On 11th February 2014, three new Directives were adopted by the Council of the European Union:


These Directives are to be transposed into national law by April 2016. Initial observations and comments were sought from the Construction Industry Federation on 17th April 2014 and were submitted on 29th May 2014. These comments were then developed into a more detailed submission relating to the transposition of the Directives. On 31st October 2014, the Transposition Unit of the Office of Government Procurement opened the public consultation on the transposition of the new EU Procurement Directives.

Following extensive consultation with experts in EU Procurement and members of the Construction Industry Federation, the views of the CIF in relation to the implementation of the new EU Directives are set out below. Given that a number of the most important options to be implemented cover the three directives, the initial part of the document addresses the headline issues arising. This is followed by Appendices addressing each of the Directives in turn, although the detailed commentary is found mainly in Appendix A. Responses to the questions asked in the consultation document issued by the Office of Government Procurement are set out at Appendix D.
Construction Industry Federation
CIF Submission on the Transposition of the new EU Procurement Directives
Article 18 PCD/Article 36 UD/Article 30 CD: Principles of procurement – Member States are required to ensure that contractors comply with applicable environmental, social and labour laws in their performance of public contracts (see also Article 71 Subcontracting).

The “cross-cutting social clause” requires Member States to take measures to ensure that obligations in the fields of environmental, social and labour law are complied with in the performance of public contracts.

Member States are left with the option of deciding what those appropriate measures are. Any such measures will have a direct impact on contractors tendering for public contracts, and could result in the exclusion of some contractors from the procurement process or the imposition of additional costs associated with confirming compliance. As such it is vital that the CIF be consulted by Government in relation to the substance and form of any eventual compliance measures.

It is of paramount importance that contractors are aware of their obligations in relation to this, as reference to “environmental, social and labour law” is an extremely broad definition. Guidance must be provided to contractors on the specifics of what this relates to in the Irish context, and no new obligations should be imposed without appropriate consultation.

It is also imperative to ensure that training and guidance is made available to contracting authorities on compliance with their measures put in place to comply with these Articles, to ensure consistency of approach across the public sector.

Article 22 PCD/Article 40 UD/Article 29 CD Rules applicable to communications – Member States are to move gradually to full electronic procurement by October 2018 (for Central Purchasing Bodies by April 2017). Member States have the option of moving to full electronic procurement by an earlier date.

It can be anticipated that the introduction of full electronic tendering will have a significant cost impact on contractors requiring substantial upfront investment in technology and training. Contractors will also want to be satisfied that the public sector has the required technology and training, to allow for a smooth transition to full electronic procurement.

CIF has already expressed concerns about the move to full electronic procurement by October 2018 given the lack of broadband infrastructure across rural areas of the country. Further concerns exist in relation to the systems in place, as contractors will need to have full confidence in the system of e-procurement in use. As such it is imperative that Government clarifies the timetable for the introduction of full electronic procurement well in advance of its actual introduction, to allow the necessary investments to be made. Assistance for both tenderers and contracting authorities will be required in making the transition, in particular in relation to the provision of financial aid (loans and/or grants), as well as the provision of training and guidance.

Article 26 PCD/Article 40 UD/Article 30 CD Choice of procedures - This provides what the Commission calls a “tool box approach” to procedures, giving contracting authorities greater freedom in their choice of procedures, more opportunity to select procedures which include negotiations as well as more flexibility to design procedures in the way that best suits the requirements of the individual procurement.

Negotiated procedures as a general rule require more resources (time, man power, skills, money) on the part of both tenderers and contracting authorities, than the more simple open and restricted procedures. For this reason, negotiated procedures should only be chosen where the nature of the contract requires it.

Guidance and training should be provided to contracting authorities to ensure that they choose appropriate procedures with reference to the requirements of the contract. The training should emphasise the skills and resources required to successfully run negotiated procedures, not only on the part of contracting authorities but also on the part of tenderers.

There are substantial costs involved in participating in any tender procedure, but particularly in respect of negotiated procedures, and consideration should be given to circumstances in which tenderers would be compensated for their participation.

In respect of Concessions, the Directive leaves it to individual contracting bodies to establish their own procurement procedures for concessions subject to compliance with Treaty principles (transparency, equal treatment, proportionality, etc), and various requirements flowing from these principles. A general option facing the Government in its implementation of the Concessions Directive is whether or not to leave it to individual contracting bodies to establish their own procedures in accordance with the flexible framework of rules set out in the Directive, or whether to attempt to streamline procurement procedures across all three directives by modelling a general procedure for the award of concession contracts on an existing procedure such as the competitive procedure with negotiation which is available under the Public Contracts and Utilities Directive. There are advantages to both tenderers and contracting bodies of streamlining procedures across all three Directives, as this would result in greater transparency and consistency of approach which benefits contracting authorities and tenderers alike.

Article 46 PCD/Article 65 UD Division of contracts into lots - option of making it obligatory to divide contracts into lots in certain circumstances, and to allow for the award of more than one lot to the same tenderer.

This provides Government with two options:
– To make it obligatory to award contracts in the form of separate lots in certain cases
– To allow contracting authorities to award contracts combining several or all lots subject to certain conditions.

CIF is of the view that division of contracts into lots is to be welcomed and will be of great benefit to SMEs. It will be important to ensure that guidelines are in place in relation to the value or size of a project that is expected to be divided into lots.

There is no equivalent under the Utilities Directive to the requirement under the new Public Contracts Directive to divide contracts into lots or to explain why not. Further, Member States do not have the option of requiring Utilities to award certain contracts in lots.

Article 47 PCD/Article 66 UD/Article 39 CD Setting Time Limits – there is a general shortening of time limits under the new Directives. These are minimum timelimits and must be extended where necessary to allow responsive tendering.

It must be emphasised clearly to contracting authorities that the time limits set out in the Directives are minimum only; actual time limits must reflect the requirements of the procurement process and must be sufficient to give candidates and tenderers adequate time to prepare their submissions. Consideration will have to be given in the implementation of shorter time periods of the actual time necessary to prepare a comprehensive and competitive tender. Contractors of all sizes regularly experience difficulty in compiling all the required documentation within the time periods allowed for some tenders, and shortened time periods may only serve to exacerbate this problem thereby resulting in reduced competition overall. Where additional information is presented during the tender period, additional time should be provided, and questions and clarifications should be responded to within a set time period to ensure that tenderers have sufficient time to present comprehensive and competitive bids.
Article 56 PCD/Article 76 UD/Article 37 CD
General principles – option of prohibiting contracting authorities from examining tenders before verifying compliance with selection criteria in open procedures; option of disallowing / limiting post-tender clarifications.

Contracting authorities should not be permitted to evaluate tenders prior to checking compliance with selection criteria, as it is vital to ensure that assessment of selection criteria is not compromised by prior viewing of the tender.

In relation to the potential limitation of the extent to which contracting authorities can ask tenderers to clarify or supplement tenders, it would not appear to be sensible for the Government to impose any restrictions. Exercise of this right is already limited by the requirements imposed by equal treatment, etc.).

Article 57 PCD/Article 80 UD/Article 38 CD
Exclusion grounds – option of requiring mandatory rather than discretionary exclusion in all cases where one of the grounds for discretionary exclusion applies; Member States must establish a national procedure for the rehabilitation of excluded contractors, which must comply with the requirements set out in these Articles. The Directives leave it to the Member States to determine how to meet these requirements.

– Member States may require exclusion of tenderers where the contracting authority can demonstrate breach of its obligations relating to the payment of taxes or social security contributions by any means.

The CIF is in favour of the implementation of this option.

– Member States may provide for a derogation from mandatory exclusion for overriding reasons relating to the public interest.

It is unclear what would constitute an “overriding reason relating to the public interest”.

– Member States may provide for a derogation from the mandatory exclusion for breach of obligation to pay taxes where exclusion would be clearly disproportionate (eg, only minor amounts outstanding).

The CIF is in favour of the implementation of such a derogation.

– Member states may provide for mandatory rather than discretionary exclusion in all cases where one of the grounds for discretionary exclusion applies.

The CIF view is that all discretionary grounds should remain discretionary.

– Member States may require, or may provide that a contracting authority may not exclude tenderers impacted by bankruptcy etc, where the contracting authority has established that the tenderer in question will be able to perform the contract, taking into account the applicable national etc.

The CIF is in favour of the implementation of this option.

