

**Submission to Office of Government Procurement  
Consultation on Public Procurement  
National Women's Council of Ireland**



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# Submission to Public Consultation on Public Procurement

## National Women's Council of Ireland

### Introduction

Established in 1973, the National Women's Council of Ireland (NWC) is the leading national women's membership organisation in Ireland. NWC represent a membership of over 180 groups and organisations across a diversity of backgrounds, sectors and locations and are committed to the promotion of full equality between women and men. We also have a growing, committed, individual membership.

NWC greatly appreciate this opportunity to make our contribution to the Office of Government Procurement's public consultation on transposition of three new procurement Directives<sup>1</sup> (Public Procurement, Utilities and Concessions) into national law by 17 April 2016.

1. **Public Procurement:** Directive 2014/24/EU on public procurement, which repeals Directive 2004/18/EC
2. **Utilities:** Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, which repeals Directive 2004/17/EC ; and
3. **Concessions:** Directive 2014/23/EU on the award of Concession Contracts, which does not directly replace any previous Directive.

The state is Ireland's biggest purchaser of goods and services with the public sector spending €12bn on goods and services in 2013. This brings significant responsibility and significant opportunity, both of which are recognised in the new EU Directives on Public Procurement.

According to previous guidelines from the European Commission around socially responsible public procurement (SRPP), (2010), public procurement should be seen as a "powerful tool both for advancing sustainable development and for achieving the EU's (and Member States') social objectives' as well as an instrument to "foster the European social model" as a "vision of society that combines sustainable economic growth with improved living and working conditions".

The three new Directives which will be transposed by April 2016 considerably strengthen the scope of states to employ Procurement in this way as a positive instrument for the achievement of wider goals, including gender equality targets.. Multiple references to social considerations within the Directives mark a distinct shift in priorities and process.

Ireland has considerable scope within this transposition process, both in terms of which area it may choose to include or exclude from public procurement and the way in which the process is managed and the kinds of consideration, criteria and clauses employed throughout the process. It is essential transposition look beyond administrative detail and consider procurement as a crucial point of leverage in the promotion of best practice.

NWC would therefore encourage an ambitious approach to the transposition process and implementation of the new directives. A number of key recommendations from the NWC are included within this submission in line with the questionnaire format provided by the department. These include recommendations in relation to the recognition of mandatory obligations, the application of social and equality considerations at pre-procurement stage, a non-exhaustive list of suggested social criteria for use

in establishment of best price quality ratios and perspectives on the use of social clauses. NWCI also make specific recommendations around conflict of interest, treatment of breaches and use of exclusions.

While these and other issues will be discussed in response to the questionnaire, NWCI would first like to highlight a few key crosscutting issues.

### **Gender equality must run through all aspects of the procurement process**

“A Public Procurement Policy, which does not explicitly account for the gender dimension...is unlikely to be gender neutral.” - This quote from a Commonwealth report on “Why Does Gender Matter in Public Procurement” underscores the importance of a genuine engagement with gender equality.

Gender Equality can in no sense be considered as an optional add on but must run clearly through all aspects of public procurement policy and practice.

While distinction must be drawn between the mandatory labour rights (social) clause in Art 18.2 and the social considerations in articles 42, 43, 67 70 and Recital 92, both should clearly reflect gender equality.

Legislative requirements, mandatory obligations and established commitments in the area of gender equality include both National and European equal status and equality legislation, important new obligations in relation to positive duty for public bodies and pending requirements such as the likely introduction of a European directive for gender equality on boards of private companies. Commitments under the National Women’s Strategy, Europe 2020 and the national anti-poverty strategy should also be fully reflected in transposition.

Such obligations provide the context in which procurement may take place and it is crucial, for example, that gender impact assessment should be conducted prior to the making of any decision to open any new area up to public procurement. ESRI research has found that women are disproportionately impacted by changes within the public service, and there may, for example, be some danger that contracting out of certain key services could significantly undermine gender equality standards within a particular sector. Positive duty is a particularly important consideration in this regard. Gender impact assessment should also of course consider women and men as service users and ensure that vulnerable service users in particular and not disadvantaged by and proposed measures.

Gender equality requirements, both mandatory and best practice, should also be clearly reflected in the social considerations around how, when and what procurement is conducted. Gender equality should be reflected and suitably weighted in the social criteria attached to and actively considered in the selection or exclusion of candidates.

All contracts should come with social clauses that include gender equality and the delivery of such clauses should be monitored and reflected in the performance of the contract.

It is important that provision is made to promote and support gender equality amongst those applying for procurement contracts. Proactive measures and supports to encourage a greater gender balance within SMEs and social enterprise have been introduced across Europe and may be appropriate in the procurement context also. Women also predominate in the community and voluntary sector which may face particular obstacles such as comparatively low turnover when seeking to tender/

It is also essential to ensure ongoing gender sensitive consideration and consultation that engages with women as key users of public services.

## **An ambitious approach is needed to deliver the full social potential of procurement.**

It is important that the transposition of these directives introduce the widest and most effective possible use of social considerations, not limited solely to social clauses, but also incorporating tools such as social impact assessment and use of social criteria procurement processes. One process will not fit all and it is important that procurement policy be recognised as consisting of a range of differentiated, responsive and interdependent processes. Where, for example, light touch is applied, that should be seen as opening up greater consideration in relation to quality.

Crucially, transposition should be seized as a real opportunity to ensure that procurement policy is not just operating smoothly but leveraged effectively to make Ireland more equal, more sustainable and a better place in terms of both society and economy.

Ireland should also show ambition around ongoing evolution of procurement policy by sustaining an active process of engagement with stakeholders, including regular consultation with service users, while also tracking emerging best practice in other countries. For example the current transposition process may wish to reflect measures such as the LM3 (Local Multiplier 3) assessment tool to consider the impact of procurement on communities which has become routine practice in parts of the UK. The UK Public Services (Social Value) Act 2012) also requires public bodies in England and Wales, including Local Authorities, to consider how the services they commission and procure might improve the socio-economic and environmental well-being of the area with a specific Public Sector Equality measure under the 2010 Equality Act requires public authorities to be more pro-active in ensuring equality of opportunity and could prove useful in considering how Ireland's new positive duty on equality is to be reflected in procurement. Such provisions are entirely compatible with EU procurement directives and Ireland has the opportunity to establish similar provisions in our transposition process.

