

Public Procurement Guidelines - Competitive Process

Foreword

1. The main body of existing guidance on public procurement is set out in *Public Procurement – 1994 Edition* [Green Book]. Developments in the meantime, such as the introduction of new and updated EU procurement Directives, the promotion of new and innovative purchasing methods and strategies, greater emphasis on the need for best practice and best value for money in an expanding public procurement market and greater accountability of public purchasers, require that existing guidelines be updated. These revised guidelines have been drafted by the National Public Procurement Policy Unit [NPPPU] of the Department of Finance in consultation with the Government Contracts Committee and other participants in the public procurement market.

2. This document is one of a series which will update and expand on the 1994 publication in regard to significant aspects of the public procurement process. It sets out steps to be followed in applying an appropriate competitive process under EU and national rules. It is intended that further guidance will be provided on issues such as disclosure of information, ethics, Remedies Directive and infringement proceedings, environmental considerations in procurement and new aspects of the revised EU procurement Directives, such as framework contracts and use of electronic means in procurement.

3. The document, and other documents in the series, may be revised and updated as required. They will be published on the national public procurement portal www.etenders.gov.ie, which will be the principal means of dissemination of guidance and other relevant public procurement material. Up to date guidelines may be viewed or downloaded at any time.

4. Additional guidelines specific to procurement of works and construction related services, the engagement of management consultants in the civil service and appraisal and management of capital expenditure proposals in the public sector are available on www.etenders.gov.ie.

This document is issued by the NPPPU to provide general guidance. It is not an interpretation of any legal provisions governing public procurement. Additional informal advice may be sought from the NPPPU [contact details are given in Appendix VII]. Legal or other professional advice should be obtained if there is doubt as to the interpretation of legal provisions or as to the correct application of such provisions

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1. Introduction

1.1 Public Procurement can be 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 by a wide and diverse range of public bodies [or contracting authorities].

1.2 General guidelines on the award of public sector contracts in Ireland were last published in the booklet *Public Procurement - 1994 Edition*. This document reiterates the principle of fair competition set out in the 1994 booklet in more detailed guidance on conducting an appropriate competitive process under national and EU rules and updates procedures to reflect developments in the meantime. The focus of this document is on the competitive process to be followed by Government Departments, Local and Regional Authorities and other State bodies in the award of contracts.

1.3 The October 2001 *Code of Practice for the Governance of State Bodies*, published by the Department of Finance, identifies procurement as one of a number of activities requiring special attention in promoting good corporate governance. It may be appropriate to adapt or supplement these guidelines with more detailed internal procurement procedures relevant to the activities of an individual contracting authority¹. Heads of Departments should ensure that these guidelines are brought to the attention of all contracting authorities under their aegis.

2. Key Principles

2.1 It is very important that the public procurement function is discharged honestly, fairly, and in a manner that secures best value for public money. Contracting authorities must be cost effective and efficient in the use of resources while upholding the highest standards of probity and integrity. Procurement practices are subject to audit and scrutiny under the Comptroller and Auditor General (Amendment) Act 1993 and Accounting Officers are publicly accountable for expenditure incurred.

¹Examples :

(i) in the Central Government sector, proposals to procure supplies or services above a certain threshold [currently €25,000] without a competitive process must be subject to an independent internal review and annual reporting to the C&AG and the Government Contracts Committee.

(ii) Corporate governance guidelines recommend that Boards of State bodies establish sub-committees to deal effectively with particular areas of activity. It may be appropriate to have a sub-committee devise and monitor adherence to proper procurement procedures. Chairpersons of Boards are required to confirm compliance with procurement rules and procedures in an annual report to the relevant Minister.

2.2 In general, a competitive process carried out in an open, objective and transparent manner achieves best value for money in public procurement. This is national policy and is reflected in EU Treaty principles and EU Directives on public procurement. Essential principles to be observed in conducting the procurement function include non – discrimination, equal treatment, transparency, mutual recognition, proportionality, freedom to provide service, freedom of establishment etc. The Directives impose legal obligations on public bodies in regard to advertising and the use of objective tendering procedures for contracts above certain value thresholds.

3. Important General Issues

3.1 Contracting authorities should ensure that staff involved in purchasing or placing contracts for works, supplies or services are familiar with the EU and international rules that may apply and are aware of the legal and policy framework within which procurement must be carried out. Contracting authorities must also take measures, such as separating functions within the procurement cycle, i.e. ordering goods, receiving goods or services, payment for goods or services, so as to safeguard against improper or unethical practices.

3.2 Purchasing profiles should be examined with a view to minimising casual or “once off” purchases. Contracting authorities with recurring or ongoing requirements should analyse their needs over a medium term period [one, two or three years]. Having done this, an appropriate contracting arrangement can be put in place for efficient and cost effective delivery of supplies and services.

