might constitute justifiable non-competitive procurement which only the contracting authority could make. In 2003, it provided guidance for reviewing offices on what might be considered 'justifiably exceptional circumstances' for recourse to non-competitive procedures. It had highlighted the system and emphasised the need for compliance via the Government Contracts Committee, which comprised representatives of the biggest procuring departments and offices. It had followed up with reminders when annual returns were due or overdue, as required. Overall, the NPPPU was satisfied that the Circular 40/2002 measures, together with the exercise of the normal accountability and auditing functions, significantly limited the extent of recourse to unjustified non-competitive procurement.

8.27 The NPPPU was satisfied that, in general, departments and offices were applying the requisite controls where they proposed to have recourse to non-competitive procurement. In addition, the recording and reporting process drew attention to trends and areas of concern. For example, internal reviews of non-competitive procurement in the Department of Justice, Equality & Law Reform and the Irish Prison Service had identified a significant number of cases where competitive procurement should have been used. The extent of recourse to non-competitive procurement was being addressed and changes in procedures had been put in place.

Procurement Improvement Initiatives

8.28 The Department of Finance has been promoting a policy of reform of public procurement functions. As part of this reform, departments and offices that engage in a significant procurement function are required to examine their purchasing profile and draw up corporate procurement plans that identify the most appropriate procurement procedures. One of the objectives of this is to reduce the amount of 'once-off' or 'off contract' spending.

8.29 It was originally envisaged the NPPPU would operate in tandem with a central procurement operations unit, but this was not set up at the time. The idea was to have a central unit to support procurement activity by public agencies.

8.30 In 2008, a decision was made to push ahead with establishment of a National Public Procurement Operations Unit (NPPOU), based in the OPW, and replacing the Government Supplies Agency. The initial planned scope of the NPPOU was to support procurement by central government departments, but a decision was taken subsequently to extend it to include also procurement by local authorities, agencies, third level education and health sector.

8.31 The NPPOU was established in March 2009. Its early development is coinciding with the transfer of OPW functions/head office to Trim, Co Meath, where it will be located.

Role of the NPPOU

- Put in place central public sector procurement arrangements for common goods and services (except construction) including computer equipment, vehicles, trucks, fuel, electricity, etc.
- Act as a ‘centre of excellence’ for the provision of procurement advice and for implementation of procurement policy in line with best practice and Government initiatives.
- Continue development of e-procurement strategies.

8.32 The kinds of methodologies that the NPPOU envisages using to achieve better procurement include

- aggregated contracts
- framework agreements
- drawdown agreements.

8.33 Current staffing of the NPPOU is around 25-30, and is expected to rise to about 50. The Unit envisages that while most client organisations will need to retain some staffing to deal with procurement issues, there may be scope for staff savings in those organisations as a result of its establishment.

8.34 A planned first initiative being implemented by the NPPOU involves

- a survey of public bodies to identify and record the profile of current procurement — type of goods and services procured and the cost of all procurements worth €100,000 or more
- a related drive to secure an agreed or negotiated reduction of 8% in the expenditure on goods and services procured, including termination of contracts and re-tendering, where feasible and economic to do so
- identification of ‘top 30’ suppliers of goods and services, as a means of identifying common requirements that might be targeted for centralised negotiation.

8.35 Other initiatives envisaged for the Unit are

- an invitation to staff generally to report areas where they believe better value could be obtained, and to explain how that could be done
- identify and publicise transferable good practice
- training for staff involved in procurement.

Conclusions

From a public accountability viewpoint, procurement must meet two criteria

- achieve value for money
- be conducted in an open, transparent and competitive way.

In general, these are mutually supporting in that competition is acknowledged as a primary means of achieving best value. However, in exceptional circumstances, it may be necessary to depart from competitive processes. To ensure that this only occurs in appropriate cases, it is incumbent on purchasers to have processes in place to identify their procurement needs in a timely manner.

Almost €19 million was spent on proprietary goods in the absence of competition. It is important that departments and offices avoid identifying their needs by reference to branded products. Specifications should, where possible be described in generic terms so as to encourage real competition. While the results of many procurements may be the purchase of branded products or services, the procurement process should be characterised by efforts to minimise ‘brand capture’ and to ensure that procurement decisions do not result in future streams of payments over which departments and offices have little or no control.

In circumstances where only one supplier emerges from a tender competition, it can be difficult for purchasers to be sure that the bid on offer represents good value. Following the Circular 40/2002 procedure and having the proposed deal reviewed in advance of award by Internal Audit or by an independent manager would be good practice in these cases.

At organisational level, the adoption of corporate procurement plans and active monitoring of trends in the extent of non-competitive procurement together with regular analysis of the reasons for not using competitive processes are required. The challenge is to move quickly to align the efforts of the central units in the Department of Finance and the OPW with more strategic approaches to procurement on the part of the major purchasing departments.

The recent establishment of the NPPOU creates an opportunity to identify potential improvements in the approach of State organisations to procurement of goods and services so as to achieve better value, and to ensure that good practice is recognised and shared.