## **Existing public services can and must be clearly protected**

NWCI have a clear mandate from our members to support and protect quality public services. Directives make it very clear that Member States are not obliged to contract out or externalise services that they wish to provide themselves. Indeed, it is only when an actual decision is made by the public authority to privatise that the EU public procurement rules apply. Such a decision is therefore significant and should only be taken following appropriate consultation, public debate and impact assessment.

It is essential that transposition of the Directives should reflect such limitations and in no way seek or promote privatisation of public services. Question 12 offers further discussion of this issue.

## **The value of the community and voluntary sector must be recognised and supported**

It is important that those not-for profit organisations who not only provide services but also make a wider social and economic contribution within their communities, including in some cases, through an advocacy role, should be protected and supported rather than not undermined by the procurement process.

Specific measures should be put in place to support this including measures to ensure that community and voluntary organisations are not disadvantaged in terms of the procurement processes, active use of social considerations, criteria and clauses, appropriate use of Reserved Contracts for Certain Services and potential application of measures equivalent to the LM3 employed in the UK. One specific concern that has been identified is a trend towards replacing of funding that has been hitherto grant-aided to community development groups and voluntary organisations with tendering processes. For example those supporting marginalised groups such as Travellers, lone parents or those who are long-term unemployed are increasingly subject to a competitive tendering processes, and treated as 'services' when previously they were recognised as initiatives developed from and by community organisations and supported by contributions from the State. It is important that the option of grant giving outside of procurement processes constraints be sustained where that is a more appropriate approach.

NWCI were asked as stakeholders to reflect on a number of specific questions and I now set out the responses of NWCI to this official Questionnaire with a particular focus and extended response in respect of certain questions such as Question 1.

## Questionnaire

### Question 1: Environmental, Social and Labour Laws

*“Member States are required to take “appropriate measures” to ensure that economic operators comply with applicable obligations in the field of environmental, social and labour law. Applicable obligations denote the national, EU or international law applying in the place where the service is provided or where the works are carried out. Member States have been given discretion to choose the mechanism to implement this requirement. The choice is between regulatory or administrative measures or some combination of both.*

*The Directives do not require the use of regulatory measures to implement this obligation. The Public Procurement Directive confirms that relevant obligations could be mirrored in contract clauses. In practice, this would mean that standard contract conditions that reflect the relevant applicable obligations in contract clauses could be developed by the OGP for use by contracting authorities. Guidance material would refer to the standard contract clauses requiring compliance with applicable obligations for inclusion in procurement documents”.*

**Stakeholders are asked to comment on the approach for implementing article 18(2) requirement. In signalling a preference, please indicate the proposed measures and reasons for your choice having regard to the key principles set out at 3 above.**

Article 18.2 states that ‘ Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

### **Certain obligations, including gender equality, must be reflected across all areas of procurement**

In relation article 18.2 it is important that the transposition make it very clear there are certain Mandatory obligations in relation to social, environmental and labour law which must be reflected across all public procurement, regardless of the specific area of focus.

Transposition must set out adequate ‘appropriate measures’ to secure compliance with Irish employment law and with the rights to organise and collective bargaining as set out in the International Labour Conventions including convention C87 on Freedom of Association and protection of the right to organise, C98 on the right to organise and collective bargaining.

Transposition must also include measures to regulate and ensure compliance with mandatory obligations, under both European and Irish legislation, in relation to equality and gender equality. The new Positive Duty obligations for Public Bodies in relation to the active promotion of equality should also be explicitly referenced in any statutory instrument on Public Procurement, along with clear measures to monitor progress in relation to that duty.

Other mandatory obligations which must be named and reflected across all procurement include binding environmental legislation and targets.

Explicit social inclusion and anti-poverty targets as set out under Europe 2020 and Irelands National Anti-Poverty Strategy might also be considered an important collective agreement and commitment and should be appropriately recognised and reflected in the transposition process.

### **Certain obligations, including gender equality, must be reflected across all stages of the procurement process**

Crucially, the NWCI **does not** believe that to ‘*reflect the relevant applicable obligations in contract clauses*’ would represent an adequate implementation of Article 18.2. Such an approach would not ensure sufficient public accountability in relation to national policy and contracting bodies as well as contractors and would only bring essential considerations to bear at a very late stage in the process. It is absolutely essential that relevant obligations, including mandatory obligations in areas such as labour rights, equality and environment be explicitly reflected and satisfied at **all stages** of the procurement process, including;

- Pre-procurement stage: where contracting authorities identify whether an area is or is not appropriate for public procurement, look at what and when to purchase, and decide which procedures to employ;
- Specification stage where the contracting authorities set out technical specifications and criteria in relation to an invitation to tender;
- Identification of suitable potential suppliers stage, with exclusions if necessary.
- Contract award stage, with inclusion of appropriate social clauses (as proposed in question)
- Performance and reporting stage.

### **Need for clear and robust regulation to ensure compliance with mandatory obligations and further good practice requirements as introduced.**

It is the view of the NWCI that a solely administrative response would not be adequate to ensure effective transposition or implementation of the Directive and clear, robust regulatory measures are also necessary.

Regulatory measures around gender should include

- I. Public authorities and contracting bodies should work with the Irish Human Rights and Equality Commission (IHREC) in order to develop effective technical specifications and ensure effective monitoring and regulation of gender equality and equality obligations including progress under positive duty.
- II. Regulatory mechanisms to monitor and track progress in relation to specific commitments under the National Women’s Strategy and Europe 2020 such as increased gender balance in the workplace. Potentially pending measures such as those around gender quotas on boards of companies should also be reflected
- III. The use of Gender Impact Assessment should be introduced as a standard regulatory measure.

