





## Public Procurement 2009

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<b>Global Overview</b> Hans-Joachim Prieß, Diana Harvey and Annette Mutschler-Siebert <i>Freshfields Bruckhaus Deringer</i>	<b>3</b>
<b>Albania</b> Sabina Lalaj and Besa Tauzi <i>Boga &amp; Associates</i>	<b>8</b>
<b>Austria</b> Axel Reidlinger and Stephan Denk <i>Freshfields Bruckhaus Deringer</i>	<b>14</b>
<b>Belgium</b> Tom Gevers <i>Freshfields Bruckhaus Deringer</i>	<b>20</b>
<b>Brazil</b> Fabio Ferreira Kujawski and Cláudia Santana Junqueira Franco <i>Barretto Ferreira, Kujawski, Brancher e Gonçalves Sociedade de Advogados (BKBG)</i>	<b>25</b>
<b>Bulgaria</b> Boryana Boteva and Emilia Petkova <i>Sabev &amp; Partners Law Firm</i>	<b>32</b>
<b>Chile</b> José Francisco Sánchez and José Manuel Cruz <i>Grasty Quintana Majlis &amp; Cia</i>	<b>40</b>
<b>China</b> Melissa Thomas and Miles Ma <i>Freshfields Bruckhaus Deringer</i>	<b>47</b>
<b>Cyprus</b> Chrysanthos Christoforou <i>Andreas Neocleous &amp; Co LLC</i>	<b>54</b>
<b>Czech Republic</b> Barbora Urbancová <i>Peterka &amp; Partners</i>	<b>59</b>
<b>Denmark</b> Torkil Høg and René Offersen <i>Lett Law Firm</i>	<b>65</b>
<b>Estonia</b> Aldo Kaljurand and Jaak Parre <i>Paul Varul Attorneys-at-Law</i>	<b>70</b>
<b>European Union</b> David Broomhall, Hans-Joachim Prieß and Victoria Harris <i>Freshfields Bruckhaus Deringer</i>	<b>76</b>
<b>Finland</b> Terhi Kauti <i>Krogerus Attorneys Ltd</i>	<b>83</b>
<b>France</b> Thierry Laloum and Juliette Deslandres <i>Freshfields Bruckhaus Deringer</i>	<b>87</b>
<b>Germany</b> Hans-Joachim Prieß and Annette Mutschler-Siebert <i>Freshfields Bruckhaus Deringer</i>	<b>93</b>
<b>Ghana</b> David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB &amp; David Law</i>	<b>100</b>
<b>Greece</b> Ioanna Lazaridou-Elmaloglou <i>Kelemenis &amp; Co</i>	<b>104</b>
<b>Hungary</b> Dóra Petrányi and Balázs Endreffy <i>CMS Cameron McKenna LLP</i>	<b>109</b>
<b>India</b> Sumeet Kachwaha <i>Kachwaha &amp; Partners</i>	<b>115</b>
<b>Ireland</b> Patrick McGovern and Peter Curran <i>Arthur Cox</i>	<b>119</b>
<b>Italy</b> Marcello Clarich <i>Freshfields Bruckhaus Deringer</i>	<b>126</b>
<b>Japan</b> Yusuke Nakano <i>Anderson Mōri &amp; Tomotsune</i>	<b>131</b>
<b>Kenya</b> Mohammed Nyaoga and Crispine Odhiambo <i>Mohammed   Muigai Advocates</i>	<b>136</b>
<b>Latvia</b> Sandis Bertaitis and Ilze Bukaldere <i>Liepa, Skopina / Borenus</i>	<b>142</b>
<b>Liberia</b> David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB &amp; David Law</i>	<b>149</b>
<b>Lithuania</b> Jonas Saladžius and Aušrys Šliavas <i>Eversheds Saladžius</i>	<b>153</b>
<b>Mexico</b> Roberto Hernandez Garcia <i>COMAD, SC, Firma de Abogados</i>	<b>158</b>
<b>Netherlands</b> Winfred Knibbeler and Paul Kreijger <i>Freshfields Bruckhaus Deringer</i>	<b>165</b>
<b>Nigeria</b> Gbenga Oyeboade and Olubunmi Fayokun <i>Aluko &amp; Oyeboade</i>	<b>171</b>
<b>Norway</b> Trygve Olavson Laake <i>Difi – Agency for Public Management and eGovernment</i>	<b>177</b>
<b>Poland</b> Jerzy Baehr and Jakub Pokrzywniak <i>WKB Wiercinski, Kwiecinski, Baehr</i>	<b>182</b>
<b>Portugal</b> João Amaral e Almeida and Paula Bordalo Faustino <i>Sérvulo &amp; Associados</i>	<b>188</b>
<b>Romania</b> Madalina Paisa and Sorin Mitel <i>Vilau &amp; Mitel Attorneys-at-Law</i>	<b>192</b>
<b>Russia</b> Falk Tischendorf, Kamil Karibov and Ekaterina Soboleva <i>Beiten Burkhardt</i>	<b>199</b>
<b>Saudi Arabia</b> Salem Al-Arjani and Yasser Al-Hussain <i>Al-Jadaan &amp; Partners</i>	<b>206</b>
<b>Slovenia</b> Mateja Galič <i>Attorneys at Law Miro Senica in odvetniki</i>	<b>211</b>
<b>Spain</b> Javier Gómez-Acebo, Rafael Murillo, Ignacio Santabaya and María Hernández <i>Freshfields Bruckhaus Deringer</i>	<b>216</b>
<b>Sweden</b> Fredrik Linder and Emma Berglund <i>Hamilton Advokatbyrå</i>	<b>222</b>
<b>Switzerland</b> Micha Bühler <i>Walder Wyss &amp; Partners Ltd</i>	<b>228</b>
<b>Turkey</b> Sidika Baysal Hatipoğlu and Zeynep Ünlü <i>Luther Karasek Köksal Consulting AŞ</i>	<b>234</b>
<b>Ukraine</b> Pavlo Barbul <i>Arzinger</i>	<b>240</b>
<b>United Kingdom</b> Sally Roe and Diana Harvey <i>Freshfields Bruckhaus Deringer</i>	<b>245</b>
<b>United States</b> Laurence Schor and Geoffrey T Keating <i>McManus, Schor, Asmar &amp; Darden, LLP</i>	<b>252</b>