– Member States may require contracting authorities to exclude a tenderer at any stage of the procedure where it turns out that one of the grounds for discretionary exclusion applies.

This option appears somewhat contradictory, as it appears to intend to make all discretionary grounds for exclusion mandatory. The CIF views that all discretionary grounds should remain discretionary.

As a general rule, it would appear to be in the interest of contractors that the grounds for exclusion are implemented into Irish law in a liberal manner i.e., in such a way as to require the mandatory exclusion of contractors in as few circumstances as possible. Contracting authorities can then make up their own minds on exclusions, based on the circumstances of the individual case.

Of particular concern is the fact that a number of the new grounds for discretionary exclusion could potentially be applied very broadly. The CIF is very concerned to ensure that contractors who are excluded from the procurement process, have the opportunity to bring the exclusion to an end, in accordance with the procedure outlined in Article 57.6 PCD which allows an excluded contractor to provide evidence that it has taken adequate measures to address its failings. The measures should be evaluated, and if considered sufficient the contractor should not be excluded. Where the measures are considered insufficient, the contractor should be informed of the reasons for the negative decision.

Training and guidance should be provided to contracting authorities covering the grounds for exclusion and the circumstances where those grounds should be applied. The CIF should be consulted in the drafting of such guidance, and in relation to the procedure for the rehabilitation of tenderers, including the time limits within which exclusion will remain mandatory.

Article 59 PCD (referred to in Article 80 UD)
European Single Procurement Document – This Article introduces the ESPD a standardised, electronic document, and requires contracting authorities to accept the ESPD as preliminary evidence that tenderers meet their selection requirements (grounds for mandatory and discretionary exclusion, financial and technical requirements, etc).

Use of the ESPD will represent a significant change in current procurement practice, bringing a standardised approach to the selection process across the EU. The fact that proof of qualifications will only be required of shortlisted tenderers, and successful tenderers, and should be sought (where available), by contracting authorities themselves, should greatly reduce the administrative burden of participation in public contracts on contractors.

The Commission is currently drafting the standard form that will be used for the ESPD, and is consulting with Member State governments as part of this process. The CIF understands that the Commission is leaving it to Member State governments to consult directly with stakeholders in their territories. As such the CIF seeks to engage with Government in relation to its submission to the Commission on form to be adopted for the ESPD.

Article 67 PCD/Article 82 UD/Article 41 CD
Contract award criteria – option of prohibiting contracting authorities absolutely from using price or cost only as the sole award criterion or alternatively, of restricting the use of such criteria to certain categories of contracting authorities or certain types of contracts.

This is a key Article which reflects, codifies and expands on current law on contract award criteria. The Article promotes a move away from the assessment of tenders based on lowest price, and towards assessment based on qualitative, environmental, social and innovative features of tenders. Member States have the option of prohibiting the use of price or cost as the sole award criterion, and makes specific reference to criteria assessing environmental, social and innovative features of tenders.

It is unclear at this stage to what extent Government intends to promote the use of award criteria assessing environmental, social and innovative features of tenders, and how and when it intends to do this. Any plans in this area must be supported by training and guidance primarily for contracting authorities, but also for tenderers. This is because the use of such criteria will require additional skills, and inevitably result in more time and resources having to be put into the preparation of tender documents and assessment of tenders but also the preparation of tenders by contractors.

It is clear that availing of the option to prohibit the use of price or cost only for certain contracts may help the market move away from the problem of below cost tenders, however in order for the use of qualitative assessment to be fair there needs to be consistency of approach across contracting authorities. Assessments must be carried out.
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in such a way that there is no subjectivity, and which allows unsuccessful contractors to understand the reasons that they were not successful.

Consultation will need to take place with the CIF in regards to the criteria other than price to be used for the awarding of contracts, with the value of the project to be taken into account in considering the appropriate weighting and criteria to be used. It is essential to ensure that criteria to be used in the award of public contracts can be objectively assessed to ensure consistency of approach across the public sector, and to ensure that the criteria used do not confer an advantage on larger contractors and cause a detrimental impact on SMEs.

Article 68 PCD/Article 83 UD Life-cycle costing – These Articles promote a move towards the assessment of the price / cost element of tenders, on the basis of “life-cycle costing”. The new Directives promote the assessment of the price / cost element of tenders, on the basis of “life-cycle costing”. The CIF welcomes the initiative to use methods other than lowest price for the award. Comments made in relation to Article 67 contract award criteria, are also relevant here. Most contracting authorities simply will not have the resources and skills to assess the life cycle costs of their contracts. The basis for assessment will need to be set out clearly and developed in a manner that ensures consistency of approach. The implementation of life cycle costing will be very difficult for some contractors and may prove to be an exclusionary measure.

As such, Government plans in this area must be indicated well in advance of implementation, and supported by training and guidance for contracting authorities, and also for tenderers. This is because asking contractors to tender on the basis of life cycle costing will require additional skills, and inevitably result in more time and resources having to be put into the preparation of tender documents.

Article 69 PCD/Article 83 UD Abnormally low tenders – Contracting authorities must always require tenderers to explain prices where tenders appear to be abnormally low “in relation to the works”, and not just before rejecting them as is the current position.

The rules on abnormally low tenders have been expanded somewhat however there remains no definition. Problems continue in respect of below – price tendering, which is causing long-term structural damage to the construction sector. Although the public purse may make short term gains from low tender prices, it pays in the end through legal claims, redundancies, bankruptcies and over time a less competitive construction sector.

Article 71 PCD/Article 88 UD/Article 42 CD Subcontracting - Member States must establish national rules and procedures for the vetting of subcontractors which should comply with Article 18 (see above). The Directives leave it to the Member States to determine how to meet this requirement. Option of limiting the applicability of the rules with reference to certain types of contracts / contacting authorities / economic operators / financial thresholds; option to provide for direct payments to subcontractors.

There are two elements to this requiring discussion:

(1) Optional requirement to allow direct payments to subcontractors:
- As a preliminary point, the Directives underline that all payment arrangements must be set out clearly in the tender documents – it is essential that main contractors have complete knowledge concerning payment arrangements up front, in order to price contracts properly. In the event that Government opts to allow direct payments to subcontractors, the circumstances where such payments will be made and if applicable, the trade packages and subcontractors involved, must be clearly identified in the tender documents. In the absence of adequate upfront information concerning the arrangements for direct payments, such payments should only be permitted in limited appropriate circumstances, such as where a dispute has arisen and the client has exercised a step-in right.
- To avoid possible abuses of the facility to make direct payments on the part of contracting authorities and subcontractors, any arrangement permitting direct payments must include a procedure allowing the main contractor to object to such payments, and ensure that his objections are taken into account before any decision on direct payments is made
- The introduction of the optional requirements in relation to subcontractors would require changes to standard form works contracts currently in use

(2) Optional requirement to check whether exclusionary grounds apply to subcontractors:
- As a preliminary point, the Directives aim to facilitate SME access to public contracts by reducing the administrative burdens associated with participation; it also aims to introduce greater procedural flexibility for contracting authorities. Requiring contracting authorities to check whether mandatory and discretionary exclusionary grounds apply to contractors, could be considered a backward step in this context
- The requirement to replace subcontractors where mandatory grounds for exclusion apply, and possibly where discretionary grounds for exclusion apply, could result in considerable programming delays for main contractors. Any requirement to replace subcontractors should be accompanied by arrangements to compensate main contractors for consequent losses, particularly in cases where the subcontractor was selected by the contracting authority
- Government should be reminded of the novelty, number and range of discretionary grounds for exclusion, making it exceptionally difficult for contracting authorities to apply them correctly, especially when works are already underway (see also discussion on Article 57 PCD/Article 80 UD/Article 38 CD)

The extension of these requirements down the supply chain would greatly magnify the negative consequences already referred to (in terms of administrative burden and procedural inflexibility)

In the event that Government decided to introduce any of the optional requirements under this heading, then they should be limited in their application as permitted in the Directives, with reference to financial value, etc.

The introduction of the optional requirements in relation to exclusionary grounds would require changes to standard form works contracts currently in use

It is vitally important to ensure that training and guidance are provided to contracting authorities on compliance with any measures put in place to comply with the provisions of this Article, to ensure consistency of approach across the public sector.

Article 72 PCD/Article 89 UD/Article 43 CD - These new Articles deal with the important question of when changes made to contracts during their term raise questions of compliance with procurement law.