Technical specifications such as those identified by ICTU around employment should also be included

- IV. A requirement that companies who wish to tender must demonstrate their track record (going back for a period of 5 years) of compliance with the following relevant obligations:
  - health and safety, equality and employment law;
  - respect for the industrial relations machinery of the State;
  - the practice of collective bargaining in the company;
  - respect for collective agreement in existence;
  - the extent to which the pay, terms and conditions provided are in line with collective agreements in the relevant sector;
  - Prompt payment of awards (made to employees) where there have been minor infringements of employment rights.
  - Contracting authorities should lay down special conditions relating to continued compliance with the relevant obligations above as a condition of performance/.
- V. Public authorities should be required to verify compliance; supported by sufficient legislative provisions to require information and data sharing from relevant inspectorates and bodies.
- VI. Re compliance with the right to organise, collective bargaining and gender equality in the workplace as set out by ILO standards, any contracting public authority should be empowered to have regard to reports from relevant representative trade unions.

- VII. Non-compliance with relevant obligations by an economic operator should be treated as a serious breach of the contract with implications including future exclusion of that economic operator from the procedure for the award of a public contract.
- VIII. In case of change of employer or outsourcing following a public procurement procedure collective agreement(s) in place before the tendering process must continue to apply.
- IX. According to Art 56, contracting authorities cannot award a contract to a tenderer submitting a 'most economically advantageous tender' where the tender does not comply with Article 18.2. Transposition should make it clear that public bodies do not have a choice: a tenderer not respecting these core criteria cannot be awarded the contract.
- X. Public authorities should report on steps taken to ensure compliance.

**Further policy measures and good practice standards should also be reflected in social consideration and social clauses throughout the procurement process.**

Respect for employment law or right to equal treatment must not be considered as simply criteria that a public authority may wish to promote in technical specifications or contract awards. Rather they are mandatory conditions that must be robustly enforced in all aspects of the public procurement process.

However the Directives also offer considerable potential around the pro-active use of social considerations and social clauses at various stages in the procurement process in order to deliver positive social, environmental and economic outcomes and promote and reward best practice in areas such as gender equality. It is important to make a distinction between social considerations which should apply at all stages including the earliest stage when a decision whether or not to engage in procurement is being made, social criteria which might feature in the award criteria or assessment of tenders and the "social clauses" which are simply a condition of contract that the successful tenderer would be expected to meet. While current directives have always provided scope for social clauses the new directive strengthens opportunities to include social considerations and criteria in earlier stages of procurement.

There is therefore considerable scope for public authorities to promote social and equality considerations, develop social criteria including gender equality criteria, ensure that **Best Price-Quality Ratio** is used to ensure appropriate selection of candidates and attach clear social clauses to the contract and performance indicators.

The Directives make a number of references to such social considerations;

- Article 42 on technical specifications makes it easier for public authorities to require further "social" characteristics, provided that those factors are linked to the subject matter of the contract and that they are proportionate to its value and objectives. (Again it is important to emphasise that mandatory obligations as discussed earlier are not constrained by subject)
- Art 43 enables contracting authorities to require a specific social label in the technical specifications, the award criteria or the contract performance conditions.
- Art 67 states contracts can be awarded on the basis of a best price-quality ratio, which involves social aspects criteria. Such criteria comprise for instance quality, social characteristics and organisation, qualification and experience of staff.
- Art 70 specifies that contracting authorities can include social considerations in their conditions for performance of the contract, even if such considerations had not been spelt out in technical specifications or contract award criteria. This could for example be important in relation to emerging best practice standards or circumstances where public concern following an invitation to tender has highlighted particular social concerns.

Social goods above and beyond any legal obligations can be promoted, recognised and rewarded through inclusion and suitable weighting of criteria around pro-active measures, for example gender audits, family friendly policies, or gender equality training for those delivering frontline services.

Recital 92 contains various examples and clarifies that the examples to be found in the Directive constitute a non-exhaustive list.

One social goal which has been identified is the tackling of long-term unemployment and it is important to ensure that any targets in this regard are gender disaggregated and progress rather than regress commitments such as improved gender balance in key sectors.

Another policy priority which has been recognised by the Government is concern about low wages and insecure work. Women are particularly vulnerable in this area, according to CSO 50% of women are earning €20,000 or less and 36% of women are in part-time or casual employment. The fact that 20% of those at risk of poverty are in employment creates significant costs for the state, creating pressure on supplementary payments such as Family Income Supplement. NWCI believe that such issues should be considered in line with MEAT and we join the many stakeholders calling for active promotion of a 'living wage' and NWCI Payment of a living wage to workers employed by a contractor improves social and economic wellbeing and reduces pressure on social transfers such as FIS. Therefore the Living Wage is a relevant social consideration that could be used when applying the Best Price- Quality Ratio.

As a social impact assessment and consideration of social value should be a standard requirement at pre-procurement stage, this could be an appropriate opportunity to consider whether the Living Wage is a relevant and proportionate matter for the specific contract under consideration.

It is also very important that constructive proposals which may emerge from the pending Low Pay Commission be integrated and reflected within the social clauses of Public Procurement. Moreover social clauses could be employed to promote and reward use of secure contracts as a key mark of professionalism within a contracting company with due regard to the fact that such requirements can only be extended to the specific staff delivering a contract.

NWCI would support the recommendation from ICTU that when determining the best price –quality ratio public authorities should be required to have regard for and report on how they took account of the following non exhaustive list of social criteria:

- Payment of the 'living wage',
- Promotion of equality of women and men at work,
- Increased participation of women in the labour market,
- Improved reconciliation of work and private life,
- Promotion of use of secure contracts
- Recruitment of disadvantaged persons,
- The impact on local employment,
- Employment of long-term job-seekers,
- Implementation of apprenticeships and training measures for unemployed or young persons, including gender disaggregated targets.
- Accessibility for disabled persons.

NWCI believe the use of Procurement Policy to leverage such social and economic goals is very much in line with the spirit and letter of the Directives and with a constructive joined-up approach to public policy. Moreover, similar clauses and criteria could and should be reflected in the provision of social transfers such as enterprise grants or employer incentives.