# Ireland

Patrick McGovern and Peter Curran

Arthur Cox

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## Legislative framework

### 1 What is the relevant legislation and who enforces it?

In the Republic of Ireland (excluding Northern Ireland, which is part of the United Kingdom) EC public procurement law is transposed into national law by a series of regulations (statutory instruments) promulgated by the minister for finance pursuant to the European Communities Act 1972, as amended, authorising a minister of the government to enact such regulations in order to give effect to an obligation of EC law. The 2004 Directives (Directive 2004/18/EC, coordinating the procurement procedures for the award of public works contracts, public supply contracts and public service contracts, (the Classic or Public Sector Directive) and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the Utilities Directive)) have been transposed into national law by the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI No. 329 of 2006) and by the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (SI No. 50 of 2007) respectively.

The EC Remedies Directives (Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and works contracts, and Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community Rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors) are transposed respectively by the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2), Regulations 1994 (SI No. 309 of 1994) and the European Communities (Review Procedures for the Award of Contracts by Entities operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1993 (SI No. 104 of 1993), each as amended.

Directive 2007/66/EC of 11 December 2007, amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, has yet to be transposed into national law in Ireland. The deadline for transposition is 20 December 2009.

In general, enforcement is by action in the courts pursuant to the Regulations transposing the Remedies Directives and pursuant to Order 84A of the Rules of the Superior Courts (introduced pursuant to the Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts) 1998 (SI No. 374 of 1998) which puts in place order 84A of the Rules of the Superior Courts and provides a judicial review procedure in respect of each of the Remedies Directives governing the Public Sector Directive as well as the Utilities Directive.

Public bodies are also subject to administrative oversight under various guidelines, circulars and codes of practice, but these are not

ordinarily justiciable in themselves.

As a general principle, the ordinary recourse for an aggrieved party is to a judicial review action pursuant to the Remedies Directives as implemented. There is also the possibility of filing complaints with various Irish authorities or with the European Commission – ordinarily outside Irish law – although such a complaint could have the effect of prompting European Commission enforcement proceedings against Ireland.

### 2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The 2006 (Public Sector) and 2007 (Utilities) Regulations effect transposition of the Public Sector and Utilities Directives in a very detailed manner and, in general, do not seek to deal in detail with matters beyond the scope of those Directives.

Importantly, the general principles of EC law are applicable in all cases in Ireland even where the Public Procurement Directives would not specifically apply. Thus, it would ordinarily be illegal under Irish law to discriminate in any public procurement matter on the basis of nationality as between enterprises from member states of the European Union. See, for example, the well-known decision in case C45/89 *Commission v Ireland* [1988] ECR 4929 (the 'Dundalk Waterworks' case), a standards case decided in a public procurement context. Furthermore, the general principles of EC law (such as that exemplified in the decision of the European Court of Justice in Case C324/98 *Telaustria*) would apply in Ireland and would ordinarily be enforced by the courts.