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

3.4 There is a need to be aware of potential conflicts of interest in the tendering process and to take appropriate action to avoid them. For instance, in tendering for advice or a study which might involve recommending a solution or in the subsequent implementation of a project, it may be appropriate to consider if the successful tenderer should be excluded from involvement with providing the solution or project implementation. It would, of course, be essential to signal this intention at the outset. In any event, care should be taken to ensure that project specifications and criteria

should be as open and generic as possible in order to avoid favouring any one solution or any one party.

3.5 Contracting authorities should ensure as far as possible that contracts for projects which they fund or sponsor, awarded by non public sector entities, are awarded in accordance with public procurement rules. [This is obligatory for most works contracts and related service contracts above EU thresholds which are 50%, or more, publicly funded].

3.6 Contracting authorities should ensure, before awarding a contract, that tenderers have regard to statutory terms relating to minimum pay and to legally binding industrial or sectoral agreements in preparing tenders. An appropriate reference to this effect should be included in tender documents.

3.7 The pricing element of tenders should be evaluated net of VAT. VAT is generally charged to the contracting authority by the supplier of goods or services. In certain circumstances, such as for goods and services invoiced from outside the State, VAT has to be accounted for by the contracting authority which receives such goods or services. VAT law provides for equal VAT treatment in the supply of goods and services, therefore such treatment should not allow any financial benefit to accrue to a contracting authority in selecting a tenderer for a project.

3.8 Professional Services Withholding Tax must be deducted at the standard rate from payments by contracting authorities for all professional services. Comprehensive information on this and other tax matters is available from the website of the Revenue Commissioners www.revenue.ie

3.9 All contracting authorities are reminded of the need for tax clearance of contractors as outlined in Department of Finance ‘*Circular 22/95 Tax Clearance Procedures - Public Sector Contracts*’ [as amended by *Circular 45/01*] or any revised version which will be available on the Department of Finance website.

4. Competitive Process under EU threshold values

It is a basic principle of public procurement that a competitive process should be used unless there are justifiably exceptional circumstances

4.1 The type of competitive process to be used can vary depending on the size and characteristics of the contract to be awarded and the nature of the contracting authority. For contracts or purchases below the EU threshold values and not part of a ‘draw down’ or framework contract, less formal procedures may be appropriate. For example

- supplies less than €5,000 in value might be purchased on the basis of verbal quotes from one or more competitive suppliers
- supplies or services contracts up to €50,000 in value might be awarded on the basis of responses to simple specifications sent by fax or email to up to five suppliers or service providers. [Requirements up to this value for which there is limited number of suppliers or service providers might also be advertised on the national public procurement website *etenders.gov.ie*]
- supplies or services contracts above €50,000 in value and up to EU thresholds should be advertised on *etenders.gov.ie* and / or tenders invited from a number of suitable suppliers or service providers, normally not less than five, selected in an open and non – discriminatory manner.

Values and procedures outlined above are indicative only and should be adapted as appropriate to suit the type of public body and the nature and scale of the project. Reasons for procedures adopted, including procedures where a competitive process was not deemed appropriate, should be clearly recorded. All contract award procedures should include a verifiable audit trail.

Advertising

4.2 Medium to larger sized contracts [above €50,000 but below value of EU Directives thresholds for advertising in OJEU and not part of a ‘draw down’ or framework contract] should normally be awarded following public advertisement as part of a formal tendering process. Publication on the *etenders.gov.ie* website generally meets national advertising and publicity requirements and significantly reduces the need for expenditure on advertising. Depending on the nature of the requirement, it may be appropriate to supplement national website advertising with advertising in other media, in trade publications and / on other websites. An

abbreviated notice indicating the publication of tender details on the national procurement website should be considered in such cases.

Restricted Tendering

4.3 Alternatively, or in combination with advertising, a process of restricted tendering may be used. This may involve

- invitation of tenders from firms on a list established on an open and objective basis [normally used by contracting authorities which have a frequent or recurring requirement for works, supplies or services or those wishing to maintain a well organised ongoing procurement system]

or

- invitation to firms deemed appropriate and particularly qualified for a particular project. [This may be appropriate for specialised requirements in markets where there is a limited number of suppliers or service providers].

4.4 In restricted tendering, the number of firms from which tenders are sought should be decided by reference to the number of potential bidders in the market concerned and to the size and particular characteristics of the project to be undertaken. The number should be sufficient to ensure an adequate level of genuine competition.

4.5 Authorities keeping a list of firms from which they invite tenders should advertise annually for the admission of interested parties and ensure that they are open to suitably qualified entrants at all times. Care should be taken to ensure that such lists are used in an open non - discriminatory manner. It is of particular importance that, under restricted tendering procedures, Contracting Authorities should ensure that recently established firms, or firms which do not have previous experience of public contracts, are not excluded from invitations to tender. There should be a conscious policy to encourage such firms by allowing them to tender for smaller contracts in the first instance and progressing to larger or more complex contracts, if they prove to be satisfactory. It is in the interest of contracting authorities that the pool of potential suppliers is actively maintained and updated.

