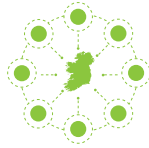


PUBLIC PROCUREMENT

A driver for SMEs, growth and sustainable secure employment



*A Sinn Féin Policy Discussion Paper
September 2015*



INTRODUCTION

Speaking recently at the Small Firms Association's annual conference the Minister for Public Expenditure and Reform told attendees that improving public procurement practices by removing obstacles and encouraging the involvement of SMEs is a Government priority¹ – an admission in itself that notwithstanding progress on issues raised over the last number of years' obstacles still remain.

Despite the work of the Office of Government Procurement (OGP) and initiatives taken by agencies such as Enterprise Ireland and Intertrade Ireland to build SME and microbusinesses awareness of public procurement, business representative organisations continue to highlight the difficulties their members experience accessing and securing contracts.

Chambers Ireland has described a continued sense of frustration amongst the SME community that issues such as the Government's limited focus on the lowest tender price above wider social and economic benefits continue to be raised, only to be ignored².

ISME have warned that in the drive for lower short term costs smaller businesses are being excluded from the procurement process putting SMEs and their employees at risk³. In a presentation to the Public Accounts Committee earlier this year the Small Firms Association (SFA) told members that Government policy on the need to save money in public procurement whilst valid should be clearly aligned to its enterprise support and job creation agenda.⁴

Since highlighting the need for Government to open up procurement to SMEs and microbusinesses in our 'Putting SMEs First' policy paper there has been some movement by Government to acknowledge the problems facing small businesses.

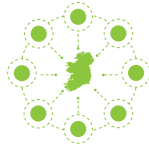
Circular 10/14⁵ issued in April 2014 by the Department of Public Expenditure and Reform to all heads of departments sets out a number of initiatives to assist SMEs. Whilst some proposals are welcome such as sub-dividing some contracts into lots, the reigning in of turnover requirements for goods and services contracts and encouraging buyers to consider innovative variants to contract specifications, significant problems remain. In reality the Circular lacks real teeth as there are no sanctions for non-compliance.

A study published earlier this year by Tenderscout found that just 26% of companies surveyed intend to participate more in 2015 as a direct result of Circular 10/14, hardly a ringing endorsement of the measures contained within.

Notwithstanding Circular 10/14, and the establishment of the SME Working Group on Public Procurement by the OGP, the SFA have said it is clear that there has been no tangible improvement in SME access to public procurement over the last year. Tenderscout's survey corresponds with this view as it finds that SMEs believe that tenders are designed to minimise SME participation.

It is also disappointing that the Government's Action Plan for Jobs 2015⁶ includes just four action points on public procurement in the 168 page document, and just one of these pertains specifically to SMEs or the social and solidarity economy. None of the proposals are new.

Government policy of prioritising the cheapest price over and above the wider economic and social value of contracts is damaging the economy, and denying small companies of much needed business. Ongoing changes to local authority procurement, which centralises millions of euro of procurement has the potential to deprive local economies of long established income.



It's of pivotal importance that firms winning public tenders have the necessary capacity and financial stability to deliver the tender on time and within budget. However it has been the experience of many small firms that excessive turnover and insurance requirements can be prohibitive. Sinn Féin seek to protect the tax payer from exposure to unfulfilled contracts and to ensure tender requirements are realistically tailored to the needs of SMEs

In response to a question raised by Sinn Féin Finance Spokesperson Pearse Doherty TD the Minister for Public Expenditure and Reform admitted that his Department had not carried out any studies into impact on local economies of the centralisation of public procurement, currently carried out by local authorities.

Sinn Féin has long argued that public procurement acts as a critical stimulus for the domestic economy and is an important driver of Ireland's recovery both in terms of employment and employment standards across the economy. Sinn Féin seeks a system of procurement that brings real value to the citizen and society. Government has to be more ambitious for the economic and social return of the €12bn annual public spend on goods, services and capital projects.

SOME OF CURRENT CHALLENGES FACING SMES

Criticisms of Government public procurement policy have been well voiced by organisations representing SMEs. Priority continues to be given to the cheapest tender. The OGP's push for consortium bids runs contrary to the way SMEs and particularly micro businesses conduct their businesses. Many SMEs hold the view that the generation of consortium bids can be challenging under current competition law. Circular 10/14 itself advises that suppliers considering forming a consortium should seek legal advice in relation to the structure and operation of the consortium to ensure that it is fit for purpose and complies with their legal obligations particularly in relation to competition law⁷.

Tenderscout's survey found that 43% of companies are unlikely to collaborate with other businesses. A lack of consistency between the contracting bodies, for example in their marking criteria, has been highlighted. Timeframes within which SMEs need to tender are often too tight and the cost of tendering too high. A lack of transparency across public procurement is also a common theme.