Contracts frequently are subject to change and these Articles provide useful guidance on what changes are permissible. Of particular interest to contractors is the safe haven for changes with a value which is below the threshold for works contracts and less than 15% of the initial contract value. Another useful clarification relates to when a change in contractor is permitted, a scenario that occurred frequently in the economic downturn.

The risk of change is a serious one for contractors and authorities as it can give rise to legal challenges and a requirement to terminate contracts. However, the risk can and should be managed right from the
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earliest stages of the procurement process. Government must ensure that training and guidance is provided to contracting authorities on how to manage change with the aim of avoiding problems with changes which may occur during performance of the contract.

**Article 73 PCD/Article 90 UD/Article 44 CD**
Termination of contracts – Member States must ensure that contracting authorities have the possibility, at least under the listed circumstances, under the conditions determined by the relevant national law, to terminate a contract during its term. The Directives leaves it to the Member States to determine how to meet this requirement.

Member States must ensure that contracts used by contracting authorities allow for termination by those contracting authorities in at least in the 3 circumstances listed. Irrespective of the manner in which Government opts to fulfil these obligations, it will be of vital importance to address not only the circumstances giving rise to the termination but also the applicable procedures (eg, requiring notice of termination to be given, mechanisms for determining existences of the right to cancel, appeals procedures, redress), and any consequential matters that may arise from the termination including the question of compensation for the incumbent contractor.

It is important to point out the vulnerable position of an incumbent contractor being asked to agree to a substantial modification. It is typically the contracting authority that introduces the substantial modifications, eg to benefit from the terms and conditions of an existing contract, to continue to work with the incumbent contractor, and to avoid the time and expense of a retender. If termination is only at their option, it is easy to anticipate cases where the issue of “substantial change” will be ignored, leaving the “substantially modified” contract open to challenge and the incumbent contractor vulnerable. It would be useful in those circumstances if the contractor also had the right to terminate. Although he may in theory be able to protect his position through an application to the court under the Remedies Directive, that avenue will be impractical in most cases because of the legal and financial hurdles involved in bringing a case to the High Court.

A preliminary issue needing resolution in all cases of substantial change will be a determination of whether the change is indeed substantial. It will be necessary to establish a mechanism for deciding this issue in advance. One such mechanism could be expert determination, or recourse to a Government department or agency with expertise in this matter. Terminating contracts in the absence of a clear determination would leave the decision to terminate open to legal challenge.

**Article 90 PCD/ Article 106 UD/Article 51 UD**
Transposition and transitional arrangements – Member States are given until 18 April 2016 to adopt the national laws to implement the Directives. Member States are given the option of determining the method of implementation (eg, rewriting or copy out) and of implementing the Directives at an earlier date.

The CIF view in relation to how to implement is that there are inherent risks involved in rewriting the text to make it easier to understand. These include the introduction of further ambiguity, questions over compatibility between the two texts (which could give rise to legal challenges) and the inadvertent gold-plating of certain requirements.

In relation to the requirement for full electronic procurement, it will certainly be necessary for the Government to postpone implementation until the extended deadline of 18 October 2018. In this regard, see discussion under Article 22 PCD/Article 40 UD/Article 29 CD Electronic communications.
Article 18 Principles of procurement

The "cross-cutting social clause" contained in this Article requires Member States to take measures to ensure that obligations in the fields of environmental, social and labour law are complied with in the performance of public contracts.

Member States are left with the option of deciding what those appropriate measures are. Any such measures will have a direct impact on contractors tendering for public contracts, and could result in the exclusion of some contractors from the procurement process or the imposition of additional costs associated with confirming compliance. As such it is vital that the CIF be consulted by Government in relation to the substance and form of any eventual compliance measures.

It is of paramount importance that contractors are aware of their obligations in relation to this Article, as reference to "environmental, social and labour law" is an extremely broad definition. Guidance must be provided to contractors on the specifics of what this relates to in the Irish context, and no new obligations should be imposed without appropriate consultation.

It is also imperative to ensure that training and guidance is made available to contracting authorities on compliance with their measures put in place to comply with this Article, to ensure consistency of approach across the public sector.

Article 19 – Economic operators

Member States may establish standard terms to consider how groups of economic operators meet various selection criteria, instead of these assessments being made by individual contracting authorities. The implementation of such standard terms would allow for consistency of approach and transparency, and would allow contractors, particularly SMEs, considering the formation of joint ventures/consortia clarity as to how financial and other criteria can be demonstrated.

Should the Government intend to establish any such standard terms, CIF requests to be consulted by Government in relation to same given the direct impact such measures will have on contractors and other economic operators seeking to qualify together for public contracts.

Article 21 – Confidentiality

Given the increased opportunities under the new Directive for contracting authorities to choose procedures which allow negotiations with tenderers, the issue of confidentiality is particularly important. Contracting authorities may find themselves running parallel negotiations with a number of tenderers and in these circumstances, inexperienced contracting authorities may unintentionally leak elements of one tenderer’s proposals, to other tenderers. The Directive allows that contracting authorities may impose requirements on tenderers, aimed at protecting the confidential nature of information which they make available during the procurement process. It is vital that the Government reinforce the importance of compliance with the requirement of confidentiality in any training provided to contracting authorities regarding the various negotiated procedures under the new Directive.

Article 22 Rules applicable to communications

Member states must move gradually to full electronic procurement by October 2018 (for Central Purchasing Bodies by April 2017). It can be anticipated that the introduction of full electronic tendering will have a significant cost impact on contractors requiring substantial upfront investment in technology and training. Contractors will also want to be satisfied that the public sector has the required technology and training, to allow for a smooth transition to full electronic procurement.

CIF has already expressed concerns about the move to full electronic procurement by October 2018 given the lack of broadband infrastructure across rural areas of the country. Further concerns exist in relation to the systems in place, as contractors will need to have full confidence in the system of e-procurement in use. As such it is imperative that Government clarifies the timetable for the introduction of full electronic procurement well in advance of its actual introduction, to allow the necessary investments to be made. Assistance for both tenderers and contracting authorities will be required in making the transition, in particular in relation to the provision of financial aid (loans and/or grants), as well as the provision of training and guidance.
### Appendix A

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<tr>
<th>Article 24 – Conflicts of Interest</th>
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<tbody>
<tr>
<td>Any policy on conflicts of interest must be compliant with the requirements set out in the Directive and applied coherently across the public sector. The overarching requirement of any policy is that it must be proportionate and should not lead to the exclusion of contractors from procurement procedures in cases where the conflict can be addressed through other means.</td>
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<tr>
<td>Government should encourage the use of pre-tender consultations where appropriate, provided that these are open to the market and do not distort competition. See also discussions on Articles 40 (preliminary market consultation) and 41 (prior involvement of candidates and tenderers), which address related issues which are frequently grouped together under the general banner of conflicts of interest.</td>
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<tr>
<td>The Government should be encouraged to draft guidelines on how to run pre-tender consultations fairly. Such guidelines could also address the management of conflicts of interest more generally, and cover the matters referred to in Articles 24, 40 and 41, all of which are related. In this regard, Government should be reminded of the requirement set out in Article 24, which obliges Government to establish rules to prevent, identify and remedy conflicts of interest.</td>
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<th>Title II – Rules on Public Contracts</th>
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<td>Article 26 – Choice of Procedures</td>
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<td>Negotiated procedures as a general rule require more resources (time, man power, skills, money) on the part of both tenderers and contracting authorities, than the more simple open and restricted procedures. For this reason, negotiated procedures should only be chosen where the nature of the contract requires it.</td>
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<td>There are substantial costs involved in participating in any tender procedure, but particularly in respect of negotiated procedures, and consideration should be given to circumstances in which tenderers would be compensated for their participation.</td>
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<td>Article 27 – Open procedure</td>
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<td>Training and guidance should be provided to contracting authorities on how to select the appropriate procedure to suit the requirements of the contract, emphasising the overarching obligation in relation to timelimits, ie that they must be as long as necessary to allow for responsive tendering. It must also be highlighted that timeframes should only be accelerated or reduced if all the information is available to tenderers from the outset. Training should underline that because of their exclusionary impact on the market, accelerated procedures must only be used in the extremely limited circumstances set out in the Directive.</td>
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<td>Article 28 – Restricted procedure</td>
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<td>Sub-Central contracting authorities may be allowed to set time limits for receipt of tenders under restricted procedure by agreement with tenderers. The advisability of having different procedural rules for different classes of contracting authority must be questioned, notably for sub-central contracting authorities. Allowing flexibility to sub-central contracting authorities to set time limits for receipt of tenders by agreement will cause difficulties for contractors who need a certain element of certainty of timing in order to properly plan their resources. Any additional flexibility in setting timelimits should be balanced against the potential for confusion.</td>
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<td>Article 29 – Competitive procedure with negotiation</td>
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<td>See Discussion under Article 26 re negotiated procedures, which is also relevant here.</td>
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<td>Article 30 – Competitive dialogue</td>
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<tr>
<td>See Discussion under Article 26 re negotiated procedures, which is also relevant here.</td>
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### Article 31 – Innovative Partnership

This procedure is intended for use in circumstances where a contracting authority has a requirement for products, works, and/or services, which are not currently available on the market, and allows for the establishment of a long-term partnership covering both the development as well as the purchase of the result, provided it can be delivered to previously agreed levels of performance and costs.