In general, contracting authorities should publicise their contracts and procurement requirements above €50,000 in value on the public sector procurement website, etenders.gov.ie. Requirements of less than this value for which there is limited number of suppliers or service providers might also be publicised on the website. Notices can be placed by registering online. The site is a key reference point for potential suppliers and service providers. The service is currently provided at no cost to contracting authorities.

4.6 If the number of firms on a list is too large to invite all suitable firms to tender, a number of those firms, sufficient to ensure adequate competition, may be selected for inclusion in the competition. Selection from the list can be made in accordance with specified criteria, randomly, or by rotation, or by a combination of all three. Selection may be based on factors such as overall suitability to the particular project - with due regard to experience, technical competence and capability and financial capacity, having particular regard to the need for equal treatment and the fair distribution of opportunities.

4.7 Selection from such lists does not fulfil the advertising obligations in the case of contracts above EU thresholds, as such contracts require OJEU advertising. [Directives governing the procurement of entities in the Utilities sector permit the selection of bidders from lists of qualified candidates set up in accordance with the terms of the Utilities Directives].

4.8 The method or procedure for selecting firms to be invited to tender and awarding contracts should be documented and should be transparently fair. It should be clearly understood that whether responses are to an advertisement or to a direct invitation, all parties in the process must be treated on the same fair and objective basis. Decisions on selections for smaller projects or purchases should be recorded with a minimum of formality.

Evaluation and Contract Award

4.9 For larger projects with the award based on a number of relevant criteria [not just price], it should be the normal practice to have the evaluation of tenders carried out by a team with the necessary competency. This may include independent representation. Fairness and objectivity are best demonstrated by the use of a scoring system or marking sheet based on the relevant weighted criteria, including price, indicating a comparative assessment of tenders under each criterion. [See Appendix V for sample scoring system].

Sole Suppliers

4.10 Where it is necessary to deal with a sole supplier, service provider or contractor, arrangements which provide best value for money should be negotiated. Care should be taken to avoid entering into open-ended arrangements, for administrative convenience, that reduce or hinder competition. Market testing should be undertaken at appropriate intervals to ensure that market openness and competition is maintained.

5. EU Public Procurement Procedures

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

This section summarises the principal features and provisions of the revised EU procurement Directives. It does not attempt to provide an exhaustive or detailed outline of their requirements nor is it a legal interpretation of the obligations they impose. It is essential that officials directly concerned with placing contracts are familiar with the provisions of the Directives. Informal advice may be sought from the Public Procurement Policy Unit, Department of Finance [contact details are given in Appendix VII]. For large or complex projects, or in the case of contracts with non - standard features, legal or other professional advice should be obtained if there is doubt as to the correct procedures to be followed.

5.2 The Directives impose obligations on contracting authorities to

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

It is a legal requirement that contracts with estimated values above the thresholds set out in the Directives, apart from some defined exceptions, be advertised in the OJEU and that these contracts are awarded in accordance with the provisions of the

Directives². Any infringement of the terms of the Directives can give rise to serious legal or financial sanctions. Even in the case of procurement which might not be subject to the full scope of the Directives, such as the ‘non – priority’ services or service concessions, the EU Commission and European Court of Justice [ECJ] have ruled that the Treaty principles of non - discrimination, transparency, freedom of movement, freedom to provide services and goods etc. must be observed. ECJ case law implies a requirement to publicise and advertise such contracts to a degree which affords parties in other Member States an opportunity of expressing an interest or submitting tenders.

Revision of Directives

5.4 The EU procurement Directives have recently been revised. Four separate public sector Directives for works, supplies and services have been consolidated into one text. They have been adapted modern market conditions by providing for measures such as the use of electronic means in tendering, providing for framework arrangements and providing for more flexible procedures in the case of more complex contracts such as major infrastructural public / private partnership projects.

The EU Directives cover contracts for

Works - buildings and civil engineering contracts

Supplies - purchasing of goods and supplies

Services - all of the most commonly procured services such as advertising, property management, cleaning, architectural/ engineering /surveying, management consultancy, financial and ICT related services, etc. [See Annex IIA and Annex IIB of the revised Directives].

Criteria for awarding contracts

5.5 Contracting Authorities may choose to award contracts on the basis of

- the lowest priced tender **or**
- the most economically advantageous tender [specifying, in addition to price, various other criteria such as running costs, servicing costs, level of

² The current value thresholds above which contracts are subject to the Directives are set out in Appendix III

after sales service, technical assistance, technical merit, environmental characteristics etc.].

When a contract is being awarded on the most economically advantageous basis, the notice or the tender documents must state all of the criteria being applied in the award process, giving the relative weightings for each criterion. If technically not possible to indicate criteria weightings in advance, they must be listed in descending order of importance. New or amended criteria must not be introduced in the course of the contract award procedure. If significant additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

Advertising in the OJEU

5.6 OJEU Notices should be drawn up in accordance with the standard forms set out in EU Directive 2001/78/EC of 13 September 2001. The forms are revised to take account of technical progress and to facilitate the use of electronic means in sending notices for publication in the OJEU. The EU Commission’s online notification system available through the Commission’s public procurement website <http://simap.eu.int> is adapted for use of the revised forms. Contracting authorities are encouraged to avail of this system in the interest of economy and efficiency and of promoting eProcurement.