Since the establishment of the Office of Government Procurement in July 2013 changes to the public procurement system have taken place, and some of the Office's work has been positive. Procurement has been professionalised and is becoming more streamlined. For the first time real data on public procurement is now available and the OGP has committed to produce an annual report of analysed expenditure and tendering activity, but again problems still remain.

The Public Service Spend and Tendering Analysis for 2013 found that 66% of public service expenditure is with SMEs, but the OGP uses the traditional definition of SMEs, enterprises that comprise of less than 250⁸ employees. In truth we know that the composition of SMEs in Ireland is in fact very different. This is further complicated by the reality that there is no differentiation between home grown small businesses and Irish subsidiaries of large multinational corporations.

The SFA has correctly described Ireland as a nation of small businesses, with 97% of the 200,000 businesses with 50 employees or less and 84% with less than 10 employees. Until the OGP data collation accurately categorises micro, small and medium enterprises the



policy solutions they put in place will continue to be deficient, and their analysis unreliable.

Both the OGP and Government Ministers have acknowledged the significant role of SMEs in the Irish economy yet they have committed only to encouraging SMEs to fully engage in public procurement –not to increase Irish SMEs participation.

Government’s Action Plan for Jobs 2015 commits only to work to increase SME awareness of public procurement opportunities, and similarly the OGP promises merely to work with industry representative bodies in developing and implementing policy initiatives and driving supplier education and awareness. SMEs need Government to commit to increased participation in public tendering, and awarding of contracts, by and to small and microbusinesses as a policy objective.

OPENING UP PUBLIC PROCUREMENT TO SMALL AND MICRO BUSINESSES

Earlier this year representatives from the Small Firms Association and the Irish School Art Supply Federation (ISASF) gave evidence to the Public Accounts Committee (PAC) on the issues small and micro businesses face when seeking to secure public contracts. This is not the first time businesses and academics have set out these challenges to an Oireachtas committee during the lifetime of this Government yet the fundamentals of the challenges faced have not been dealt with by the Department of Public Expenditure or the OGP.

Giving evidence to the Jobs Committee in October last year Dr Paul Davis Program Director for Dublin City University’s MSc in Strategic Procurement and the MSc in International Management noted that, “the Irish public sector has formally moved to a more centralised approach for procurement, yet research throughout Europe and elsewhere has shown that centralised state procurement can lead to a stifling of innovation and a reduction of competition and certainly does not allow for local needs and the increased participation of SMEs⁹.”

Dr Davis recommended that clear key performance indicators for SME participation should be set for all public procurers, and that to date no key performance indicators are used in any public sector body for the level of participation of SMEs or indicating what the level of participation of SMEs should be. Even if they were put in place, the academic noted that there there is no contract monitoring to ensure they would be met.

It is also worth noting that Section 1.13 of the Competition and Consumer Protection Guide to SMEs on Consortium Bidding states that excluding efficient SMEs from public procurement could potentially have a detrimental impact on competition. It warns that it may have the effect of excluding smaller firms or new entrants with innovative solutions, thereby reducing the value for money that the State can achieve. It may also reduce the overall number of firms that can take part in a tender competition and that this may potentially decrease competition and increase the cost of goods and services purchased by the State. In the longer term, it may limit the number of firms left in the market and deter new firms from entering the market, meaning that the field of potential bidders may be considerably reduced for the next round of tendering¹⁰.

A.J. Noonan, Chair of the Small Firms Association outlined how centralised large aggregated contracts make it increasingly difficult for small innovative companies to compete resulting



in a serious potential loss of business, and advised that such contracts should be broken into lots¹¹. He went on to say that the idea that small companies can simply join together with their competitors and compete for larger contracts as advocated by the OGP is simplistic in the extreme. Anyone with a working knowledge of small and micro businesses would concur with this view. 43% of companies surveyed by Tenderscout said they were unlikely to collaborate with other businesses when tendering.

With 50% of Irish companies only operating within a 25 km radius Mr Noonan added that they are unlikely to tender for businesses unless it is regionalised and in much smaller lots. This reality runs contrary to the centralisation objectives of the OGP whose new model provides for centralised categories of services for which small businesses must tender. They are competing with much larger companies who have infrastructural abilities to provide goods and services across the country, and offer significantly lower prices as they can, unlike small and micro businesses, absorb losses knowing gains will be made elsewhere.

