



Public Procurement: A Practical Guide to Challenging Public Contract Decisions

Introduction

Winning public contracts is the lifeblood of many businesses. While such contracts may not carry the promise of high margins, they can be significant in value and are often seen as a safer bet than private sector contracts. Indeed, the consequences of failing to have a significant public contract renewed (or of being unsuccessful in a bid for a new public contract) can be disastrous for the financial health of a business.

A disappointed bidder should know that challenging public sector or utilities contract decisions is not easy. The EU Remedies Directive, implemented into Irish law in 2010, governs how parties might challenge such decisions. However, time limits are strict and the grounds on which challenges can be taken are relatively restricted.

This guide is intended to help aggrieved bidders navigate the rules for challenging decisions regarding contracts procured under EU public procurement rules.

What are the rules and when do they apply?

EU public procurement rules are primarily contained in Directives implemented into Irish law, and govern the award by public bodies of supply, works and service contracts above certain financial thresholds (for example, €5.350 million in the case of works contracts). Similar EU rules also apply to the contract award procedures of companies operating in the utilities sector (water, energy, transport, etc.), even where these organisations are not publicly owned. New EU Public Procurement Directives were adopted in 2014, revising the existing Directives. The new Directives have been implemented in Ireland by the European Union (Award of Public Authority Contracts)

Regulations 2016 and the European Union (Award of Contracts by Utility Undertakings) Regulations 2016. However, these revisions do not affect the rules on challenges to contract decisions set out in this guide.

Not all contracts are subject to the full force of the EU public procurement rules. For example, certain "non-priority" services (such as legal services and training services) are not currently subject to detailed procedural requirements and time limits. A limited number of exceptional circumstances such as urgency may also justify a departure from the normal rules. However, whichever rules apply, contracting authorities must always respect the over-riding principles of transparency, equal treatment and observance of fair procedures.

The 2010 Remedies Regulations, which implement both the EU Remedies Directive and the EU Utilities Remedies Directive, establish a special form of judicial review applying to contracts governed by the EU public procurement rules. If the relevant contracting authority or utility refuses to accept a disgruntled bidder's objection, then High Court litigation is unfortunately the only serious option for disgruntled bidders seeking to protect their rights. There is no Irish procurement authority with powers to investigate complaints and resolve disputes outside litigation. While a complaint to the European Commission might assist in persuading the contracting authority to terminate the infringement, this falls outside the control of the challenger. Moreover, significant delays are common. In addition, any subsequent enforcement action by the Commission becomes more about the State's responsibility for failure to fulfil its EU law obligations than obtaining a remedy for the complainant.

Contracts which fall outside the scope of the EU public procurement rules are normally awarded under more flexible national guidelines issued by the Department of Finance (whose procurement functions have been transferred to the Office of Government Procurement). Challenges to such procedures are subject to general principles of judicial review and contract law. This guide focuses on the special procedure for challenging decisions under EU public procurement rules.

Grounds for challenge

Challenging decisions of a public body (or relevant utility) in court is subject to judicial review principles. The proceedings are not a full appeal and the Courts have repeatedly stated that their role is not to 'second guess' the public body's actions. Instead, the focus is on how the decision was reached. Were there procedural errors or bias? Was the action so unreasonable it could not be objectively sustained?

Circumstances that might constitute grounds for challenge include:

- failure to advertise a relevant contract;
- wrongly determining that a candidate does not meet the pre-qualification criteria;
- giving one bidder important information that is not provided to other bidders;
- bias in favour of one party (or against another);
- incorrect application of the award criteria; and
- changing the award criteria or their relative weightings after receipt of bids.

The burden of proof usually lies on the disappointed bidder. However, this burden might switch to the public body in certain circumstances. For example, if the challenger can show that another bidder had access to additional information that it did not receive, the contracting authority will have to explain why the apparent inequality in treatment did not breach the procurement rules.

When things go wrong: know your rights

A company's experience of the tender process, coupled with knowledge of the relevant industry, might lead it to suspect that a breach of EU procurement rules has occurred. In addition, public procurement rules impose disclosure obligations on contracting authorities that may give bidders an indication that an infringement was committed. Participants in a tender process

must be informed in writing of the outcome of the process and must be given a summary of the reasons for rejection of their pre-qualification submission or tender.

Contracting authorities are precluded from awarding a contract for a certain period after this information has been communicated to unsuccessful bidders. This "standstill" period must be at least fourteen calendar days, provided the information is issued by fax or e-mail. In other cases, the authority must wait at least sixteen days before signing a contract with the successful bidder.

A participant may also use Freedom of Information rules to seek records relating to the award process. Records requested under this legislation are unlikely, given the short time limits, to arrive in time to inform a decision to take legal proceedings under the 2010 Remedies Regulations.

Act quickly

Timing is a key consideration and aggrieved bidders must not delay. A company usually has 30 days after it learned of the decision (or knew or ought to have known of the alleged infringement) in which to issue proceedings, and must inform the public body before doing so.

Challenges may be made to any decision that produces legal effects, not just contract awards. The strict timing rules mean that if, for example, a bidder believes that the wrong procedure was used, it should issue proceedings within 30 days of publication of the contract notice. If it does not launch a legal challenge yet continues to participate in the process until its bid is rejected, any proceedings contesting the choice of procedure will be ruled 'out of time'. Likewise, one can challenge a decision excluding a party from the award process at pre-qualification stage, but this must normally be done within 30 days of receiving notification of the exclusion. Each application will be looked at critically, although time limits may be extended at the discretion of the High Court.

Process

Before beginning High Court litigation, a party is required to notify the contracting authority in writing of its intention to issue legal proceedings and of the matters that in its opinion constitute the infringement. There is no formal obligation to wait further before issuing proceedings,

although in practice a short period should be given to allow time for a response from the contracting authority. A separate application can be made to transfer the case to the Commercial Court, which operates to an expedited timeframe (the average waiting period for a Commercial Court hearing is currently around 24 weeks).

Remedies available

There are a number of potential remedies available to an aggrieved bidder. Prior to the award of the contract, an aggrieved bidder can apply to the Court for an order to correct the alleged infringement or for review of the award decision; such an application will have the effect of automatically suspending the contract award. If the contract has already been awarded, an aggrieved bidder can apply to the Court to have the contract declared ineffective (i.e. void) or seek damages to compensate for any loss caused by the breach of procurement rules. Finally, the 2010 Remedies Regulations have introduced the concept of a financial penalty payable by the relevant contracting authority, separate to any damages award.

Practical steps

The 2010 Remedies Regulations provide a clear framework for the judicial review of public contracts and should provide a further incentive to contracting authorities to act transparently and correctly. If you suspect there has been a breach of the procurement rules, you should gather your resources quickly and efficiently.

The following practical steps should help:

- Act swiftly. Time limits for taking action are short, so do not delay. Seek advice early if you suspect there has been a breach of the rules. Remember that you will need some time to obtain legal advice and to make an informed decision on the options open to you.
- Ask questions. You are entitled to be given reasons for the rejection of your tender. If you are not satisfied, ask for a debriefing meeting to obtain further information. Although it may be difficult to accept, there may be a valid reason for rejecting your tender: it is better to find this out at an early stage than mid-way through costly litigation.

- Create a paper trail. Keep notes of any conversations that could be relevant. Where possible, record your objections or concerns in relation to the process in writing (e.g., in an e-mail to the authority's relevant contact person).
- Consider your preferred result and be realistic. Do you believe you should have been awarded the contract? Are you seeking damages? In many cases, parties would be happy for the flawed process to be abandoned and started afresh, or even to know that the authority has learnt its lesson and will apply this to future processes.

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