5.7 Advertisements in the OJEU should also be published on the national procurement website. They may be supplemented by advertisements in the national media to ensure the widest possible competition for the contract. However, such national advertisements must not appear before the date of dispatch to the OJEU and must not contain any information additional to that in the OJEU advertisement. Where supplementary national media advertising is considered necessary, contracting authorities are advised, in the interests of economy, to place abbreviated notices in such media referring interested parties to the OJEU notice and to the *etenders* website for full details and, where appropriate, to access documents for downloading.

Prior Information Notices (PINs) and Buyer Profiles

5.8 Contracting Authorities with an aggregated procurement requirement in excess of €750,000 for any product area of supplies or category of services are encouraged to publish in the OJEU an annual notice called a Prior Information Notice / Prior Indicative Notice [PIN]. The PIN is normally published at the start of the budgetary year and sets out the categories of products and services they are likely to be procuring in the course of the year.

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

Insertion of a PIN does not commit Contracting Authorities to purchasing or proceeding with a project if circumstances change: it is merely intended as an aid to transparency and is for the benefit of suppliers. Publication of a PIN permits a contracting authority to reduce the minimum time for tendering if the PIN, with the necessary amount of information specified, has been dispatched to the OJEU at least 52 days before, and within twelve months, of dispatching the contract notice [see 5.14 on ‘Time limits for Replies’].

Contract Award Notice

5.9 It is a requirement that contracting authorities publish in the OJEU certain information on contracts awarded within 48 days of the award. This information is submitted on the standard ‘Contract Award Notice’ annexed to the Directives.

Common Procurement Vocabulary

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

Thresholds

5.11 The thresholds applying from 1 January 2004 to 31 December 2005 are set out in Appendix III. The thresholds in the Directives are revised by the Commission, under the terms of the Directives, at two-yearly intervals. The revised thresholds are published on the EU procurement website <http://simap.eu.int> and the national procurement website www.etenders.gov.ie. The Department of Finance will notify Departments of these changes as they occur.

Estimation of contract values

5.12 Estimation of contract values for OJEU publication purposes must be realistic. If a contract, not advertised in the OJEU, attracts tenders in excess of the EU

thresholds, an award to such a tenderer would be open to a risk of infringement proceedings. In such an event a contracting authority would be required to justify its estimation.

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

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

Under the Services Directives services are divided into two categories described as 'priority' and 'non-priority' services [set out in Annex IIA and Annex IIB of the revised public sector Directive]. The two categories of services are listed in Appendix IVA and Appendix IVB of these guidelines.

The 'priority' services are subject to the full provisions on services in the Directive. In the case of 'non-priority' services, the requirement is that they should be awarded without using restrictive technical specifications. In addition, information on such contracts awarded should be notified to the Commission in the form of an Award Notice, indicating whether the notice should be published in the OJEU [the purpose is to assist in determining whether at a future date some or all of those services might be made subject to the full provisions of the Directive].

Tendering Procedures

5.13 The new EU Directives permit four tendering procedures:-

- (i) **Open** - all interested parties may submit tenders. [Information on tenderers capacity may be sought and only the tenders of those deemed to meet minimum levels of technical, financial etc. capacity and expertise evaluated. If there are minimum requirements it is important that they be made clear in the notice or the RFT so as to avoid unqualified bidders incurring the expense of preparing and submitting tenders].
- (ii) **Restricted** - a two-stage process whereby only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and / or financial capacity to carry out a project are invited to tender.

As a first step, a Contracting Authority sets out its requirements through a notice in the OJEU and invites expressions of interest from potential tenderers. The notice may indicate the relevant information to be submitted or the information may be sought via a detailed questionnaire to interested parties. Only those who possess the requisite level of professional, technical and financial expertise and capacity are issued with the complete specifications and tender documents [RFT] and invited to submit tenders.

It is important to note that, as a basis for pre - qualifying candidates, only the criteria relating to personal situation, financial capacity, technical capacity, relevant expertise and competency etc., set out in the Directives are permissible. The European Court of Justice and the EU Commission have ruled clearly on this. [Refer also to 5.18 and 5.19 below]

Shortlisting of qualified candidates may be carried out if this intention is signalled in the contract notice and the number or range of candidates indicated. Any shortlisting of candidates who meet the minimum qualification criteria must be carried out by non - discriminatory and transparent rules and criteria made known to candidates. The Directives require that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five, provided there are at least this number who meet the qualification criteria [three in negotiated and competitive dialogue procedure] and up to a total of twenty.

Candidates or tenderers who have been convicted of involvement in organised crime, of fraud, corruption or money laundering must be excluded from performing a public contract.