### 3 Are there proposals to change the legislation?

Regulations to transpose Directive 2007/66 (in relation to remedies) are expected to be introduced later this year. However, no specific proposals have been published to date in this regard. The deadline for transposition is 20 December 2009.

### 4 What is the relevant legislation for the procurement of military equipment?

In principle, the 2006 (Public Sector) Regulations apply to the acquisition of military equipment by public authorities in Ireland. However, the Regulations do not apply to a public contract if the performance of the contract is accompanied by special security measures in accordance with the laws or administrative provisions in force in the state or if the protection of the essential interests of the state so require. Neither do the Regulations apply to a public contract the award of which is governed by special procedural rules prescribed under an agreement relating to the stationing of armed forces and involving authorities of the state or a third country.

Certain specific legislation (such as that governing dual use technology) under EC law can have a bearing. In like manner, EC law instruments precluding trade with certain states from time to time may also be relevant.

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#### Applicability of procurement law

- 5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The Irish High Court referred to the European Court of Justice the question as to the definition of a public body falling within the scope of public procurement law in case C-306/97 *Connemara Machine Turf Co Limited v Coillte Teoranta* [1998] ECR I - 8761. The Irish courts, however, have not made a specific ruling to the effect that specific bodies do not come within the scope of public procurement law. A 'contracting authority' is defined in the 2006 (Public Sector) Regulations and the 2007 (Utilities) Regulations as 'the State, a local authority or a public authority, or an association comprising one or more local authorities or public authorities, or local authorities and public authorities'.

- 6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

There are no particular reported decisions of the Superior Courts (Supreme Court and High Court) in Ireland governing this issue.

- 7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

The 2006 (Public Sector) Regulations and the 2007 (Utilities) Regulations incorporate the provisions of the 2004 Directives, as amended, in this respect but there are no other specific national provisions.

In other respects, certain general provisions and principles of Irish national law may be pertinent including, in particular, the principles of statutory interpretation that govern anti-avoidance provisions. These will have been litigated in other sectors (such as Taxation Law) but might well be deemed relevant by analogy in this context.

- 8 Does the extension of an existing contract require a new procurement procedure?

This can be considered in accordance with the provisions of the 2004 Directives and transposing Regulations. In general, depending upon the facts, if an extension has not been provided for in tender documents, notices or elsewhere, the 'extension' of an existing contract may well be considered as a new contract which, assuming that no relevant exemption is applicable, would require a new procurement procedure to be initiated.

- 9 Does the amendment of an existing contract require a new procurement procedure?

The principles governing such an amendment would be broadly similar to those governing an extension and there is no specific wider provision under Irish national law.

- 10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

There are no specific Irish rules governing the transfer of a contract to another supplier or provider without a new procurement procedure. However, it is common practice in commercial contract awards to allow for certain transfers to take place including, for example,

on large projects to allow for subcontracting, generally with the approval of the awarding authority.

- 11 In which circumstances do privatisations require a procurement procedure?

There have been no specific reported decisions in the Irish Superior Courts (Supreme Court and High Court) governing circumstances when privatisations might be considered to require a procurement procedure. However, in general, in a privatisation, there is a share offering to the public, typically by means of initial public offering (IPO) or perhaps by way of a trade sale. In either case, the sale of shares and the offer of those shares would not ordinarily constitute a 'procurement'. However, the provision of functions, typically for either the entity in sale (the enterprise to be privatised) or its owner (typically the incumbent or state shareholder), could entail circumstances which would require a procurement procedure – such as the appointment of advisers and with the provision of certain financial services, the award of printing contracts and so forth.

- 12 In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

There are no specific provisions governing the circumstances when public private partnerships (PPP) are considered to require a procurement procedure. The general principles apply and, in many instances, they are similar to circumstances governing privatisations (see question 11). In general, the major procurement issues in PPPs are whether it is permissible to have recourse to the negotiated procedure (although this is not a problem under the Utilities Directive) and whether a concession is involved and, if so, whether services, works or a mixed concession. When devising and planning a PPP project, it is also appropriate to consider at the outset what public procurement discretions and scope need to be provided for. If a procurement procedure has to be recommended owing to the inadequacy or inappropriateness of the initial, specified procurement details this can have serious consequences for project timescales and resources. Under the new 2004 Directives, it is anticipated that a further issue might be the circumstances in which it is appropriate to have recourse to the competitive dialogue and whether that will, in turn, further limit the circumstances in which recourse may be had to a negotiated procedure.

- 13 What are the rules and requirements for the award of services concessions?