Although the procedure will have limited application in the procurement of traditional building and civil engineering contracts, it has potential application to the development of innovative buildings and infrastructure – an example could be a model for a commercial zero emissions house. Contractors could also be involved in such procedures as part of a broader consortium tendering for projects – an example could be the development of an innovative solution for an urban transport system.

As the innovation partnership is also a negotiated procedure, the comments made with reference to Article 26 are valid here also.

### Article 32 - Negotiated procedure without prior publication.

Guidance and training should be provided to contracting authorities on the very limited circumstances where it is appropriate to use this procedure, which allows contracting authorities to award contracts through direct negotiations with contractors of their choice, without advertisement.

### Chapter II – Techniques and instruments for electronic and aggregated procurement

#### Article 33 – Framework agreements

There is currently a push towards aggregated procurement in the Irish public sector, and particularly towards the use of framework contracts. This push towards aggregated procurement at national level will be further boosted by the Articles in the new Directives on frameworks, central purchasing bodies, joint procurement and electronic forms of procurement such as electronic auctions. In addition, the new Directive promotes aggregated cross-border procurement, raising the possibility of Irish authorities either procuring jointly with, or using eg frameworks set up by, contracting authorities in other Member States.

CIF is concerned about the potentially exclusionary impacts of all forms of aggregated procurement. These impacts can be particularly severe where the authorities involved represent an important source of work in a particular sectoral or geographical market, and where the arrangement is of long duration.

Additional issues arise in respect of cross-border purchasing arrangements. In particular, there is a need to have absolute clarity on the legal obligations of all concerned. Tenderers must be guaranteed access to legal remedies in cases of breach of the procurement rules, even where these breaches occur in other jurisdictions. There would also be a general concern about potentially important purchasing decisions with a considerable impact on the Irish market, being taken by contracting authorities will no link and no accountability to that market.

Irish experience to date with aggregated purchasing has not been good, insofar as the choice of aggregated forms of purchasing has often been ill advised (with no consideration of the impact on the market), and the procedures non-compliant with the provisions of the current Directive.

It is vital to ensure that very specific training and guidance is provided to contracting authorities on the different forms of aggregated purchasing available, the factors that must be taken into account before opting for one of these forms, the procedural rules applying to the different forms of aggregated procurement under the Directive. Any training and guidance should also highlight additional concerns in relation to cross-border arrangements, and in particular, the importance of having a clear legal framework in place. In relation to framework agreements, it is vital to ensure that these are properly concluded, having an initial live project for participants to tender for in accordance with the rules.

As participating in some forms of aggregated procurement may require upfront investment on the part of tenderers in technology and training, CIF requests that Government clarify the timetable for any extension of aggregated procurement to allow the necessary investments to be made. Government should also be strongly encouraged to support tenderers in making the transition, through the provision of training and guidance.

### Article 35 – Electronic auctions

While contracts for works are partially excluded from electronic auctions, CIF would be interested to know if Government has any plans to use electronic auctions for the procurement of works contracts, and would ask to be consulted in respect of any such plans going forward.
### Article 36 - Electronic catalogues
CIF would be interested to know if Government has any plans to use electronic catalogues for the procurement of works contracts, and would ask to be consulted in respect of any such plans going forward.

### Article 37 Centralised purchasing activities and central purchasing bodies
Articles 37 aims to promote purchasing from CPBs, even where the CPBs are based in other Member States. The options in this Article allow Government to impose certain limitations on the way in which contracting authorities can use CPBs, limiting them to direct or intermediary purchasing. In addition, Member States may require that contracting authorities purchase via CPBs for particular purchases. Many of the concerns in relation to the use of CPBs have already been raised in the context of the discussion on frameworks and other forms of aggregated procurement (see Article 33). CIF is concerned generally about the potentially exclusionary nature of the use of CPBs on SMEs and local companies.

An additional concern in relation to CPBs is that they are required to use full electronic procurement from the deadline for implementation of the Directive, ie April 2016. Participation in full electronic tendering will have a significant cost impact on contractors requiring substantial upfront investment in technology and training. Government will need to clarify the timetable for the introduction of full electronic procurement for CPBs well in advance of its actual introduction, to allow the necessary investments to be made. Government should also be strongly encouraged to support both tenderers and contracting authorities in making the transition. Relevant issues in this regard include the provision of financial aid (loans and/or grants), as well as the provision of training and guidance.

### Article 38 - Occasional joint procurement
The Directive clarifies that two or more contracting authorities may agree to perform certain specific procurements jointly. Many of the concerns in relation to occasional joint procurement have already been raised in the context of the discussion on frameworks and other forms of aggregated procurement (see Article 33).

### Article 39 - Procurement involving contracting authorities from different Member States
Cross border procurements should not be permitted to take place in the absence of a clear legal framework setting out the rights and responsibilities of the contracting authorities, and also of tenderers. It is essential that whatever law is applicable to the procurement, tenderers must have easy access to remedies for breaches of the procurement rules. It is not clear how this will be achieved where the contracting authority is based in another Member State.

Discussion on Article 33 also relevant here.

### Chapter III - Conduct of the procedure

#### Section 1 - Preparation

**Article 40 – Preliminary market consultation**
Pre-tender consultations are of benefit to both the market and to contracting authorities, allowing the market advance warning of upcoming tender opportunities and the chance to contribute to the procurement plan. As such, pre-tender consultation should be encouraged where appropriate, provided that such consultations are open to the market of potential tenderers and do not distort the subsequent competition.

The Government should be encouraged to draft guidelines on how to run pre-tender consultations fairly. Such guidelines could also address the management of conflicts of interest more generally, and cover the matters referred to in Articles 24, 40 and 41, all of which are related. In this regard, Government should be reminded of the requirement set out in Article 24, which obliges Government to establish rules to prevent, identify and remedy conflicts of interest.

**Article 41 - Prior involvement of candidates or tenderers**
See discussions on Article 24 and 40, which cover related topics.
### Article 42 - Technical specifications

Many contracting authorities fail to comply with the current rules on technical specifications, and continue to name products and processes simply adding the word “or equivalent”, or by giving a specification so narrow that it can only refer to one product. This common practice breaches the requirement in the current Directives regarding the statement of technical specifications, insofar as it encourages contractors to tender the named product rather than to tender an often cheaper alternative and have to prove its equivalence, thus impeding the “free movement of goods”.

This widespread failure to comply with the current rules on technical specifications has led to several ongoing disputes concerning the statement of technical standards in works contracts. The Government should be encouraged to provide guidance to contracting authorities on how to state technical standards correctly.

### Article 46 - Division of contracts into lots

This Article provides Government with two options:

- To make it obligatory to award contracts in the form of separate lots in certain cases
- To allow contracting authorities to award contracts combining several or all lots subject to certain conditions.

CIF is of the view that division of contracts into lots is to be welcomed and will be of great benefit to SMEs. It will be important to ensure that guidelines are in place in relation to the value or size of a project that is expected to be divided into lots, and that the relative size of the economy and the construction companies forming part of the industry as against other European nations is taken into account in the establishment of any such guidance.