(iii) **Competitive Dialogue** – [a procedure introduced under the revised Directives] is designed to provide more flexibility in the tendering process for more complex contracts, such as might be required for public private partnership type arrangements. Contracting authorities may enter dialogue with interested parties, pre – qualified on the same basis as for restricted procedure described above, for the purpose of identifying arrangements or solutions which are capable of meeting its needs. In conducting the dialogue, contracting authorities must ensure equality of treatment and respect the intellectual property rights of all candidates. When the contracting authority can identify the best means of meeting its needs, and is in a position to sufficiently specify its requirements, it must invite at least three parties to submit tenders and select the most economically advantageous.

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

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

- where the nature of the requirement does not permit overall pricing
- where it is not possible to specify requirements for a service precisely enough etc.
- where an open, restricted or competitive dialogue procedure has not attracted acceptable tenders
- for works contracts performed solely for research, testing or development.

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

- when there is extreme urgency,
- when (for technical or artistic reasons or due to the existence of special or exclusive rights) there is only one possible supplier or service provider,
- when an open or restricted procedure has not attracted appropriate tenders (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially),
- extension of existing works or service contracts and repeat contracts subject to certain conditions, etc.

Contracting Authorities should ensure that the precise circumstances justifying negotiation, as set out in the Directives, exist before deciding on the use of this procedure. It should be noted that definitions of ‘exceptions’ and ‘urgency’ etc. are strictly interpreted by the Commission and the Courts. Factors giving rise to urgency must be unforeseeable and outside the control of the Contracting Authority. Where one of these exemptions is invoked the onus is on the Contracting Authority to meet the burden of proof that the relevant circumstances apply. Candidates must be treated fairly and objectively in negotiations.

Time-limits for Replies

5.14 Minimum time-limits are set down for the different stages of the particular contract award procedure chosen. In all cases the times specified in days relate to

calendar days. When fixing times to be allowed for submission of expressions of interest or tenders, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and drawing up tenders, etc.

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

Open Procedures: for receipt of tenders - 52 days

If a Prior Indicative Notice was published - generally 36 days but in no circumstances less than 22 days.

Restricted, Negotiated and Competitive Dialogue Procedures

For requests to participate - 37 days

For receipt of tenders under restricted procedures - 40 days from date of issue of tender documents. If a Prior Indicative Notice was published : generally 26 days but in no circumstances less than 22 days.

Under a negotiated procedure or in competitive dialogue the time allowed for submission of tenders will normally be agreed between the parties involved.

Where **genuine** urgency renders these time limits impracticable, shorter time-limits may be applied as follows - for receipt of requests to participate, not less than 15 days from the date of dispatching the notice and for receipt of tenders, not less than 10 days from the date of dispatching the invitation.

Note : The use of the urgent procedures, or accelerated procedures, as referred to in the Directives, must be justified and have been caused by events outside the control of the Contracting Authority. The EU Commission and ECJ interpret ‘urgency’ very strictly. Delay on the part of the Contracting Authority in commencing the tendering process is not sufficient reason for applying exceptional procedures.

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

Issue of Documents

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

Receipt and Opening of Tenders

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

Clarification of Tenders

5.17 Contracting Authorities may seek additional information in clarifying submitted tenders. However, substantive alterations to bids after the deadline for submission has passed are not permissible under the open or restricted procedures. In particular, any adjustment to price which could improve the competitive position of a bid is not permitted³.

Examination and evaluation of tenders

5.18 Examination of tenders should be carried out by a team with the necessary competence. The team may include independent representation. Tenders which do not comply with the requirements specified in the RFT should be rejected.

³ The EU Council and Commission in regard to the open and restricted procedures has stated that “*all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, in particular on prices, shall be ruled out*. It provides that discussions may be held with such persons “*but only for the purpose of clarifying or supplementing the content of their tenders, or the requirement of contracting authorities, and provided this does not involve discrimination*”.

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

(i) Where price is the sole criterion, the contract will be awarded to the lowest priced compliant bid.

(ii) Where ‘most economic advantage’ is the basis for the award objectivity and transparency is best achieved by the use of a scoring system or marking sheet based on the relevant weighted criteria, indicating a comparative assessment of tenders under each criterion. [The scoring system must include price and not ‘value for money’ or ‘cost effectiveness’ as a specific criterion. Value for money / cost effectiveness / economic advantage is largely the outcome of the completed evaluation. See Appendix V for sample of a basic scoring system].

5.19 Where a pre-qualification process is used, care should be taken to ensure that the pre-qualification criteria relating to minimum capacity etc. is not used inappropriately in the award process [i.e. avoid double crediting]. Tenderers deemed to have met the minimum pre-qualification requirements should be evaluated solely on the basis of how they meet the award criteria related to the actual project. [See 5.13 (ii) above].