The 2006 (Public Sector) Regulations do not apply to public service concession contracts (ie, contracts of the same kind as public service contracts except that the consideration to be given for supplying the relevant service consists only of the right to exploit the service or that right together with the payment of money). The 2007 (Utilities) Regulations do not apply to service concessions if the contract is awarded by a contracting entity that carries out a prescribed activity (ie, an activity to which the Regulations apply) and the concession is awarded for carrying out the activity.

Irish awarding authorities, however, are conscious of the various interpretations accorded to the requirements under EC Law governing service concessions, works concessions and mixed concessions. Moreover, the Interpretative Communications and other publications emanating from the European Commission have received careful consideration by Irish awarding authorities and their advisers. Furthermore, the Commission Interpretative Communication of 23 June 2006 on 'EC Law Applicable to Contract Awards not, or not fully, subject to the provisions of the Public Procurement Directives'

could be relevant here. There would also be a consciousness of the implications of the judgments (including Case C 324/98 *Telaustria* [2000] ECR I-10745) of the European Court of Justice.

- 14 What are the rules and requirements for the award of an in-house contract without a procurement procedure?

There are no specific Irish rules or requirements for the award of an in-house contract without a procurement procedure other than in accordance with the 2004 Directives, as reflected in the 2006 (Public Sector) and 2007 (Utilities) Regulations.

The procurement procedures

- 15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

The 2006 (Public Sector) and 2007 (Utilities) Regulations do specifically state or restate the fundamental principles for tender procedures including equal treatment, transparency and competition. In particular, they both state that in awarding a public contract (in the case of the Public Sector Regulations) or a regulated contract (in the case of the Utilities Regulations) a contracting authority shall treat all economic operators equally and without discrimination and shall act in a transparent way.

Moreover, there is a consciousness of these rules and, for example, in the case of *SIAC v Mayo County Council* [2002] 2 ILRM 401, that was determined by the Supreme Court following remittal of the matter from the European Court of Justice, which had adjudicated the matter pursuant to a referral under article 234 EC, these matters were also considered.

There is also a strong consciousness in practice of the decisions of the European Court of Justice in cases such as C-324/98 *Telaustria* [2000] ECR I-10745 and case C-358/00 *Buchhändler-Vereinigung GmbH v Saur Verlag GmbH & Anor* [2002] ECR I-4685. There has been use of the non-mandatory notice facility in the official journal of the European Union, in which contracting or awarding authorities have published notices even though these were not specifically required under the detailed rules of the EC Public Procurement Directives.

- 16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The relevant 2006 (Public Sector) and 2007 (Utilities) Regulations do effectively require the contracting authority to be impartial. Moreover, a developed Irish Administrative and Constitutional Law has involved frequent litigation in the High Court and Supreme Court. Thus, the constitution of Ireland has been held by the Supreme Court to require a 'basic fairness of procedures' (*Re Haughey* [1971] IR 217, 263). 'Constitutional Justice' has been developed as a concept by the Irish courts to elaborate upon the principles of natural justice but with constitutionally entrenched standing, so that it is not open to the legislature (Oireachtas) to oust these principles by specific legislative provision.

- 17 How are conflicts of interest dealt with?

There are no specific rules in Irish legislation governing this, but the general principles of EC Law, now stated expressly in the 2006 (Public Sector) and 2007 (Utilities) Regulations, as well as the general principles of administrative law, would also be applicable. These include the general principle of *nemo iudex in causa sua* (no person shall be a judge in his or her own cause) and rules against bias. It

would be common practice for the tender documentation issued by contracting authorities to contain provisions explaining how conflicts of interest are to be dealt with.

- 18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

There are no specific general provisions governing this under the 2006 (Public Sector) or 2007 (Utilities) Regulations. However, the principles of equal treatment, non-discrimination, transparency, comity and others are enshrined in the 2006 and 2007 Regulations and would be enforceable in the Irish courts. The principles of administrative and constitutional law (including constitutional justice) would ordinarily preclude any one potential bidder being afforded preferential treatment over others. In practice, this can be overcome by affording sufficient time and information to other prospective bidders so that any one potential bidder who might have had prior exposure to the affairs of a prospective awarding authority would not retain a competitive advantage in any procurement process. However, in most circumstances, where a potential bidder had been involved in the drafting of tender documents, it would be unlikely to be in a position to bid.

- 19 What is the prevailing type of procurement procedure used by contracting authorities?

All of the procurement procedures available under the EC Public Procurement Directives are frequently used in Ireland. This includes the new Competitive Dialogue procedure. There can sometimes be a discernible pattern among certain awarding authorities or contracting authorities to incline more towards a particular procurement procedure, but that is constantly reviewed by awarding or contracting authorities.