## **Question 2: Group participation of Economic Operators**

*Member States have the choice to establish “standard terms” for how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability. This does not refer to the legal form that the group or consortia should take but rather that way in which information on financial standing and technical ability is to be provided.*

*The choice for Member States is whether to implement this provision and, if so, how – by regulatory or administrative measures (i.e. standard terms in Irish contract documents). Alternatively, the Directives permit contracting authorities themselves to set out in procurement documents how groups of economic operators are to meet these requirements.*

**Stakeholders are asked to state whether Ireland should establish “standard terms” for how groups of economic operators are to meet the requirements for economic/financial standing and technical and professional ability. If yes, please indicate (i) the reason for your choice and in particular any examples of where the absence of national terms has caused difficulty on the ground and (ii) the particular mechanisms/approaches you consider appropriate to meet this requirement.**

NWCI believe that there are certain areas in relation to economic/financial standing and technical and professional ability in which “standard terms” for economic operators would be appropriate, and there other aspects which might be best set out by contracting bodies, for example when very particular technical capacities and professional experience are required.

Standard terms should be set out in relation to financial transparency, published accounts and tax compliance. The transposition should take active measures to ensure that it offers no scope for situations such as recently seen in relation to ‘Direct Provision’ whereby a number of those contracted to deliver those services have been conducting their business in a non-transparent manner from off-shore companies. Transparency in terms of wages within a contractor is also important, particularly if a cap on senior management payment or specific income ratio target were included in social clauses.

In accordance with Article 57, standard terms are also useful in ensuring that public authorities can systemically and consistently verify compliance with applicable equality, environmental, employment, health and safety and labour laws including collective bargaining. Potential standard terms might reflect some of the proposals discussed in relation to regulation in the previous section

It is important that any economic contractors who intend to use sub-contractors are obliged to list the subcontractors in the tender documents and ensure that compliance with the same labour and equality obligations and standards is delivered throughout the sub-contracting chain, ideally through a system of joint and several liabilities.

In terms of technical and professional ability it is important that in assessment of tenders a clear minimum weighting be set in terms of the professional capacity and training of those delivering a contracted service. For example some concern was expressed around what seemed to be quite low weighting for quality and training of caseworkers in recent procurement processes around Jobpath.

To support comparable monitoring of the new cross-cutting positive duty for public bodies. NWCI believe it would be useful to include certain standard terms for contractors around provision of information on key equality indicators, for example gender disaggregated data as standard. This is not to preclude inclusion of more specific terms by public bodies in relation to particular equality targets.

In relation to information technical and professional ability, a standard term could also be included which would reserve the right for public bodies to request information from contractors around steps taken to implement new legal technical or professional requirements (e.g. in relation to child safety) which may emerge during the course of the contract.

### **Question 3: Electronic communications and e-procurement**

While e-procurement measures are a largely positive development, it is important that their continued introduction be conducted in a manner which does not disadvantage smaller economic actors. SMES or community and voluntary sector actors who may not have the same staffing capacities as larger operators. In this regard, while the means of calling for competition for all the procedures are set out in Annex V in terms of a contract notice and PIN (prior information notice). It would be positive to ensure that any contract notice is advertised off-line as well as on-line including, where appropriate, advertisement within the geographical area and/or sector where a contract is to be delivered.

### **Question 4: Conflicts of interest**

*Under article 24 there is a requirement that Member States take “appropriate measures” against conflicts of interest in the conduct of procurement procedure to avoid any distortion of competition and to ensure equal treatment of suppliers. Conflicts of interests should cover situations where a person (member of the contracting authority or service provider acting on their behalf (consultant)) plays a role in the procurement procedure on the side of the contracting authority in a situation where conflicting private or professional interests could result in behaviour not fully serving the interests of the contracting authority. The person may have financial, economic or other personal interests which might be perceived to compromise their impartiality and independence in the context of the procurement procedure. The choice is to decide what appropriate measures to put in place; codification in the regulations of what constitutes conflicts of interest or appropriate guidance for stakeholders.*

**Stakeholders are asked to give views, if any, on the optimum approach – administrative or regulatory – to take that would be consistent with the principles underpinning the transposition**

It is important that any definition of ‘conflict of interest’ should not be framed in a way which might be used to constrain the advocacy function or obligations of potential or current contractors or disproportionately limit public civil society debate on key policy issues. In this regard it would be important to ensure in transposition that “behaviour not fully serving the interests of the contracting authority” is not open to inappropriately loose interpretation and does not, for example, constrain a community or voluntary actor from constructive critique of a particular Department’s policies, particularly where that relates to issues separate from the area being contracted.

It is the belief of NWCI that conflict of interest in relation to financial and economic advantage must be of particular concern. In addition to consideration of an individual’s “financial, economic or other personal interests which might be perceived to compromise impartiality and independence” which should include a robust examination of any directorships or shareholdings, it is important to ensure sufficiently wide consideration is given to any potential conflict of interests within a contracting company and/or parent or sister companies. There are concerns for example that the interests and well-being of service users, particularly vulnerable service users, must not be compromised in the interest of shareholder returns or quarterly profit targets. Similarly concerns about direct or indirect inappropriate financial benefit that may accrue through a contract should extend beyond the persons involved to a consideration of contracting company and/or parent or sister companies.

A potential overarching concern around the possible conflict of interest involved in the introduction of a focus on profit margin to spaces with priorities which cannot or should not be market-driven is recognised and accommodated the Directives. Article 1.4 expressly states that that where ‘social and other specific services’ are concerned, Member States should organise and finance Services of General Economic Interest (‘SGEIs’) or Social Services of General Interest (SSGIs’) as they see fit.

Article 77 also offers the possibility to reserve certain services to selected organisations and Recital 7 further reinforces the freedom of national, regional and local authorities to define the characteristics of the SGEI to be provided, including conditions regarding its quality. Such services are subject to publication

requirements and some awarding principles, but are exempted from the rest of the Directive. “Equal treatment of suppliers” should not, for example, be seen as limiting the reservation of certain contracts for non-profit actors.

It is important that measures in relation to ‘reserved contracts for certain services’ should be suitably robust to ensure that they are sidestepped by, for example, the creation of ‘non-profit’ subsidiaries of larger for-profit corporations who may subsequently advantageously benefit in other tenders.