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

Abnormally Low Tenders

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

Tax Clearance

5.21 Before a contract is awarded, the successful tenderer must be required to produce a valid Tax Clearance Certificate from the Revenue Commissioners.⁴

Framework Agreements

5.22 The revised procurement Directives provide for “framework agreements” whereby Contracting Authorities may enter into arrangements with suppliers or service providers to provide supplies or services under agreed conditions for a period of time, normally not more than four years. Under such agreements, some elements of the requirement, such as quantity, price, precise product specification etc. will generally not be established at the commencement of the agreement.

Advertising for framework agreements should set out the precise nature of the proposed procurements to the highest degree possible.

Framework agreements can be with one supplier or service provider, selected following a competitive process, to fulfill orders or supply services over the period of the agreement, or with a number of suppliers or service providers selected following a competitive process. In the latter case each contract or requirement must be the subject of a sub - competition between parties to the framework agreement. The fundamental requirement is that there is transparency, non - discrimination and genuine competition in establishing framework agreements, and in awarding contracts on the basis of such arrangement, and the provisions of the Directive are designed to ensure this.

Utilities Sector

5.23 Separate Directives cover the traditional public sector and the Utilities sector, i.e. entities operating in the water, energy, transport and postal sectors. Private sector entities which operate under special or exclusive rights in the utilities sector are covered by the Utilities Directive. Most features of the Directives are common to both sectors. However, the Utilities Directive provides more flexibility in tendering procedures, reflecting the more commercial remit of the entities it covers. For example, higher thresholds apply to supplies and service contracts under the Utilities

⁴ Tenderers should contact Tax Clearance Section, Collector-General’s Division, Revenue Commissioners, Sarsfield House, Limerick (phone +353 1 61 310310). The full requirements are published in Department of Finance ‘*Circular 22/95 Tax Clearance Procedures - Public Sector Contracts*’. The up to date version will be available on the Department of Finance website.

Directive and there is wider scope to negotiate contracts [therefore a “competitive dialogue” procedure is not considered necessary].

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

The Directives provide for the removal of sectors as and when markets become sufficiently liberalised.

6. Glossary of Terms

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

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

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

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

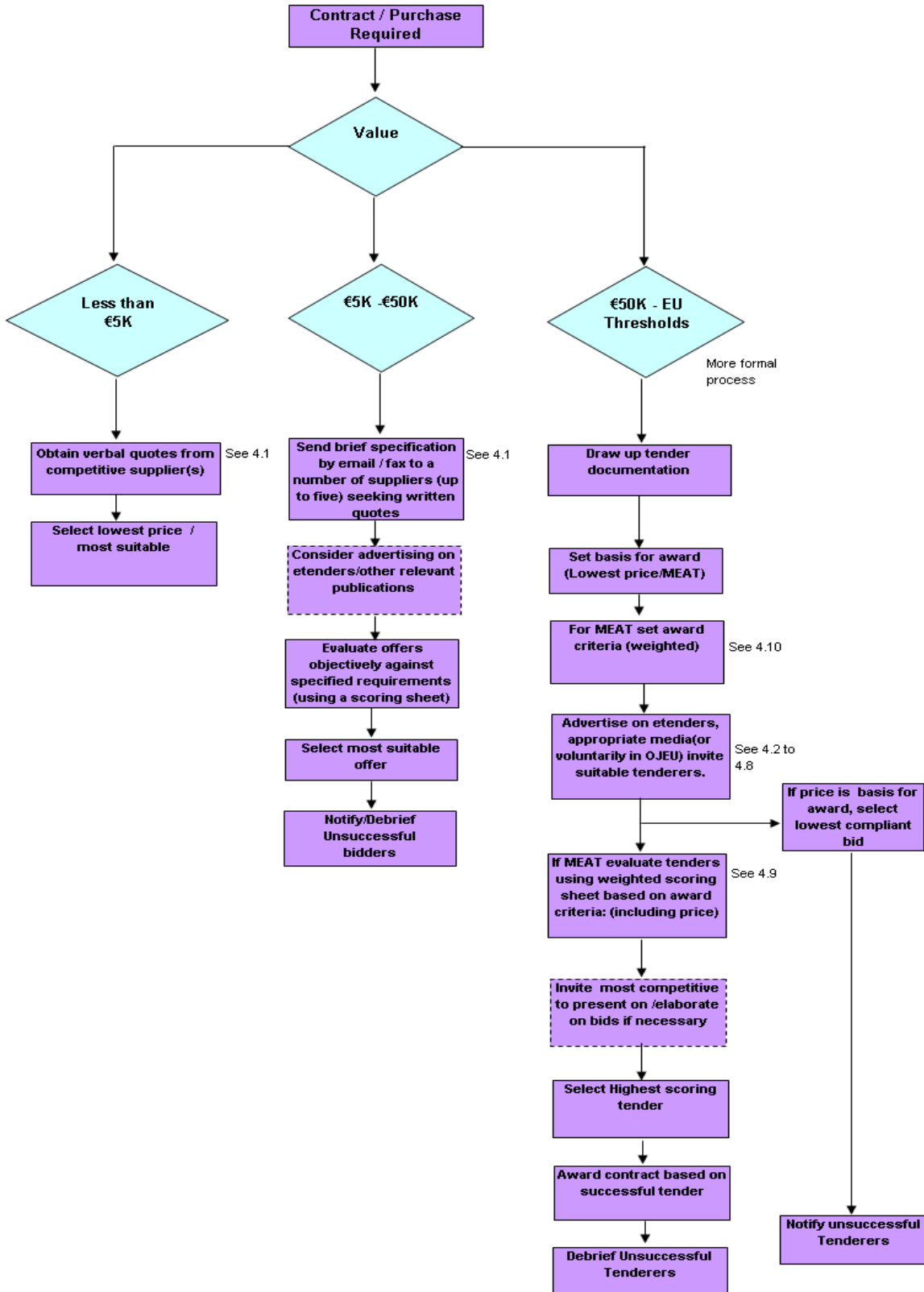
Restricted Procedure : A procedure under EU procurement Directives whereby expressions of interest are invited through a notice in the OJEU [and other appropriate media] and only those who meet certain qualification criteria are issued with the full tender documentation and invited to submit tenders.