- 20 Are there special rules or requirements determining the conduct of a negotiated procedure?

There are no special, specific or express rules or requirements to determine the conduct of a negotiated procedure under Irish national law over and above as set forth in the Public Sector Directive and 2006 (Public Sector) Regulations in particular. However, there is a consciousness in Ireland of the limited circumstances in which recourse to a negotiated procedure is permissible other than under the Utilities Directive.

- 21 When and how may the competitive dialogue be used?

There is no separate provision for the competitive dialogue in Ireland over and above the Public Sector Directive 2004/18/EC as transposed by the 2006 (Public Sector) Regulations. The 2006 Regulations provide that a contracting authority may award a public contract by means of a competitive dialogue if it considers that the contract is particularly complex and that the use of an open or restricted procedure would not allow the contract to be awarded. If this procedure is used, the contracting authority must define its requirements in a contract notice or a separate document accompanying the notice, publish the notice and any such document and award the contract to the tenderer that makes the most economically advantageous tender. The aim of the subsequent dialogue with selected candidates must be to identify and define the means best suited to satisfying the authority's requirements. All aspects of the contract may be discussed with those candidates. However the authority must treat all candidates equally and without discrimination. The authority may opt to conduct the competitive dialogue in successive stages but, if this is the

case, it must be specified in the contract notice or accompanying documents. As soon as practicable after a competitive dialogue has ended, a contracting authority shall declare the dialogue to be ended and inform the candidates accordingly. Candidates shall be asked to submit final tenders on the basis of the solution or solutions that were presented during the dialogue.

**22** What are the requirements for the conclusion of a framework agreement?

There are no separate Irish national provisions on the requirements for the conclusion of a framework agreement over and above the 2004 Directives as transposed by the 2006 (Public Sector) and 2007 (Utilities) Regulations.

A framework agreement is defined in the 2006 Regulations as 'an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a specified period (including the terms relating to price and, where appropriate, the quantity of works to be carried out, or the products or services to be supplied). The 2007 Regulations contain a similar (but not identical) definition. In entering into a framework agreement, the basic rules set out in the 2006 and 2007 Regulations (including those relating to the setting of award criteria and award procedures) will apply. Under the 2006 (Public Sector) Regulations, the duration of a framework agreement may only exceed four years in exceptional cases, where this is justified by factors such as the subject matter of the contract.

Reference is made to questions 8 and 9. There is a consciousness in practice in Ireland of the possibilities that a drawdown pursuant to a framework agreement might well constitute a new agreement or an amended agreement, which, in certain circumstances, might require an additional procurement procedure.

**23** May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

There is no separate provision in Irish national law on whether several procurement agreements may be concluded, over and above the 2004 Directives, as transposed by the 2006 (Public Sector) and 2007 (Utilities) Regulations. The 2006 Regulations permit a contracting authority to enter into a framework agreement with several economic operators provided the number of such operators is not less than three, unless there is an insufficient number of operators to satisfy the relevant selection criteria or an insufficient number of admissible tenders to satisfy the relevant award criteria. Under these Regulations, a contracting authority may award a contract based on a framework agreement entered into with several economic operators either by applying the terms specified in the framework agreement without reopening the competition. In certain circumstances, where not all the terms are specified in the framework agreement, a new competitive 'mini-tender' procedure is permitted provided specified procedures are followed. Framework agreements with several economic operators are permitted in the utilities sector although less detailed rules are provided in the 2007 Regulations. In this context, it is possible that the courts would look to the more explicit public sector rules for guidance. There is also provision for single operator framework agreements.

The principles elaborated in questions 8, 9 and 22 may also be helpful.

**24** Under which conditions may consortium members be changed in the course of a procurement procedure?

There are no specific Irish legislative provisions on when consortium members may be changed in the course of a procurement procedure. The general principles of EC law, however, would be applicable. In practice, rules governing changes in consortia are frequently specified by contracting authorities in their tender documentation.

**25** Are unduly burdensome or risky requirements in tender specifications prohibited?

There is no specific prohibition of unduly burdensome or risky requirements in tender specifications. However, there would be a consciousness in practice in Ireland of the potential legal vulnerability of unduly burdensome or risky requirements, including against the background that requirements ought generally to be proportionate and not objectively unreasonable. See, for example, *Whelan Group (Ennis) Ltd v Clare County Council*, High Court (Kelly J) [2001] 1 IR 717. In particular, the risk that an unduly burdensome or risky requirement might be held to favour one or more potential bidders or category of potential bidders might frequently deter the imposition of such requirements. It is common practice in negotiations on complex projects (including on public-private partnership projects) that awarding or contracting authorities may engage in negotiation with bidders in relation to particular provisions of contracts or tender specifications but these are ordinarily resolved in the course of negotiation.