### Article 47 - Setting time limits

It must be emphasised clearly to contracting authorities that the time limits set out in the Directives are minimum only; actual time limits must reflect the requirements of the procurement process and must be sufficient to give candidates and tenderers adequate time to prepare their submissions. Consideration will have to be given in the implementation of shorter time periods of the actual time necessary to prepare a comprehensive and competitive tender. Contractors of all sizes regularly experience difficulty in compiling all the required documentation within the time periods allowed for some tenders, and shortened time periods may only serve to exacerbate this problem thereby resulting in reduced competition overall. Where additional information is presented during the tender period, additional time should be provided, and questions and clarifications should be responded to within a set time period to ensure that tenderers have sufficient time to present comprehensive and competitive bids.

### Section 2 – Publication and transparency

#### Article 48 - Prior information notices

Sub-central contracting authorities have the option of making a call for competition using a PIN notice, rather than a contract notice, provided certain conditions are met. This option already exists under the existing Utilities Directive. If some contracting authorities are going to change their procedures for advertising in line with this Article, which is likely to be the case, it is very important that this change is highlighted and explained to the market in advance. If this is not the case, potential tenderers could miss out on tender opportunities.

### Section 3 Choice of participants and award of contracts

#### Article 56 – General principles

Contracting authorities should not be permitted to evaluate tenders prior to checking compliance with selection criteria, as it is vital to ensure that assessment of selection criteria is not compromised by prior viewing of the tender.

In relation to the potential limitation of the extent to which contracting authorities can ask tenderers to clarify or supplement tenders, it would not appear to be sensible for the Government to impose any restrictions. Exercise of this right is already limited by the requirements imposed by equal treatment, etc. Furthermore, Government should provide clarity on the measures that it envisages taking to ensure compliance with Article 18(2).
Appendix A

Subsection 1 Criteria for qualitative selection

<table>
<thead>
<tr>
<th>Article 57 – Exclusion grounds</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>•</strong> Member States may require exclusion of tenderers where the contracting authority can demonstrate breach of its obligations relating to the payment of taxes or social security contributions by any means</td>
</tr>
<tr>
<td>The CIF is in favour of the implementation of this option.</td>
</tr>
<tr>
<td><strong>•</strong> Member States may provide for a derogation from mandatory exclusion for overriding reasons relating to the public interest</td>
</tr>
<tr>
<td>It is unclear what would constitute an “overriding reason relating to the public interest”</td>
</tr>
<tr>
<td><strong>•</strong> Member States may provide for a derogation from the mandatory exclusion for breach of obligation to pay taxes where exclusion would be clearly disproportionate (eg, only minor amounts outstanding</td>
</tr>
<tr>
<td>The CIF is in favour of the implementation of such a derogation</td>
</tr>
<tr>
<td><strong>•</strong> Member states may provide for mandatory rather than discretionary exclusion in all cases where one of the grounds for discretionary exclusion applies</td>
</tr>
<tr>
<td>The CIF view is that all discretionary grounds should remain discretionary</td>
</tr>
<tr>
<td><strong>•</strong> Member States may require, or may provide that a contracting authority may not exclude tenderers impacted by bankruptcy etc, where the contracting authority has established that the tenderer in question will be able to perform the contract, taking into account the applicable national etc</td>
</tr>
<tr>
<td>The CIF is in favour of the implementation of this option.</td>
</tr>
<tr>
<td><strong>•</strong> Member States may require contracting authorities to exclude a tenderer at any stage of the procedure where it turns out that one of the grounds for discretionary exclusion applies.</td>
</tr>
<tr>
<td>This option appears somewhat contradictory, as it appears to intend to make all discretionary grounds for exclusion mandatory. The CIF views that all discretionary grounds should remain discretionary.</td>
</tr>
</tbody>
</table>

As a general rule, it would appear to be in the interest of contractors that the grounds for exclusion are implemented into Irish law in a liberal manner ie, in such a way as to require the mandatory exclusion of contractors in as few circumstances as possible. Contracting authorities can then make up their own minds on exclusions, based on the circumstances of the individual case.

Of particular concern is the fact that a number of the new grounds for discretionary exclusion could potentially be applied very broadly. The CIF is very concerned to ensure that contractors who are excluded from the procurement process, have the opportunity to bring the exclusion to an end, in accordance with the procedure outlined in Article 57.6 which allows an excluded contractor to provide evidence that it has taken adequate measures to address its failings. The measures should be evaluated, and if considered sufficient the contractor should not be excluded. Where the measures are considered insufficient, the contractor should be informed of the reasons for the negative decision.

Training and guidance should be provided to contracting authorities covering the grounds for exclusion and the circumstances where those grounds should be applied. The CIF should be consulted in the drafting of such guidance, and in relation to the procedure for the rehabilitation of tenderers, including the time limits within which exclusion will remain mandatory. The CIF is of the view that the time period of exclusion should be dependent of the severity of the ground on which said exclusion is based. At the very least, where a tenderer has been excluded on a particular ground, that tenderer should remain excluded until such time as the situation giving rise to the ground for exclusion has been rectified.
Article 58 – Selection criteria

The Directives specify that authorities must not require tenderers to have a minimum annual turnover of more than two times the estimated contract value. This is of concern to the CIF on larger projects of a long duration, where the current requirement is that the turnover must be within the range of 75% - 150% of the annualised value of the contract. Take for example a €40million project of 24 months duration – the new Directives would allow a turnover requirement of up to €80million to be sought. Under the existing rules, the turnover sought would be between €15million and €30million.

This will also have the impact of reducing the level of turnover that can be sought on some smaller projects – take for example, a €1million project with a 6 month duration. Under the existing rules set out in Guidance Notes, the turnover sought could be 75% - 150% of the annualised capital value of the project (€2million) allowing a contracting authority to seek turnover of between €1.5million and €3million. Under the new Directives, the maximum turnover the contracting authority can require is €2million.

*This issue is of particular concern to civil engineering contractors, as the current requirement set out in the Guidance Note on Suitability Criteria for Works Contractors (Minimum Standards) published by the Department of Public Expenditure and Reform stipulates that turnover for civil engineering projects must be within the range of 30%-60% of the annualised capital value of the project. On the basis of a €40million project with 24 months duration, the new Directives would allow for a turnover of €80million to be sought. Under the existing rules, the turnover sought for this project would be between €6million and €12million. These new rules could have significant impact even on a small project, for example a €1million project of 6 months duration which under the current rules would have turnover of between €600,000 and €1.2million sought – the new rules would allow for turnover of €2million to be sought. The increased turnover requirements that would result from the implementation across the board of the maximum level of turnover permissible under the new EU Directive are of serious concern to civil engineering contractors, as this would result in a major curtailment of the number of contractors with the turnover sought to carry out works.

It must be noted that given the recent economic conditions which Irish construction companies have found themselves trading in, turnover is considered a crude instrument for the determination of financial standing. If turnover is to be used as a consideration of the financial capacity of a company it should be considered alongside alternative measures to determine the financial status of a company.

Article 59 - European Single Procurement Document (ESPD)

Use of the ESPD will represent a significant change in current procurement practice, bringing a standardised approach to the selection process across the EU. The fact that proof of qualifications will only be required of shortlisted tenderers, and successful tenderers, and should be sought (where available), by contracting authorities themselves, should greatly reduce the administrative burden of participation in public contracts on contractors.

The Commission is currently drafting the standard form that will be used for the ESPD, and is consulting with Member State governments as part of this process. The CIF understands that the Commission is leaving it to Member State governments to consult directly with stakeholders in their territories. As such the CIF seeks to engage with Government in relation to its submission to the Commission on form to be adopted for the ESPD.

Article 61 - Online repository of certificates (e-Certis)

e-Certis is potentially a very useful tool for Irish contractors working in other Member States as it will inform them what documents are required to prove their qualifications. It will also give contracting authorities information regarding the availability and equivalence of documents between the various Member States, allowing them direct access where this is available. The usefulness of e-Certis is currently limited by the fact that the information has not been kept up to date, and as such the CIF would encourage the Government to keep the information on e-Certis up to date.

* This paragraph was not contained in the original submission
Tenderers may rely on the capacity of other entities to meet financial and technical qualification requirements, however in relation to educational, professional, qualifications, or professional experience, tenderers may only rely on the capacities of other entities insofar as they are actually going to carry out the works. Contracting authorities are required to verify whether the grounds for mandatory exclusion apply to such entities and require their replacement if this is the case. Member states are given the option of requiring entities to be replaced where any of the discretionary grounds for exclusion apply.