Qualification Criteria : Exhaustive criteria set out in EU procurement Directives to be used in pre-qualifying [pre-selecting] candidates who will be invited to submit tenders. The criteria relate to a candidates professional conduct and standing, professional or technical expertise, financial or economic standing, general capacity and competency, i.e. criteria which relate to a candidate's character and capability to perform a particular contract. Proposals in relation to a particular project are not sought and are not a consideration at this stage.

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

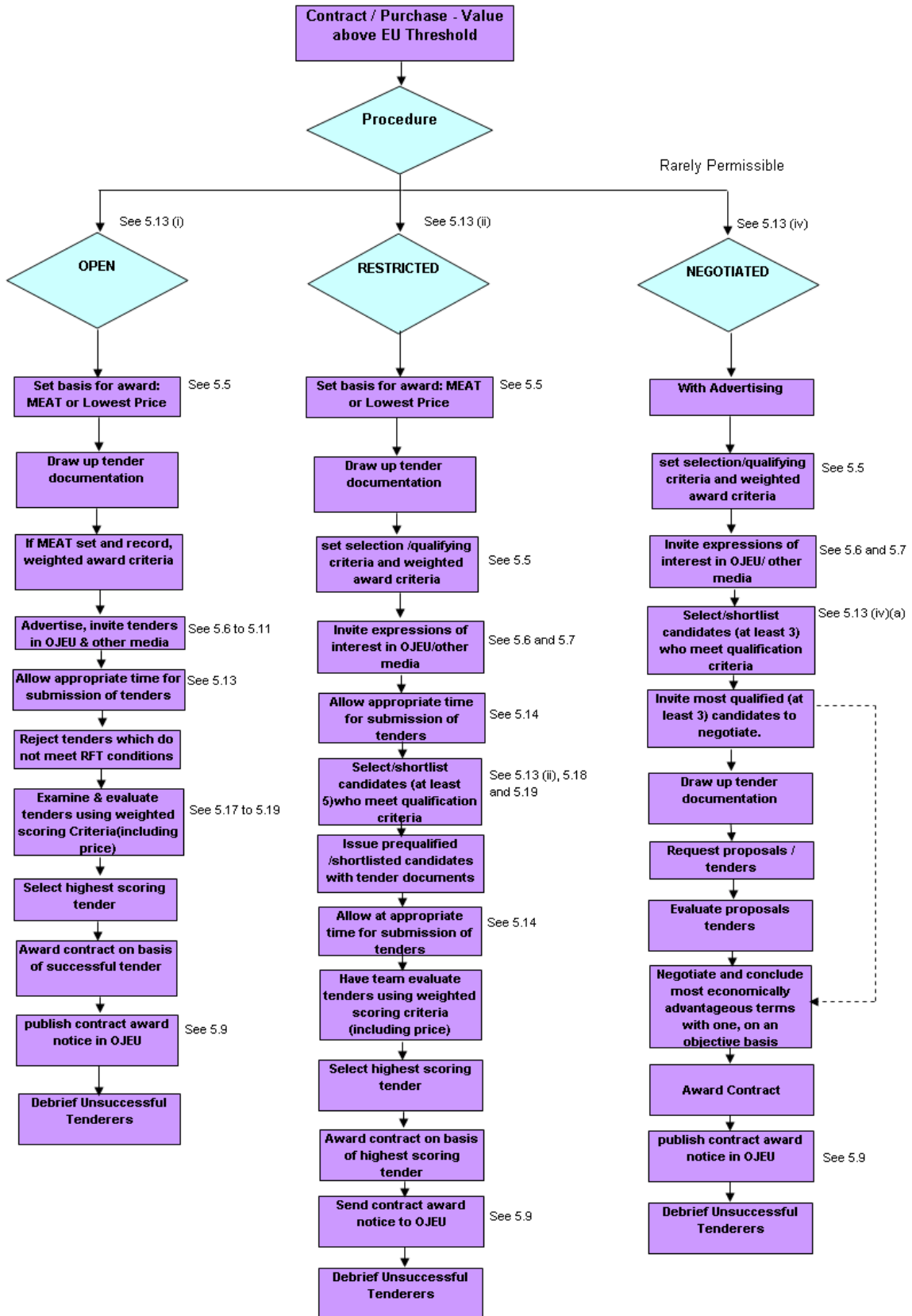
Appendix I

Below EU Threshold Values - Section 4 of Guidelines



Appendix II

**EU Directives Procedure -
Section 5 of Guidelines**



Appendix III**Thresholds [exclusive of VAT] above which advertising of contracts in the EU Journal is obligatory, applicable from 1 January 2002 to 31 December 2003:**