**26** What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

In general, there are no specific provisions to limit the discretion of contracting authorities in assessing the qualification of tenderers over and above the 2004 Directives, as transposed by the 2006 (Public Sector) and 2007 (Utilities) Regulations. But there would be a consciousness of general EC Public Procurement Law and in particular of the decisions of the European Court of Justice in cases such as *C27/86 Constructions et Entreprises Industrielles SA v Association Intercommunale pour les Autoroutes des Ardennes* [1987] ECR 3347. This is particularly pertinent where, in the context of the infrastructure deficit in Ireland, certain sectors of providers of goods, works or services, can, from time to time, be under pressure. But there is also a body of non-Irish providers active in the Irish market. The 2006 and 2007 Regulations expressly provide for such general principles of comity: Regulation 61(7) of the 2006 Regulations and Regulation 54 of the 2007 Regulations recognise such qualifications.

**27** Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

No. But requirements must be proportionate. There are also limits in the Regulations on the periods over which candidates may be required to prove, for example, economic and financial standing (three years), technical ability (five years in works and three years otherwise) and there is express provision that an economic operator may rely on the capacity of other economic operators. A body promoted by the governments of the Republic of Ireland and in Northern Ireland, InterTrade Ireland, is studying how to promote greater SME awareness of procurement opportunities.

**28** What are the requirements for the admissibility of alternative bids?

There are no specific requirements for the admissibility of alternative bids in Ireland over and above the 2004 Directives, as transposed by the 2006 (Public Sector) and 2007 (Utilities) Regulations. However, these do not ordinarily take place unless the award procedure makes specific provision for it. Ordinarily the risk of disqualification would deter such bids. But there can be legitimate provision for lots or variant bids. Where these are permitted by a contracting authority, the minimum requirements to be met by the variants and any specific requirements for their presentation must be stated in the contract documents. Only variant bids which satisfy the specified minimum requirements may be considered by the contracting authority.

**29** Must a contracting authority take alternative bids into account?

There is no specific provision in Irish national law for a contracting authority to permit alternative bids. However, if the possibility of alternative bids is specifically provided for in the tender documentation, then there would ordinarily be an obligation on the contracting authority to take such bids into account.

**30** What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

There is no specific preclusion on this in Irish national law. However, where this would occur, an awarding or contracting authority would ordinarily consider this in the context of whether the tender specification or terms would preclude this or whether the specification or terms might bestow a discretion upon the authority to eliminate or disqualify such bids. In order to ensure compliance with the principles of equality and non-discrimination, the practice, where reasonably practicable, is for contracting authorities to determine their requirements (in the form of the scope or specification) and establish the terms and conditions of contract in advance of the invitation to tender. Accordingly, although there is no specific preclusion on this in Irish law, except where variant bids are permitted and subject to the rules for such variants, contracting authorities would not generally permit bidders to change or amend specifications or submit their own standard terms of business.

**31** What are the award criteria provided for in the relevant legislation?

There are no specific additional award criteria provided for in Irish national legislation over and above the 2004 Directives as transposed by the 2006 (Public Sector) and 2007 (Utilities) Regulations. However, there is a consciousness in the Irish market of the proper differentiation between qualification criteria and award criteria. For more complex projects, the 'most economically advantageous tender' award criterion is far more commonly employed and in this case the criteria adopted must be linked to the subject matter of the contract. The Regulations state that these criteria may include (but shall not be limited to) the following: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

**32** What constitutes an 'abnormally low' bid?

There are no specific provisions in Irish law on what constitutes an 'abnormally low' bid over and above the 2004 Directives as transposed by the 2006 (Public Sector) and 2007 (Utilities) Regulations. This must be considered by a relevant awarding or contracting authority in the light of the general body of EC Public Procurement

Law and on the facts of any given case. Moreover, as stated above, the Irish courts have a developed jurisprudence on anti-avoidance provisions in other contexts.

**33** What is the required process for dealing with abnormally low tenders?

There is no specific or express provision in Irish national law for dealing with abnormally low tenders over and above the 2004 Directives as transposed by the 2006 (Public Sector) and 2007 (Utilities) Regulations.