### **Question 5: Procedures**

Articles 26&32; 28; 48; of the Public Procurement Directive

Article 32(2) and (5): circumstances include no tenders or suitable tenders or requests to participate received (2)(a); contract can be supplied by only one operator ( unique work of art or artistic performance); technical reasons, exclusive rights including IP (2)(b) ; extreme urgency unforeseeable by contracting authority 32 (2)(c) plus sub article 32(5) repetition of a contract by operator for the same contracting authority that is clearly flagged in the basic project and within a three year period from conclusion of the original contract.

There are five main procedures rather than the four in the existing Directives – the open, restricted, competitive procedure with negotiation, the competitive dialogue and the new innovation partnerships. All these procedures must be implemented into national law. Under article 26(6), the choice is whether to provide in national law that contracting authorities may use the negotiated procedure without a call for competition in circumstances specified in article 32 of the Directive.

**(a) Stakeholders are asked to state whether Ireland should avail of this choice, and why.**

Under article 28(4) Member States can provide that all or specific categories of sub central authorities can set the time limit for receipt of tenders by mutual agreement or if this isn’t possible, then a minimum 10 day time limit applies.

**(b) Stakeholder are asked to state whether they favour having the flexibility provided for in 28(4) and if not, why.**

The means of calling for competition for all the procedures are a contract notice (Annex V, Part C); and PIN (prior information notice) (Annex V, Part B section I & II). The use of a PIN rather than a contract notice for contracts awarded by either the restricted procedure or the competitive procedure with negotiation is only available for use by sub-central authorities and Member States have a choice under article 48(2) to transpose this option into national law.

**(c) Stakeholders are asked to state whether they favour permitting sub-central authorities to use a PIN as a call for competition and why.**

Ireland should avail of the option to provide for negotiated procedure as this allows for greater flexibility and responsiveness in relation to particular and evolving contexts and therefore supports more effective outcomes for citizens or service users. The introduction of innovation partnerships is a positive development and should be framed to support active consultation or even collaboration of service user as well as collaboration between the contractor and contracting body.

### **Note on Reserved contracts**

Under current procurement policy, “reserved contracts” provide the possibility to restrict tendering processes to sheltered workshops that pursue the aim of the social and professional integration of persons with disabilities. The new directives (Art. 20, Directive 2014/24/EU) will extend this provision to a wider definition of ‘disadvantaged’ groups, and provides that “Member states may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose

main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.” NWCI believe that transposition of the directives should fully reflect this option which provides far greater scope than currently for reserved contracts, this is particularly important from a gender perspective as many women are disadvantaged workers. Lone parents, for example, predominantly women, experience extremely high levels of deprivation and can face particular obstacles in accessing supportive employment.

The new directives (Art. 77) also allow contracting authorities to reserve the right for organisations to participate exclusively in the award of public contracts for certain health, social, education and cultural services. Moreover, the lighter procurement regime for social, health and cultural services, supports more attention to quality in public procurement procedures, and also allows for reserved contracts for these services. These reserved contracts are applicable to organisations meeting the following criteria:

- Its objective is the pursuit of a public service mission linked to the delivery of the services;
- Profits are reinvested with a view to achieving the organisation’s objective. Where profits are distributed or redistributed, this should be based on participatory considerations;
- The structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- The organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

Reserved contracts are very important in the context of the community and voluntary sector but may also be relevant to social economy enterprises, mutuals or other similar structures. It is however important that such contracts should not be laid open to inappropriate use by for-profit companies or subsidiaries of such companies.

It is for example the view of the NWCI that ‘its objective is the pursuit of a public service mission’ must be interpreted as requiring that a contractor’s primary and chief objective should be such a mission, rather than any loose definition which might allow for a service mission as subsidiary to goals such as profit or shareholder returns for a contractor and/or a linked or parent company.

The use of reserved contracts is limited: contracting authorities cannot reserve contracts for organisations that have been awarded contracts within the last 3 years, and contracts cannot be longer than 3 years. The application of the 3 year rule should not operate in such a way that it undermines the security of funding or capacity for planning within local community groups, women’s projects and networks such as the NCCWN or Community Workers Co-op who all play such a vital role in many communities, far beyond simple service delivery. Indeed, the additional community development and voluntary work made possible by the sustained existence of such organisations delivers huge social and economic dividends. In this regard it is appropriate to accommodate an ongoing active role for alternative funding approaches such as grant aid which is outside the procurement process.

The use of grants can be allowed in relation to Social Services of General Interest (SSGI). The new procurement directives make provision for recognition of such social services which are regarded (by member states) as important and often refers to services which are not economic in nature.

Social Platform (the Platform for European Social NGOs) has advocated for a wide definition of Social Services of General Interest (SSGI), based on their universal character and linked with the access to fundamental rights for all, including access to services for the most vulnerable groups. SSGI are relevant to

all citizens who without them could not fully participate in society, not just to citizens most in need; however, access for those most in need must be guaranteed. It is important to both affirm SSGI's at European level and ensure that in its transposition, every member state identifies services and beneficiaries concerned and suggests the manner of implementation, according to users' needs. Recital 114 of the Directive acknowledges that many of these services will not be of cross-border interest, and so enables public bodies to organise social services in a way that does not involve public contracts, provided the usual Treaty principles of transparency and non-discrimination. For example SSGI can allow for funding by way of grant rather than service contract. Compliance with state aid rules is important in avoiding any challenge of distorting competition. However, if an activity is not economic, it is unlikely to come within the remit of state aid, as considerations of competition will not be likely to apply and even if an activity is economic, there are a number of exemptions and specific provisions that can apply – for example in relation to reserved contracts for sheltered workshops for disadvantaged persons. The Commission has also indicated that “Where the public service mandate is well defined and there is no over-compensation, the Commission takes the view there is no [state] aid” (Joaquín Almunia 2011)

In a case of the *Commission v Ireland (ambulance services)* for example, the Court decided that as “it is conceivable that DCC provides such services to the public in the exercise of its own powers derived directly from statute, and applying its own funds, although it is paid a contribution by the Authority for that purpose, covering part of the costs of those services”. The mere fact that funding arrangements exist between two public bodies in respect of such services did not imply that the provision of the services concerned constitutes an award of a public contract.