[Thresholds are revised every two years. Up to date thresholds can be checked on the public procurement website 'etenders.gov.ie'].

Under the EU Directives and the Government Procurement Agreement [GPA] of the World Trade Organisation, a two tier threshold system exists.

1. The Directives and the GPA apply to the vast majority of contracts and the thresholds are as follows:

Works	Directive 93/37/EEC (as amended by 97/52/EC)	
Contract Notice/ Prior Indicative Notice	€6,242,028	Threshold applies to Government Dept's & Offices, Local and Regional Authorities and other public bodies.
Supplies and Services	Directives 93/36/EEC and 92/50/EEC (as amended by 97/52/EC)	
Contract Notice	€162,293	Threshold applies to Government Dept's & Offices
Contract Notice	€249,681	Threshold applies to Local and Regional Authorities and public bodies outside the Utilities sector.
Prior Indicative Notice	€750,000	Threshold applies to Government Dept's & Offices, Local and Regional Authorities and other public bodies.
Utilities	Directive 93/38/EEC (as amended by 97/52/EC)	
Works / Prior Indicative Notice	€6,242,028	For entities in Utilities sectors covered by GPA
Supplies and Services	€499,362	For entities in Utilities sectors covered by GPA
Prior Indicative Notice / Supplies and services	€750,000	

2. (i) For service contracts not covered by the GPA (principally R&D and certain telecommunications services) placed by public bodies a threshold of €200,000 applies.

(ii) For contract notices of entities in utility sectors not covered by the GPA (gas, heat, oil and railways) a threshold of €5,000,000 applies for works and a threshold of €400,000 applies for services.

Appendix IVA

Priority Services [i.e. Services subject to the full scope of EU Procurement Directives].

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

Appendix IVB

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

17. Hotel and restaurant services
18. Rail transport services
19. Water transport services
20. Supporting and auxiliary transport services
21. Legal services
22. Personnel placement and supply services (but not employment contracts)
23. Investigation and security services (except armoured car services)
24. Education and vocational education services
25. Health and social services
26. Recreational, cultural and sporting services
27. Other services

Appendix IVB**Sample Score Sheet for evaluation of Tenders – Open Procedure for Consultancy /
Training type contracts**

Quality of proposal in addressing requirements of project	Particular experience relevant to this project	Relevant knowledge skills and expertise of personnel assigned to this project	Timeframe for delivery	Proposed Cost	Total marks awarded
70	30	30	20	50	200
60	24	22	12	30	148
62	30	27	15	42	176
49	11	12	15	25	112
55	22	25	14	40	156
60	25	16	15	40	156

Appendix VI

Contacts and Information Sources on Public Procurement

Contacts in the Department of Finance’s Public Procurement Policy Unit:

Billy Noone Phone 639 6216, email: billy.noone@finance.gov.ie and
Gráinne Dooher Phone 639 6234, email: grainne.dooher@finance.gov.ie
Fax 639 6203

Guidelines and Directives

The Public Procurement guidelines are available on the National Public Procurement portal www.etenders.gov.ie [under Procurement Guidelines] and on the Department of Finance website www.gov.ie/finance under Publications - Other Publications (under “Miscellaneous” heading).

The EU Public Procurement Directives and guidelines on the Directives, as well as general information on the EU Public Procurement regime, are available on the EU Procurement website <http://simap.eu.int> [under ‘Rules and Guidelines’].

Hard copies of EU Directives may be purchased at Alan Hanna Bookshop, Rathmines Road Lower. (Phone 496 7399).

Official Journal of the EU

The email address of the OJEU for publication of notices is mp-ojs@opoce.cec.eu.int

Fax numbers for the EU Official Journal :

+ 352 29 29 44 619 or + 352 29 29 44 623 or + 352 29 29 42 670

For online notification ??

Some relevant websites

National Public Procurement website www.etenders.gov.ie

EU website on Public Procurement <http://simap.eu.int>

General EU website <http://europa.eu.int>

Forum on Public Procurement in Ireland www.fpp.ie

WTO site on the 1994 Government Procurement Agreement (GPA)

<http://www.wto.org/govt/agrmnt.html>

Irish Statute online www.irishstatutebook.ie/front.html for information on FOI, Prompt Payment etc. legislation.