Requiring the replacement of an entity in these circumstances poses significant practical difficulties, not least in relation to the delay occurring as a result of the necessity to find another equivalent entity. This is because of the variety of grounds and the fact that some of them are very broadly drafted. Government must ensure that its decision on this option is covered in any training and guidance issued on the subject of exclusion (see also comments on Article 57).

Subsection 3 - Award of the contract

Article 67 - Contract award criteria

This is a key Article which reflects, codifies and expands on current law on contract award criteria. The Article promotes a move away from the assessment of tenders based on lowest price, and towards assessment based on qualitative, environmental, social and innovative features of tenders. Member States have the option of prohibiting the use of price or cost as the sole award criterion, and makes specific reference to criteria assessing environmental, social and innovative features of tenders. Should the Government opt to retain the use of price only or cost only, it should be allowed as the sole award criterion only in very limited circumstances, to be set out in guidelines.

It is unclear at this stage to what extent Government intends to promote the use of award criteria assessing environmental, social and innovative features of tenders, and how and when it intends to do this. Any plans in this area must be supported by training and guidance primarily for contracting authorities, but also for tenderers. This is because the use of such criteria will require additional skills, and inevitably result in more time and resources having to be put into the preparation of tender documents and assessment of tenders but also the preparation of tenders by contractors.

It is clear that availing of the option to prohibit the use of price or cost only for certain contracts may help the market move away from the problem of below cost tenders, however in order for the use of qualitative assessment to be fair there needs to be consistency of approach across contracting authorities. Assessments must be carried out in such a way that there is no subjectivity, and which allows unsuccessful contractors to understand the reasons that they were not successful. Consultation will need to take place with the CIF in regards to the criteria other than price to be used for the awarding of contracts, with the value of the project to be taken into account in considering the appropriate weighting and criteria to be used. It is essential to ensure that criteria to be used in the award of public contracts can be objectively assessed to ensure consistency of approach across the public sector, and that the criteria used do not confer an advantage on larger contractors and cause a detrimental impact on SMEs.

Article 68 - Life-cycle costing

The new Directive promotes the assessment of the price / cost element of tenders, on the basis of “life-cycle costing”.

The CIF welcomes the initiative to use methods other than lowest price for the award. Comments made in relation to Article 67 contract award criteria, are also relevant here. Most contracting authorities simply will not have the resources and skills to assess the life cycle costs of their contracts. The basis for assessment will need to be set out clearly and developed in a manner that ensures consistency of approach. The implementation of life cycle costing will be very difficult for some contractors and may prove to be an exclusionary measure.

As such, Government plans in this area must be indicated well in advance of implementation, and supported by training and guidance for contracting authorities, and also for tenderers. This is because asking contractors to tender on the basis of life cycle costing will require additional skills, and inevitably result in more time and resources having to be put into the preparation of tender documents.
## Article 69 - Abnormally low tenders

The rules on abnormally low tenders have been expanded somewhat however there remains no definition. Problems continue in respect of below-price tendering, which is causing long-term structural damage to the construction sector. Although the public purse may make short-term gains from low tender prices, it pays in the end through legal claims, redundancies, bankruptcies and over time a less competitive construction sector.

### Chapter IV – Contract performance

#### Article 70 – Conditions for the performance of contracts

Contracting authorities may lay down special conditions for the performance of contracts, provided they are linked to the subject matter of the contract, and indicated in the tender documents. These conditions may include economic, innovation-related, environmental, social or employment-related considerations. Any such special conditions for the performance of contracts must be proportionate and relevant to the contract. Training and guidance will again be required in relation to these.

#### Article 71 - Subcontracting

There are two elements to this Article requiring discussion:

1. Optional requirement to allow direct payments to subcontractors:
   - As a preliminary point, the Directive underlines that all payment arrangements must be set out clearly in the tender documents – it is essential that main contractors have complete knowledge concerning payment arrangements up front, in order to price contracts properly. In the event that Government opts to allow direct payments to subcontractors, the circumstances where such payments will be made and if applicable, the trade packages and subcontractors involved, must be clearly identified in the tender documents. In the absence of adequate upfront information concerning the arrangements for direct payments, such payments should only be permitted in limited appropriate circumstances, such as where a dispute has arisen and the client has exercised a step-in right.
   - To avoid possible abuses of the facility to make direct payments on the part of contracting authorities and subcontractors, any arrangement permitting direct payments must include a procedure allowing the main contractor to object to such payments, and ensure that his objections are taken into account before any decision on direct payments is made.
   - The introduction of the optional requirements in relation to subcontractors would require changes to standard form works contracts currently in use.

2. Optional requirement to check whether exclusionary grounds apply to subcontractors:
   - As a preliminary point, the Directive aims to facilitate SME access to public contracts by reducing the administrative burdens associated with participation; it also aims to introduce greater procedural flexibility for contracting authorities. Requiring contracting authorities to check whether mandatory and discretionary exclusionary grounds apply to contractors, could be considered a backward step in this context.
   - The requirement to replace subcontractors where mandatory grounds for exclusion apply, and possibly where discretionary grounds for exclusion apply, could result in considerable programming delays for main contractors. Any requirements to replace subcontractors should be accompanied by arrangements to compensate main contractors for consequent losses, particularly in cases where the subcontractor was selected by the contracting authority.
   - Government should be reminded of the novelty, number and range of discretionary grounds for exclusion, making it exceptionally difficult for contracting authorities to apply them correctly, especially when works are already underway (see also discussion on Article 57).
   - The extension of these requirements down the supply chain would greatly magnify the negative consequences already referred to (in terms of administrative burden and procedural inflexibility).
   - In the event that Government decided to introduce any of the optional requirements under this heading, then they should be limited in their application as permitted in the Directive, with reference to financial value, etc.
   - The introduction of the optional requirements in relation to exclusionary grounds would require changes to standard form works contracts currently in use.

It is vitally important to ensure that training and guidance are provided to contracting authorities on compliance with any measures put in place to comply with the provisions of this Article, to ensure consistency of approach across the public sector.
### Appendix A

#### Article 72 – Modification of contracts during their term

Contracts frequently are subject to change and this Article provides useful guidance on what changes are permissible. Of particular interest to contractors is the safe haven for changes with a value which is below the threshold for works contracts and less than 15% of the initial contract value. Another useful clarification relates to when a change in contractor is permitted, a scenario that occurred frequently in the economic downturn.

The risk of change is a serious one for contractors and authorities as it can give rise to legal challenges and a requirement to terminate contracts. However, the risk can and should be managed right from the earliest stages of the procurement process. Government must ensure that training and guidance is provided to contracting authorities on how to manage change with the aim of avoiding problems with changes which may occur during performance of the contract.

#### Article 73 - Termination of contracts

Member States must ensure that contracts used by contracting authorities allow for termination by those contracting authorities in at least in the 3 circumstances listed. Irrespective of the manner in which Government opts to fulfil these obligations, it will be of vital importance to address not only the circumstances giving rise to the termination but also the applicable procedures (e.g., requiring notice of termination to be given, mechanisms for determining existences of the right to cancel, appeals procedures, redress), and any consequential matters that may arise from the termination including the question of compensation for the incumbent contractor.

It is important to point out the vulnerable position of an incumbent contractor being asked to agree to a substantial modification. It is typically the contracting authority that introduces the substantial modifications, eg to benefit from the terms and conditions of an existing contract, to continue to work with the incumbent contractor, and to avoid the time and expense of a retender. If termination is only at their option, it is easy to anticipate cases where the issue of “substantial change” will be ignored, leaving the “substantially modified” contract open to challenge and the incumbent contractor vulnerable. It would be useful in those circumstances if the contractor also had the right to terminate. Although he may in theory be able to protect his position through an application to the court under the Remedies Directive, that avenue will be impractical in most cases because of the legal and financial hurdles involved in bringing a case to the High Court.

A preliminary issue needing resolution in all cases of substantial change will be a determination of whether the change is indeed substantial. It will be necessary to establish a mechanism for deciding this issue in advance. One such mechanism could be expert determination, or recourse to a Government department or agency with expertise in this matter. Terminating contracts in the absence of a clear determination would leave the decision to terminate open to legal challenge.