#### **Question 6: Central Purchasing Bodies (CPBs)**

*There is provision in S.I. No. 329/2006 (that transposed Directive 2004/18/EC on public procurement) for contracting authorities to purchase through a central purchasing body so the concept is not new to the public procurement regime. This flexibility to allow contracting authorities to use central purchasing bodies to procure their requirements is maintained in article 37(1) first and second sub paragraphs.*

*The main choice for Member States in article 37(1) last sub paragraph is to provide that “certain procurements are to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.” A possible current example of a CPB in the Irish context is the Office of Government Procurement. This is intended to give power to mandate that certain procurements must be made using specific central purchasing bodies. The power would be vested in the Minister in the normal course and would be exercised having regard to agreed public procurement policy objectives.*

**Stakeholders are asked to state whether they agree that this provision be implemented into national law as envisaged. If not, please set out the reason for your position.**

Some concern has been expressed that overemphasis on central purchasing bodies may in some cases negatively impact on small suppliers or potentially undermine local achievement of a wider public service mission. For example, the aggregation of the supply of books to libraries across local authorities saw contracts awarded to UK suppliers and it was maintained by the Irish Book Industry Forum, that the contract award criteria for supply of books also saw a change in weighting, from 65% for quality of service, to weighting 65% for lowest price. Should such measures lead, for example, to the closure of local bookshops it might be argued that that could serve to undermine an overall public service goal of the libraries in increasing the prevalence of reading across Ireland.

It may be appropriate to consider combining of the CPB role with measures equivalent to the LM3 (Local Multiplier 3) assessment tool as employed in the UK. Such provisions are compatible with EU procurement directives and require consideration of how commissioned services and procurement might improve the socio-economic and environmental well-being of the area.

## Question 7: SME access and division of contracts into Lots

***Stakeholders are asked to state if they favour leaving the decision to divide contracts into lots to contracting authorities or to require compulsory division of public contracts into lots.***

NWCI support the use of measures to require that public contracts, particularly those over a certain size, are divided in lots. Without clear guidance in this regard, the time and capacity constraints of contracting authorities may encourage over-reliance on larger contractors. This not only disadvantages smaller economic actors or community and voluntary sector actors, it also diminishes direct accountability for the central contracting authority and excessive dependence on a single provider can also leave a service open to greater risk and vulnerability.

## Question 8: Exclusion of economic operators from public procurement for various offences, failures and transgressions.

### 8.1 Mandatory exclusions

*Articles 57(1) & (2) of the Public Procurement Directive; article 80(1) of the Utilities Directive which refers to the relevant Part of article 57 in the Public Procurement Directive; articles 38(4) & (5) of the Concessions Directive.*

*Article 57(4) of the Public Procurement Directive; article 80(1) of the Utilities Directive; article 38(7) of the Concessions Directive*

*Article 57(4) of the Public Procurement Directive above refers to: article 18(2) obligations as well as bankruptcy/ insolvency; grave professional misconduct; distortion of competition; conflicts of interest; prior involvement in preparation of procurement documents; past performance; serious misrepresentation; misleading information/false declaration. See also article 80(1) of Utilities Directive which refers to the relevant parts of article 57 of the Public Procurement Directive. See also 38(7) of the Concessions Directive. Under existing rules, suppliers must be excluded from contracts if convicted of offences related to organised crime, corruption, fraud, money laundering. Under article 57(1) mandatory exclusion of economic operators has been extended to conviction for terrorist, child labour and human trafficking-related offences.*

*Under article 57(2) there is an obligation to exclude an economic operator that has been subject to a binding and final legal or administrative decision which found breach of obligations to pay tax or social security obligations. Even where no binding decision has been made, the authority may use its discretion to exclude a supplier where it can demonstrate (“by any appropriate means”) supplier non-payment of taxes/social security contributions. These can be remedied by full payment or “entering into a binding arrangement with a view to paying the taxes or social security contributions due”.*

*Under 57(3) there is a choice for Member States to provide for derogation from the application of mandatory exclusions above:*

*☑ in the case of exclusions at article 57(1) where there are public interest considerations involved, for example the provision of vaccines in emergency public health scenario;*

*☑ In cases covered by article 57(2) where the exclusion is disproportionate - where only minor non-payment amounts are involved.*

**Stakeholders are asked to consider whether Ireland wants to allow for derogation permitted under article 57(3) in the circumstances set out in article 57(1) and article 57(2) to maintain flexibility for contracting authorities. If not, can you please give cogent reasons for not availing of the derogation permitted in the Directives?**

### 8.2 Discretionary exclusions

*While the Directives requires the exclusion of economic operators in the specific circumstances set out above, the Directives leave it to the discretion of contracting authorities to exclude economic operators in the various circumstances set out in article 57(4) (a)-(i). Member States have a choice to mandate some or*

*all of these discretionary exclusions. Transposition of the New EU Procurement Directives: Consultation Document*

*To maintain flexibility in implementation of the Directives it may be preferable to maximise the discretion afforded to contracting authorities in the decision to exclude, or not to exclude, an economic operator in all the circumstances of the particular case. To support the decision-making process by contracting authorities, guidance could be provided on the various categories of discretionary exclusion.*

**Stakeholders are asked to provide views/comments on whether it is desirable under article 57(4) to mandate contracting authorities to exclude economic operators for certain transgressions deemed appropriate for discretionary exclusion under the Directive.**

### **8.3 Period of exclusion**

*Article 57(7) of the Public Procurement Directive; article 80(1) of the Utilities Directive; article 38(10) of the Concessions Directive*

*Articles 56(2) & (3) and article 67(2) of the Public Procurement Directive; see also articles 76(7) & (4) and article 82(2) of the Utilities Directive respectively. The maximum period of exclusion allowed is 5 years from the exclusion event in the case of mandatory exclusions or 3 years if exclusion is discretionary. Member States can decide the period of exclusion at or below these maxima. The exception is in cases where a term of exclusion forms part of a final judgement.*

**Stakeholders are asked to consider what the actual period of exclusion should be for (i) mandatory and (ii) discretionary exclusion and the reason for the decision.**

NWCI believe that companies who are consistently in breach of legal obligations including equality, environmental, health and safety and employment rights obligations should face mandatory exclusion from public procurement contracts, (and indeed should also be subject to exclusion from receipt of public grants and incentives).