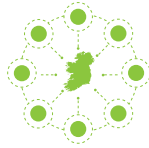
The OGP's rush to centralise the bulk of public procurement of goods and services is having a deeply negative impact on small and micro companies already struggling to keep the doors open. As Retail Excellence advocate every €1 spent locally is worth €4 to the local economy¹². The OGP has argued that EU rules precludes them from positively discriminating in favour of small and micro businesses yet we know that Wales, like Scotland and other EU member states include variations of community benefit clauses when assessing tenders without reproach from the European Union institutions.

Predatory pricing was also raised during the PAC meeting in March. The ISASF noted that the OGP's trigger for predatory pricing investigations is where there is a price difference between competitors of 10% to 25%. Of course if more than one company engages in the practice this safeguard becomes redundant. When raising predatory pricing with regards to the stationary contract the ISASF were told the OGP had investigated predatory pricing at the framework stage. As contract is not awarded at the framework stage, which happens at the mini-competition stage, in effect large suppliers know that they can go below the initial quoted price without fear of triggering an investigation.

The cost of tendering for small businesses and the lack of in-depth understanding of how small and micro companies conduct their business has also been raised by small businesses and the organisations that represent them. There is also conflicting evidence between the OGP and others regarding the volume of contracts being awarded to companies outside of the state.

RECOMMENDATIONS

- Intertrade Ireland and the OGP to develop a 'Meet the Supplier' event programme in consultation with the SFA, ISME and micro business representatives to be rolled out for all public servants engaged in all levels of awarding public procurement contracts
- The OGP to put in place robust predatory pricing safeguards at the mini-competition stage of the tendering process following consultation with micro and small business representatives
- The OGP to clearly define a micro, small and medium size organisation and collect and disseminate procurement data that pertains accurately to each category
- The OGP to set key performance indicators for micro, small and medium size enterprise participation for all public procurers and a monitoring mechanism ensuring these performance indicators are met
- The OGP to reduce the size of tenders to make them accessible to the relevant enterprise size
- OGP in consultation with all relevant stakeholders to review the current centralised tendering model to provide an alternative approach that better marries cost benefits with wider regional economic and social policy objectives



- The OGP to extend categorising of suppliers by number of employees, and also a 'subsidiary' classification for companies who are Irish subsidiaries of multinational companies
- The Department of Public Expenditure and Reform to conduct a study on the impact on local economies and to micro/small businesses of public procurement centralisation

DELIVERING A WHOLE OF ECONOMY BENEFIT

Sinn Féin Public Expenditure and Reform Spokesperson Mary Lou McDonald TD introduced a Private Members Bill in 2014 for debate which legislates for the mandatory inclusion of social clauses in all public procurement contracts worth in excess of €1 million. This important piece of legislation was first introduced in 2013.

Whilst the Government parties did not vote against the Sinn Féin Bill the actions they committed to progress with regards to social clauses has been painfully slow. Over a year has passed since the Minister for Public Expenditure and Reform established the Social Clauses Project Group and just 11 pilot projects have been identified¹³ to test the inclusion of social clauses in tender and contract documentation, and just one other initiative has secured employment for 50 people who were long-term unemployed, as well 18 apprenticeships.

Whilst every job that takes someone off the dole is to be welcomed, when these numbers are viewed in the context of an €8.5bn public spend on goods and services and €3.5bn on capital expenditure¹⁴ we see the lack of ambition and political commitment displayed by Government in using public procurement to the benefit of the whole economy or to socio-economic objectives much talked about but rarely actioned.

Social clauses are not rocket science nor are they new. As Deputy McDonald has highlighted Italian clauses favour bidders from less developed regions of the country. Dutch and Danish local Government laws provide for requirements to create jobs for the long-term unemployed. German rules allowed favourable terms for bidders with a background in the former German lands in Poland, the Soviet Union and Czechoslovakia¹⁵, and Community benefit clauses have been used in Scotland since 2008¹⁶.

Recent procurement reform legislation introduced in Scotland has sought to establish a national legislative framework for public procurement that supports economic growth by delivering social and environmental benefits, supports innovation and promotes procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business friendly. It's also worth adding that the Scottish Model of Procurement defines value for money in procurement as not just being about cost and quality, but about the best balance of cost, quality and sustainability¹⁷. In addition the Public Services (Social Value) Act 2012 for England and Wales requires public authorities to have regard to economic, social and environmental well-being in connection with public services contracts; and for connected purposes¹⁸.

Let's not forget businesses themselves are well versed in the values of corporate social responsibility (CSR). This management practice has been in place for decades. Whilst CSR has its critics, its widespread practice illustrates that social responsibility including human rights, local employment, community gain and environmental protections can be absorbed into the cultural practice of businesses and intertwined with their strategic goals. Labour and Fine Gael need to view social clauses in the same light. Current and future debate on social and community clauses must also extend beyond the traditional sectors such as construction and other related trades to include better links to the priority skills sectors for the economy as has been recommended by NICVA, the Northern Ireland Council for Voluntary Action.