#### Title IV Governance

##### Article 83 - Enforcement

Government must identify at the earliest possible opportunity the national structure / specific bodies, that will be responsible for fulfilling the various tasks set out in this Article, as well as the any more specific plans in relation the provision of training and guidance on the new Directives. Given the particular difficulties facing contractors in resolving procurement disputes with contracting authorities, there may be a role for Government to intervene between contracting authorities and contractors in cases of suspected infringement of the rules, for example with the establishment of an Ombudsman for Procurement. In this regard, contractors are faced with significant obstacles in seeking to enforce their legal rights to remedies for breaches of procurement law, which have proven to be insurmountable for all but the largest Irish contractors.

##### Article 86 – Administrative co-operation

Improved exchanges of information between procurement authorities in different Member States are to be welcomed. Contracting authorities will have better access to information concerning the equivalence of qualifications of tenderers based in other EU Member States and contractors will have better access to information concerning the qualification and other requirements of contracting authorities based in other EU Member States.

Government needs to ensure both that exchanges of information with other Member States take place and also that they respect to all applicable laws in regards to confidentiality and personal data protection.
 TITLE V - DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

Article 90 – Transposition and transitional arrangements

The CIF strongly recommends that sufficient time be allocated to careful and detailed consideration of the Directives before the required transposition into national law by April 2016. Although the increased flexibility offered by the new rules could be welcome, there is a concern that Ireland does not have the resources to complete all the necessary pre-implementation steps before the April 2016 deadline. These steps include: consultations with stakeholders, decisions in relation to all policy options offered by the new Directive, establishment of all new procedures, roll out of training across public and private sectors, drafting of guidance in relation to key features of the new rules.

The CIF view in relation to how to implement is that there are inherent risks involved in rewriting the text to make it easier to understand. These include the introduction of further ambiguity, questions over compatibility between the two texts (which could give rise to legal challenges) and the inadvertent gold-plating of certain requirements.

In relation to the requirement for full electronic procurement, it will certainly be necessary for the Government to postpone implementation until the extended deadline of 18 October 2018. In this regard, see discussion under Article 22, Electronic communications.
APPENDIX B
Detailed Consideration of New Utilities Directive

While much of the content of the new Utilities Directive is mandatory and cannot be altered in implementation, it does provide Government with a number of important options in relation to the overall strategy for implementation, the implementation of specific provisions and the establishment of new procedures. These policy options are largely similar to the policy options addressed in relation to the Public Contracts Directive at Appendix A and as such discussion and comment on the new Utilities Directive is limited to those few Articles where a different approach is taken.
### NEW UTILITIES DIRECTIVE

#### Title 1 – Scope, definitions and general principles

#### Chapter IV – General principles

**Article 42 – Conflicts of Interest**  
See discussion and comments on PCD Article 24.

#### Title II – Rules Applicable to Contracts

#### Chapter 1 – procedures

**Article 44 – Choice of Procedures**  
See discussion and comments on PCD Article 24.

**Article 50 - Negotiated procedure without prior publication**  
See discussion and comment on PCD Article 32 but note that the option given to Member States under the equivalent provision of the new Public Contracts Directive, is not available here.

#### Chapter II – Techniques and instruments for electronic and aggregated procurement

**Article 51 – Framework agreements.**  
See discussion and comment on PCD Article 33. The new Utilities Directive for the first time introduces rules on the call off of contracts under frameworks. It also states that the duration of framework contracts should not exceed 8 years (4 years under the Public Contracts Directive) “save in exceptional cases duly justified”. The extension of framework periods up to a potential duration of 8 years is of great cause for concern, as this is simply too long and may result in the exclusion of contractors from a particular type of work for the entire duration of the framework. Given that past experience of similar works can only be demonstrated in the last 7 years, the effect of an 8 year framework could conceivably be to exclude contractors from particular types of works perpetually as they will not be in a position to demonstrate the requisite experience. As such, frameworks should only be concluded for a maximum of 4 years as in the Public Contracts Directive.

#### Chapter III - Conduct of the procedure

**Section 1 - Preparation**

**Article 65 - Division of contracts into lots**  
See comments and discussion in relation to Article 46 but note that there is no equivalent to the requirement under the new Public Contracts Directive to divide contracts into lots or to explain why not. Further, Member States do not have the option of requiring Utilities to award certain contracts in lots.

**Article 80 – Use of exclusion and selection criteria provided for under Directive 2014/24/EU**  
The new Utilities Directive states that the objective rules and criteria for the exclusion and selection of candidates may include the exclusion grounds listed in Article 57 of the Public Contracts Directive. Further, where the Utility is also a contracting authority, then it is required to apply the grounds for mandatory exclusion listed at Article 57(1) and (2) of that Directive – this obligation does not apply to private sector utilities. Member States have the option of requiring Utilities which are also contracting authorities to apply the grounds for discretionary exclusion listed at Article 57(4) of that Directive, on the terms set out in that Article. The view of the CIF is that there appears to be no reason why the exclusionary grounds should not apply equally to public sector utilities as to other public sector contracting authorities.
APPENDIX C
Detailed Consideration of New Concessions Directive

The new Concessions Directive for the first time sets out a legal framework for the procurement of all concession contracts. It will apply to the procurement of works and services concessions, in both the public and utilities sectors, where the value of the contract is in excess of €5,186,000.

The concept of concession covers all contractual arrangements where the contractor or “concessionaire” is remunerated for carrying out the works or providing the services, by being granted the right to exploit those works or services, and in some cases that right plus payment. However for an arrangement to fall within the definition of concession set out in the Concessions Directive, in addition to the right to exploit, an element of operating risk must be passed on to the concessionaire. The risk must be such that the concessionaire is exposed to financial loss that is not “merely nominal or negligible”. Many arrangements which may be referred to as concessions do not meet this requirement. Such arrangements are likely to fall within the scope of the new Public or Utilities Contracts Directives and should be procured in accordance with the procedures set out in those Directives.

Much of the content of the Concessions Directive is mandatory and cannot be altered in implementation, however it does provide Government with a number of important options in relation to the overall strategy for implementation, the implementation of specific provisions and the establishment of new procedures. These options are set out in the Table at 3, which lists the articles of the Concessions Directive. Some of these options are similar to those already explained in the papers on the new Public Contracts and Utilities Directives. Where this is the case, cross-reference is made to the relevant articles in those Directives as discussed in Appendices A and B. Other options are unique to the Concessions Directive and are addressed herein. The table also highlights some of the novel and important features of the Concessions Directive.
NEW CONCESSIONS DIRECTIVE

Title 1 – Subject matter, scope, general principles, definitions and thresholds

Chapter 1 – Scope, definitions, general principles

Article 3 – Principle of equal treatment, non-discrimination and transparency

Procurement procedures must guarantee that all economic operators are treated equally, and without discrimination, and that they themselves must always act in a transparent and proportionate manner. Further the design of the procedure must not be made with the intention of excluding the concession from the scope of the Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services. The Article also reminds contracting bodies of the importance of respecting the confidentiality of tenderers’ information.

Section III – General provisions

Article 18 – Duration of the concession

The Directive requires that the duration of a concession is limited, and should be established “on the basis of the works or services requested”. The Directive specifies that for concessions lasting more than 5 years, the maximum duration should not exceed the time that a concessionaire “could reasonably be expected to take to recoup the investment made in operating the works or services, together with a return on capital taking into account the investments required to achieve the specific contractual objectives”.

Chapter II - Principles

Article 29 – Rules applicable to communications

Member States (or contracting bodies) are given the option of choosing the means of communication during the procurement process. However in accordance with Article 34, the actual procurement documents must be electronically available.

In the interest of streamlining procurement procedures across public and utilities sectors, there are potential advantages in applying the same approach to communications under the Concessions Directive as under the other new Directives. As such, electronic communication should be mandatory in accordance with the timetable set out in those Directives.

Title II – Rules on the award of concession general principles and procedural guarantees

Chapter 1 – General Principles

Article 30 – General Principles

Individual contracting bodies can be permitted to establish their own procurement procedures subject to compliance with Treaty principles (transparency, equal treatment, proportionality, etc), and various requirements flowing from these principles. Member States must take appropriate measures to ensure that in the performance of concession contracts, concessionaires comply with applicable national and international environmental, social and labour laws.

Government in implementing the Concessions Directive must decide whether or not to leave it to individual contracting bodies to establish their own procedures in accordance with the flexible framework of rules set out in the Directive, or whether to attempt to streamline procurement procedures across all three directives by modelling a general procedure for the award of concession contracts on an existing procedure such as the competitive procedure with negotiation which is available under the Public Contracts and Utilities Directive. There are advantages to both tenderers and contracting bodies of streamlining procedures across all three Directives, as this would result in greater transparency and consistency of approach which benefits contracting authorities and tenderers alike.