Effective monitoring of such breaches should be supported in the transposition process through appropriate provision for data sharing between those responsible for public procurement contracts and Revenue, Social Protection, the Health and Safety Authority and the Labour Inspectorate. It is important that clear measures are set out to ensure that arguments such as commercial sensitivity cannot be deployed as a means to obscure relevant information.

NWCI concur with the position taken by ICTU in relation to article 57(2) in that transposition should not provide any scope for companies to evade or postpone compliance with essential employment rights obligations such as payment of an outstanding national minimum wage or social security contributions by instead allow companies to simply “enter into a binding arrangement with a view to paying the taxes or social security contributions due”. Such a position would be contrary to Article 18.2. and unacceptably increase the vulnerability of women workers who are more likely to be working on low incomes and without secure contracts.

Exclusion from invitation to tender should also be considered for companies with standing ‘inability to pay’ orders made under NMW/EROs/REOs. Such companies should not be allowed to tender given the unfair competition created by the inability to pay order, this is in line with Article 58 which suggests that ‘With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.

In terms of prevention of breach it is also important that the specific concerns raised in the Directives in relation to Abnormally Low Tenders are fully reflected in the transposition. Up to date information on pay, terms and conditions should be required to ensure that tenders are not being awarded where the pay and conditions are below national standards or those set by collective agreements (article 69). Where a contractor is seen to put forward a number of abnormally low tenders an investigation should be conducted and exclusion considered.

For mandatory exclusion the maximum period of exclusion should automatically apply in order to ensure a firm disincentive and economic impact which outweighs any economic advantage accrued through breach of obligations. A set period would also allow reasonable opportunity for other economic actors who are not in breach to tender in the given area. Measures should be taken to ensure that the impact of exclusion is not diluted or evaded by those trading through multiple companies.

#### **Question 9: Tender Assessment**

*In the open procedure under article 56(2) first sub paragraph of the Public Procurement Directive and the respective article in the Utilities Directive, contracting authorities may examine tenders before checking to see if any of the grounds for exclusion apply or if the tender meets the selection criteria (articles 57-64 refer of the Public Procurement Directive refers information and equivalent Articles in the Utilities Directive). However, Member States have the choice to exclude the use of this procedure for, or restrict it to, certain types of procurement or specific circumstances under article 56(2) second sub paragraph. There is an option not to transpose second sub paragraph of article 56(2).*

#### **Stakeholders are asked to comment on whether they want to maintain the flexibility offered in article 56(2) first sub paragraph or to introduce the restriction in article 56(2) second sub paragraph and equivalent provisions in the Utilities Directive<sup>27</sup>**

*In line with current practice, under article 56(3) and Utilities Directive equivalent provisions there is provision to allow contracting authorities to ask for incomplete or incorrect information to be supplemented by economic operators.*

#### **Do stakeholders have any difficulty with this provision and, if so, why?**

*Under article 67(2) last sub paragraph and equivalent<sup>29</sup> there is a choice for Member States to prohibit contracting authorities from using cost only or price only as the sole award criteria or to restrict use of these criteria to certain categories of contracting authorities or to certain types of contracts. In coming to a view on this issue, stakeholders should consider the need to maintain flexibility in the operation of the procurement rules.*

#### **(b) Stakeholders are asked to comment on whether to prohibit the use of price only or cost only as the sole award criterion and if so please to explain the reasons for this view/position.**

NWCI believe that the Most Economically Advantageous Tender MEAT should be the standard approach across all competitive public procurement. Procurement procedures based on cost alone risk downward pressure upon equality standards, working conditions and the quality of the service and can serve to undermine rather than support the social objectives of the EU Treaty. Such cost only tenders can also prove less effective and socially or economically sustainable in the medium term.

Contracting authorities should be prohibited (except in the most exceptional circumstances) from use of a cost or price only approach. Instead, a wider consideration of economic advantage and best Price-Quality Ratio should be applied, with due regard to gender equality, social considerations and sustainability.

Moreover, it is not sufficient to simply prohibit cost or price only approaches, specific measures should also be taken in transposition to ensure that cost and price are not accorded disproportionate influence or weighting within a MEAT process and that quality and social and economic considerations such as equality and sustainability are also accorded substantial weighting.

The strong references to social considerations throughout the three new Directives as outlined earlier in this submission mark a distinct preference towards awarding criteria based on MEAT and the best price-quality ratio. In its guidelines on procurement the European Commission (2010: 5) stresses that socially responsible public procurement (SRPP) “can be a powerful tool both for advancing sustainable development and for achieving the EU’s (and Member States’) social objectives’ (2010: 7). In that regard procurement policy should “give companies real incentives to develop socially responsible management” –



such incentives require that socially responsible requirements are explicitly named and sufficiently weighted in any assessment of tenders.

With respect to goals such as gender equality and equitable participation in the workplace, the incorporation of social objectives in public procurement both allows for and rewards the promotion of better practice and guards against erosion of existing standards by ensuring that public contracts do not exert a downward pressure on workplace equality, working conditions or wages.

#### **Question 10: Sub-contracting**

*There are a number of choices for Member States to consider under this heading including:*

*(a) Whether it should be compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and the details of any proposed subcontractors.*

*(b) Whether the main contractor should be directly obliged to provide information about its subcontractors and supply chain.*

*(c) Whether contracting authorities should be required to verify whether there are mandatory or discretionary grounds for exclusion of any subcontractors and, if such verification is undertaken and the response shows that there are discretionary grounds for exclusion, whether contracting authorities should be obliged to require that the main contractor find a replacement subcontractor.*

*(d) Whether or not to provide for direct payments to contractors.*

**Stakeholders are asked to indicate a preference for each or any of the choices set out at (a)-(d) above. If you have other comments on any aspect of this article please include them in your submission.**

Art 71.1 makes it clear that the obligations stemming from Art 18.2 also apply to subcontractors. Moreover, in accordance with Art 57, public authorities are required to systemically verify compliance with applicable gender equality, equality, environmental, health and safety, employment and labour laws including collective bargaining.

In order to ensure full compliance with the requirements of Article 18(2) it must be compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and the details of any proposed subcontractors. The main contractor must be obliged to provide clear information about its subcontractors and supply chain.