Under the Regulations, if a tender for a public contract appears to the contracting authority to be abnormally low, that authority shall by notice in writing and before rejecting the tender, request the tenderer to provide written details of such constituent elements of the tender as are specified in the notice. The authority shall, as far as possible, verify the constituent elements by consulting the tenderers and by taking account of the evidence that the tenderer provides about those elements. The authority can reject a tender on being satisfied that the only reason for the tender being abnormally low is that the tenderer has received aid from a member state, but only after the authority has consulted the tenderer about the matter and the tenderer has failed to satisfy the authority that the aid was granted lawfully. If a contracting authority rejects a tender for these reasons, it must inform the European Commission in writing of the rejection and the reasons for it.

**34** How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is 'self-cleansing' an established and recognised way of regaining reliability?

There is no specific or express provision in Irish legislation for dealing with this situation. Generally, each tender procedure would operate in accordance with certain rules established by the contracting authority and these rules would specify the qualification and/or award criteria with which tenderers or prospective tenderers are required to comply. Contracting authorities are required to exclude from consideration any person who has been convicted of an offence involving participation in a prescribed criminal organisation, corruption, fraud or money laundering. Contracting authorities may also exclude from consideration any person who is subject to a bankruptcy or insolvency procedure, who is found guilty of professional misconduct by a competent authority or of grave professional misconduct provable by the authority, who has not fulfilled social security payment obligations, who has provided a statement or information to the authority knowing it to be false or misleading or who has failed to provide a statement of information that is reasonably required by the authority. If such specified criteria are not met then the contracting authority in question may disqualify the tenderer in question. The legislation does not provide any specific facility for bidders to 'cleanse' themselves of such irregularities; such legislation has been proposed in the criminal domain but has not been enacted.

## Review proceedings and judicial proceedings

**35** Which authorities may rule on review applications?

See question 1.

As stated, in ordinary course, enforcement is by judicial review proceedings under order 84A of the Rules of the Superior Courts.

In addition, Irish public bodies tend to be subject to a number of administrative (but not ordinarily justiciable) enjoiners by way of guidelines, circulars and codes of practice.

As a general principle, the locus standi rules of the Common Law Courts as developed in jurisprudence apply. These require that, for

a litigant to pursue proceedings against a defendant or respondent, the plaintiff or applicant must ordinarily show sufficient legal interest in the subject matter of the proceedings. As a general principle, a mere bystander or what is referred to in the administrative law textbooks as 'the inferring busybody' is not permitted to pursue such proceedings. The courts have striven to strike a fair balance between affording redress for persons legitimately aggrieved on the one hand, and not interfering with or inappropriately delaying public affairs or projects conducted by awarding authorities on the other. Moreover, the courts have stressed that judicial review is not an appeal. Rather, it is a corrective mechanism in which there is a 'curial deference' to the decisions of authorities vested in the first instance with power to make such decisions. This is illustrated by the decision of the Irish High Court (O'Sullivan J) in *Aer Rianta cpt v Commission for Aviation Regulation* [2003] IEHC 12. The courts have stressed many times that they are not in place to enable decision makers at first instance to be 'second guessed'. See also in relation to the discretion of an awarding authority *Advanced Totes Ltd v Bord na gCon* [The Greyhound Racing Board], High Court (Murphy J) [2004] IEHC 415 and Supreme Court [2006] IESC 17. Rather, established principles of judicial review including error of law, procedural error, bias or the fact that a decision was so unreasonable that it could not be objectively sustained are applied. *SIAC v Mayo County Council*, referred to above, hints at a slightly easier burden to be discharged by an applicant in a public procurement context – per Fennelly J in the Supreme Court.

**36** How long does a review proceeding or judicial proceeding for review take?

There can be rapid recourse to the courts in a judicial review proceeding and an interim order can be obtained rapidly. A review may come to hearing within six months. The Commercial Court within the High Court has a discretion to admit certain commercial matters where the monetary value at stake ordinarily exceeds €1 million and in such instance the hearing can be even more rapid.

**37** What are the admissibility requirements?

In ordinary course, the admissibility requirements are those of locus standi or sufficient legal proximity, set out above. In judicial review proceedings outside the context of EC Public Procurement, it is ordinarily necessary to apply in the first instance for 'leave to apply', but that requirement is not present in the context of EC Public Procurement Law.

**38** What are the deadlines for a review application and an appeal?

Order 84A rule 4 provides that: an application for the review of a decision for the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending such period.

The courts have tended to be strict in requiring promptness in application and there have been several decisions in which challenges to procurement processes have failed on the grounds of lack of promptness in application – for example *SIAC v National Roads Authority, High Court (Murphy J)* [2004] IEHC 128, in the context of the M1 Motorway Project. See also *Dekra Eireann Teoranta v Minister for the Environment and Local Government* [2003] 2ILRM 210 in the context of an application to challenge the award of a national car testing-centre regime. See also *Veolia Water UK plc v Fingal County Council* [2006] IEHC 137 on accrual of cause of action and extending time limits.