RECOMMENDATIONS

- Immediately attach social clauses to all public works contracts as provided for in Sinn Féin's Social Clauses in Public Procurement Bill 2013
- Task the Social Clauses Project Group with drawing up and delivering no later than six months after commencing work a draft framework for reform of public procurement that supports social and environmental benefits, innovation, and enhanced transparency in the system
- Launch a public consultation on the Social Clauses Project Group's reform framework
- Finding of the framework and public consultation to be addressed in the legislation transposing the new EU procurement Directives into Irish law
- The inclusion of a provision in the new legislation to give Ministers the power to make regulations specifying the criteria against which a contracting authority may exclude a supplier from participating in a procurement process, to include where a supplier has been found to have engaged in blacklisting of trade union members or to have been in breach of environmental, social or labour law
- Sanctions for non-compliance by procurers to be included in public procurement Circulars and initiatives to assist and increase SME participation

Using new EU Procurement Directives to the benefit of Irish businesses and workers
Last year three new EU procurement Directives came into effect, and must now be transposed into Irish law by April 2016¹⁹.

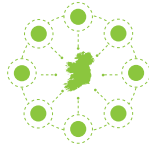
The Irish Congress of Trade Unions (ICTU) has, as part of its Charter for Fair Conditions at Work, included 'Fair Public Procurement' as one of the campaigns five demands and it is calling for a fair transposition of the Directives so that the aims of the Charter are supported and secured²⁰.

Whilst the new Directive on Public Procurement offers fairer terms and conditions for workers, it also provides Irish businesses and their representatives with an opportunity to make a significantly increased demand of Government and the OGP, and more widely for citizens a much greater benefit from the billions of euro spent each year on goods, services and public works.

Article 2 of the Public Procurement Directive²¹ (one of the three new Directives) provides that the existing procurement Directives be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. It is repeatedly highlighted that the existing price-only or cost-only assessment of tenders is a thing of the past, and all stages of public procurement and must have due regard to economic, innovation-related, environmental, social and employment-related considerations.

It is particularly welcome that the Directive makes specific reference to small and micro businesses as this puts an added pressure on the OGP to distinguish between small and medium sizes companies in the data it collects and disseminates. Emphasis is given to the potential of SMEs for job creation, growth and innovation and a policy objective is set out of increasing their participation in the public procurement.

The awarding of contracts under the new rules will be based on the principle of the 'Most Economically Advantageous Tender', or the MEAT criteria. Whilst price remains one of the criteria for public procurement, additional standards are included such as life cycle costing



to include all costs over the life cycle of works, supplies or services. Quality, environmental and social criteria can also be applied by contracting bodies. This offers SMEs a real chance to compete on value, service, price and arguably on the basis of job retention, in the context of the social aspect of the MEAT criteria.

Member state Governments will also be required to report back to the Commission every 3 years on SME participation in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities. This raises the issue of compliance and enforcement of existing and new public procurement rules and provisions in this state following the transposing of the Directive. Government's record on both is poor with examples in the public domain of clear breaches of public works contracts by principal contractors. National Employment Rights Authority (NERA) and others are not adequately resourced to tackle effectively or in a timely manner these breaches as they occur. This has led to unnecessary industrial unrest and unscrupulous contractors being awarded multiple lucrative capital projects.

The Directive provides numerous advances in how public procurement can be progressively used to improve industrial relations, protect subcontractors, and provide real benefits to citizens whose taxes (noting that we are all taxpayers whether we are in work, out of work, an employer or a child paying VAT on her sweets) pay for goods and services purchased by Government on their behalf. It also puts a renewed emphasis on tackling low cost tendering, a practice we know employed by those engaged in predatory pricing. Those awarded state contracts, including subcontractors taken by principal contractors must comply with national, European and international legal obligations set out in environmental, social and labour law, as well as collective agreements.

RECOMMENDATIONS

- When transposing the public procurement Directives into Irish law the Government must take a maximalist approach in the areas providing for fairer procurement rules for micro and small enterprises, environmental social and employment rights
- A review of compliance and enforcement of labour and employment legal obligations by public contractors and suppliers to be jointly undertaken by the Departments of Public Expenditure and Reform, Jobs Enterprise and Innovation and Social Protection and in consultation with ICTU in advance of the transposing of the EU procurement Directives
- ICTUs Charter for Fair Conditions at Work 'Fair Public Procurement' demands to be implemented in full



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