Contracting authorities should be required to verify whether there are mandatory or discretionary grounds for exclusion of any subcontractors in the same a manner as applies to the main contractor.

With a view to reducing abuses in subcontracting situations and in order to protect posted workers' rights it is necessary to ensure that all contractors down the chain can be held liable to pay to the posted workers all entitlements due to him/her. The inclusion of the above in public procurement contracts must not in any way preclude the application of or introduction of more stringent rules on national level.

#### **Question 11: Termination of contracts**

*Under article 73(b) of the Public Procurement Directives and equivalent provisions in the Utilities and Concessions Directives<sup>32</sup>, Member States have to ensure that a public contract can be terminated during its term, if it turns out that the contractor was subject, at the time of the contract award, to (i) a mandatory exclusion under article 57(1); (ii) for substantial modification within the meaning of article 72(4) or (iii) for an adverse Court of Justice ruling<sup>33</sup>.*

*Member States must ensure that contracting authorities are able to terminate contracts in certain circumstances "under conditions determined by the applicable national law". The Transposition of the New EU Procurement Directives: Consultation Document main issue is likely to be how this should be ensured*

and under what conditions. It may be preferable in the S.I. to state that contracting authorities must include in all their public service contracts a condition that allows them to terminate if any of the three grounds for termination is found to apply. This is in the nature of a right to cancellation rather than automatic termination.

**Stakeholders are asked to indicate if they disagree with this proposed approach and if so, why and to offer an alternative approach to implementing this article.**

### **Question 12: Light Touch Regime**

*Articles 74-76 and Annex XIV of the Public Procurement Directive: social, health and other specific services: viz. hotel and restaurant services; certain legal services; rescue, firefighting and prison services; investigation and security services (e.g. alarm monitoring services, guard services).*

*Articles 91-94 of the Utilities Directive e.g acquisition or rental of land existing buildings; audio visual media services; arbitration and conciliation services; certain legal services ; certain financial services etc. ECJ : Telaustria case- paragraph 62 and Parking Brixen case , paragraph 49*

*The current distinction between Part A and Part B services is abolished and, as a result, the normal rules will apply to many former Part B services formerly subject to a very light regime. Therefore the starting point for the new system is that all services are subject to the full set of rules unless (i) the service concerned is explicitly excluded under article 1036 (ii) the services concerned are explicitly listed in the exhaustive list in Annex XIV (but mainly social, health and educational services: “services to the person”). The contracts will only be covered by the Directive if their value exceeds €750,000 in the Public Procurement Directive and €1million in the case of the Utilities Directive.*

#### **Question 12.1 Scope of the regime**

*Under Article 75 of the Public Procurement Directive contracting authorities are required to award contracts for these services by (i) publication in the OJEU of a call for competition or a prior information notice - PIN) (ii) publication in the OJEU of a contract notice or quarterly submission of batches of contract award notices (iii) Member States are required to establish their own national rules for the award of these contracts – within the framework of Treaty obligations, (iv) Member States also have a choice to require contracting authorities to apply MEAT (best price/quality ratio) only. Both (i) and (ii) are intended to meet an obligation of transparency underpinned by the principles of equal treatment and non- discrimination. The main issue is establishing national rules to underpin the light regime. It would be important that a balance is struck between importing provisions from the main regime and maintaining the desire for flexibility and simplicity in the operation of the light regime.*

**Stakeholders are asked to give views on the “national rules” to put in place to operationalise the new light-touch regime.**

NWCI do not believe the transposition of these will necessarily lead to a wider application of ‘normal rules,’ but rather regards the directives as opening up far more flexibility and options for contracting bodies. We have addressed a number of these areas elsewhere in this submission, with particular regard to reserved contracts, sheltered workshops, and the continued distinctive role for grant-making.

When ‘social and other specific services’ are concerned, Article 1.4 expressly states that a number of key principles are not affected by the public procurement Directive. In particular, Member States should organise and finance services SSGI’s and SGEI’s as they see fit. Recital 7 reinforces the freedom of national, regional and local authorities to define the characteristics of the SSGI or SGEI to be provided, including conditions regarding its quality. Such services are subject to publication requirements and some awarding principles, but are exempted from the rest of the Directive. Article 77 also offers the possibility to reserve certain services to selected organisations

The Directive foresees a lighter regime for the “social and other specific services” which are worth more than EUR 750 000 and are listed in Annex 14. Such services are subject to publication requirements and

some awarding principles, but are exempted from the rest of the Directive. Article 77 also offers the possibility to reserve certain services to selected organisations.

There are questions as to what extent any list in Annex XIV can or should be considered 'exhaustive' as some flexibility must surely be maintained, for example to reflect the emergence of new areas of public service.

### **Protection of Existing Public Services and Supporting Community and Voluntary Services**

NWCI have received a clear mandate from our membership to promote and protect quality public services. We believe it is essential that and transposition clearly reflect the fact that the Directives do not oblige Member States to contract out or externalise services that they wish to provide themselves. It is only when an actual specific decision is made by the public authority to privatise that the EU public procurement rules apply.

For this reason it is important that very robust deliberation, public consultation, debate and impact assessment should precede any such decision. As outlined in the introduction, NWCI recommend that a full and transparent social impact assessment, including a specific gender impact assessment, be conducted prior to a decision to open any area up to a procurement process. For example given consistently better gender equality standards in public service, it is important that they not be diluted through contracting out. Women may also be particularly reliant on public services and vulnerable to reductions in service.

NWCI has also provided extensive comments relation to 'Reserved Contracts for Certain Services' under question 5. We have also highlighted particular concerns around the recognition and support of community and voluntary services, including ensuring such actors are not disadvantaged by technical criteria and the importance of secure and sustainable grant-making structures outside the procurement process. NWCI have also called for the transposition to support strong national and local use of social considerations, criteria and clauses throughout the procurement process and have highlighted the potential for development of practical measures equivalent to the LM3 local multiplier assessment tool as currently used in the UK.

### **Conclusion**

NWCI would again like to thank the Office of Government Procurement for providing us with an opportunity to make a submission on such an important area. We greatly look forward to further engagement around the transposition of these Directives and the wider Public Procurement process.