**39** Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

No. It would be necessary for the applicant to seek an injunction preventing the award of the contract or suspending performance of the contract as part of the judicial review proceedings. It is ultimately within the discretion of the court, but subject to precedential case law, to determine whether or not to grant such injunction.

**40** Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

There is an obligation to notify unsuccessful bidders if they apply for information. Moreover, bidders may have entitlements under other legislation including the Freedom of Information Acts 1997-2003. There is now also a specific express legislative requirement to notify unsuccessful bidders before the contract with the successful bidder is concluded. This follows on from the decision of the European Court of Justice in *Alcatel* [1999] ECR I 7671. Initially, the Department of Finance issued guidance and recommended that a 10-day standstill period should apply from the date of notification to the tenderers of the decision of the contracting authority to the date of contract award. Regulation 49(5) of the 2006 (Public Sector) Regulations and 51(8) of the 2007 (Utilities) Regulations now provide for statutory standstill periods of 14 days in each case.

**41** Is access to the procurement file granted to an applicant?

There are no specific rules in the Irish Public Procurement Regulations governing access to a procurement file by an applicant. However, under the Freedom of Information Acts 1997-2003 and certain other legislation (including, for example the European Communities Act 1972 (Access to Information on the Environment) Regulations 2007 (SI No. 133 of 2007)), there may be specific entitlements to information or access to 'records'. The information entitlements in the 2004 Directives may have to be read side-by-side with such national provisions. However, the national provisions do not purport to limit any provisions of EC Public Procurement Law.

**42** Is it customary for disadvantaged bidders to file review applications?

It is customary for unsuccessful bidders to be accorded a 'debrief' by the awarding authority, detailing why their bid was unsuccessful, and it is customary for disappointed bidders to seek such debriefs. However, it is not 'customary' for disappointed bidders to file judicial review applications – although such applications are frequent. A disappointed bidder would have to establish it was 'disadvantaged' and would bear the burden of proving this unless there were circumstances to reverse the burden of proof – for example, if another bidder had prior access to relevant information – then the burden of proof might switch to the awarding or contracting authority to demonstrate that all bidders were given adequate information and adequate time to absorb such information, in order to enable them to bid on a fair and competitive basis with any bidder which might have had prior access to information.

**43** May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

There is no specific provision governing whether a contract might be cancelled or terminated if the procurement procedures had led to its conclusion and violated procurement law. However, there would ordinarily be a discretion for contracting or awarding authorities to so terminate and it is frequent that awarding or contracting authori-

#### Update and trends

The scope of public procurement has not been altered. But the hottest topics are dealing with the effects of the international 'credit crunch' and refining the working experience of the competitive dialogue. There has been a large volume of public procurement litigation in the neighbouring jurisdiction of Northern Ireland the decisions of whose courts are of high persuasive authority in the Republic.

ties reserve the right in their tender terms not to make any award or not to make the award to the lowest or any tenderer. The courts have a wide discretion under the Remedies Directives and it is considered that this could include the cancellation or termination of a contract that would have been awarded. Moreover, there is provision under the Regulations transposing into Irish national law the Remedies Directives to enable a court to declare such a contract void ('set aside' in the Directive). Moreover, in the light of the decision in case C-81/98 *Alcatel*, the Department of Finance issued guidance to awarding authorities not to award a contract for a two-week period so as to enable such challenge to be mounted. That is now reflected in the 14-day statutory standstill periods under the 2006 (Public Sector) and 2007 (Utilities) Regulations (see question 40).

**44** Is legal protection available in cases of a de facto award of a contract, namely, an award without any procurement procedure?

Legal protection is available in cases of a de facto award of a contract without any procurement procedure. If a procurement procedure ought to have taken place pursuant to the EC Public Procurement Directives, then that would ordinarily constitute a breach of such Directives and would ordinarily be justiciable pursuant to order 84A of the Rules of the Superior Courts. In other circumstances, legal protection may also be available pursuant to the generality of the judicial review procedure under order 84 of the Rules of the Superior Courts, which is very similar to that in respect of EC public procurement (for example, there are certain differences such as the requirement to apply for leave before the substantive application). Moreover, it may be necessary or prudent in certain instances for an aggrieved party to institute two separate sets of proceedings in parallel so that redress may be sought under each of order 84 and order 84A. A case in point arose in *MCD Productions v Commissioners of Public Works in Ireland*, 2005 (which did not proceed to judgment) when such proceedings were brought in the High Court in respect of a contract to award facilities in a public park to stage a rock concert.

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