Article 35 – Combating corruption and preventing conflicts of interest

Similar to Articles in the Public Contracts and Utilities Directive, requiring Member States to take “appropriate action” to combat not only conflicts of interest as defined, but also fraud favouritism and corruption.

Chapter II – Procedural guarantees
**Article 38 – Selection of and qualitative assessment of candidates**

Member States have the option of making compliance with discretionary grounds mandatory, as with the Public Contracts Directive option in relation to this, CIF is of the view that this would not be appropriate and flexibility should be maintained with regards to discretionary grounds for exclusion.

**Article 41 – Award criteria**

Similarly to Article 30 above, contracting bodies are free to choose their own award criteria, provided that the criteria comply with certain listed requirements i.e., they must be objective, respect Treaty principles, be linked to the subject-matter of the concession, and not confer an unrestricted freedom of choice on the contracting body. It would be advantageous here to take the opportunity to streamline award criteria across all three Directives as this would result in greater transparency and consistency of approach which benefits contracting authorities and tenderers alike.
APPENDIX D

Responses to Questions issued by Office of Government Procurement
Transposition of the new EU Procurement Directives Consultation
Document
Several of the questions posed by the consultation document ask that stakeholders comment on whether measures required by the Directives should be imposed by way of regulatory or administrative measures. As a general comment to the foregoing, it is preferable that where new measures are to be imposed, that these be dealt with in a manner that can be amended without significant difficulty should issues arise regarding the manner in which they are to be complied with. As such, the CIF would have a preference for the use of administrative rather than regulatory measures, or an appropriate blend of both, as terms in standard contract clauses can be more readily amended than legislation.

**QUESTION 1: ENVIRONMENTAL, SOCIAL AND LABOUR LAW**
Stakeholders are asked to comment on the approach for implementing Article 18(2) requirement, which may be done by regulatory measures or by including in terms of standard contract clauses.

It may be preferable as outlined generally to take the approach of using the terms of the contract to ensure compliance with environmental, social and labour law, so as to ensure consistency of approach across public procurement functions. The introduction of such measures could result in the exclusion of some contractors from the procurement process or the imposition of additional costs associated with confirming compliance. As such it is vital that the CIF be consulted by Government in relation to the substance and form of any eventual compliance measures.

Guidance documents must be provided to contractors in order to ensure that they are aware of what the obligations relating to “environmental, social and labour law” constitute in the Irish context, as this is an extremely broad definition. Furthermore, no new obligations should be imposed without appropriate consultation.

It is also imperative to ensure that training and guidance is made available to contracting authorities on compliance with their measures put in place to comply with this Article, to ensure consistency of approach across the public sector.

**QUESTION 2: GROUP PARTICIPATION OF ECONOMIC OPERATORS**
Stakeholders are asked to state whether Ireland should 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.

The CIF is of the view that it would be preferable for standard terms to be established in order to set out clearly the manner in which requirements are to be met by groups of economic operators, to allow for consistency of approach and transparency. In the past, it has been unclear for contractors tendering on the basis of a joint venture as to how financial and other criteria can be demonstrated, and as such standard terms would facilitate the forming of joint ventures/consortia for projects. This would in turn provide better guidance for SMEs considering such ventures.

Should the Government seek to introduce standard terms for how groups of economic operators are to meet requirements as to economic and financial standing or technical and professional ability, the CIF requests to be consulted in relation to the development of the standard terms given the direct impact such measures will have on contractors and other economic operators seeking to qualify together for public contracts.

It is also vital to ensure that appropriate training and guidance is made available to contracting authorities, as well as guidance documentation for tenderers on the implementation of these standard terms, to ensure consistency of approach across the public sector.

**QUESTION 3: ELECTRONIC COMMUNICATIONS AND E-PROCUREMENT**

a. Stakeholders are asked to consider whether the details of a framework should be set out in the Regulation or if it is preferable to provide non-statutory advice and guidance and a cross-reference to existing policies and best practice. As per the general comment, it would be preferable to favour non-statutory advice and guidance or an appropriate blend of both including guidance documents to tenderers outlining their obligations.

b. Stakeholders are asked to say whether they favour the use of advanced electronic signature

The use of advanced electronic signatures as outlined in the Directive would impose significant costs on both users and SMEs, particularly given the concerns already expressed by the CIF about the availability of adequate broadband infrastructure across the country. The Directive intends the use of such signatures for situations in which electronic procurement is deemed to hold a risk, and the CIF does not view that the electronic procurement of works contracts would fall into this category. As such it is not considered necessary to introduce electronic signatures.

c. Stakeholders are asked to indicate if they favour mandating the use of e-Catalogues for certain types of procurement

The format of an electronic catalogue is as yet unclear and as such, it is difficult to say whether or not it would be appropriate for use in the procurement of works contracts. In the event that such a format for tendering was introduced in the procurement of works contracts, it would be essential to ensure that adequate training was provided to those using it.
QUESTION 4: CONFLICTS OF INTEREST
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

The CIF would have a preference for the use of administrative rather than regulatory measures, or an appropriate blend of both, for the implementation of any policy on conflicts of interest which should be developed in consultation with industry. Any such policy must be compliant with the requirements set out in the Directive and applied coherently across the public sector. The overarching requirement of any policy is that it must be proportionate and should not lead to the exclusion of contractors from procurement procedures in cases where the conflict can be addressed through other means. Training and guidance must be provided in order to ensure consistency of approach across the public sector.

QUESTION 5: PROCEDURES

a. Stakeholders are asked to state whether Ireland should avail of the choice to allow use the negotiated procedure without a call for competition in circumstances specified in Article 32. There seems no reason why the State should not avail of the choice to allow use of the negotiated procedure without a call for competition given the very limited circumstances in which this is permissible, although it is imperative to ensure that guidance and training is provided to contracting authorities on this.

b. Stakeholders are asked to state whether they favour having the flexibility provided for in 28(4) and if not, why. The view of the CIF is that it is not appropriate to allow sub-central contracting authorities to fix their own time limits. Allowing flexibility to sub-central contracting authorities to set time limits for receipt of tenders by agreement will cause difficulties for contractors who need a certain element of certainty of timing in order to properly plan their resources. Any additional flexibility in setting timelimits should be balanced against the potential for confusion.

c. Stakeholders are asked to state whether they favour permitting sub-central authorities to use a PIN as a call for competition and why. This provision already exists under the Utilities Directive, and the CIF does not feel that permitting it under the Procurement Directive would cause any difficulty. It would be of great importance to ensure that the market is made aware of any such change however to ensure that tenderers do not miss out on potential opportunities.

QUESTION 6: CENTRAL PURCHASING BODIES
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

CIF is concerned generally about the potentially exclusionary nature of the various forms of aggregated procurement. It will be important if the option regarding CPBs is implemented to ensure that the procurements to be made using specific CPBs be clearly set out in guidance to tenderers for clarity. CIF is also concerned regarding the fact that CPBs are required to use full electronic procurement at an earlier date than traditional contracting authorities, i.e. April 2017. Participation in full electronic tendering will have a significant cost impact on contractors requiring substantial upfront investment in technology and training. Government will need to clarify the timetable for the introduction of full electronic procurement for CPBs well in advance of its actual introduction, to allow the necessary investments to be made. Government should also be strongly encouraged to support both tenderers and contracting authorities in making the transition. Relevant issues in this regard include the provision of financial aid (loans and/or grants), as well as the provision of training and guidance.

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.

CIF is of the view that division of contracts into appropriate lots is to be welcomed and will be of benefit to SMEs. It will be important to ensure that guidelines are in place in relation to the value or size of a project that is expected to be divided into lots, and that the relative size of the economy and the construction companies forming part of the industry as against other European nations is taken into account in the establishment of any such guidance.

QUESTION 8: EXCLUSIONS OF ECONOMIC OPERATORS FROM PUBLIC PROCUREMENT FOR VARIOUS OFFENCES, FAILURES AND TRANSGRESSIONS

8.1 Mandatory Exclusions
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? The CIF is in favour of allowing the derogation so as to maintain flexibility for contracting authorities.
8.2 Discretionary Exclusions

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.

The CIF is of the view that any discretionary grounds for exclusion should not be made mandatory, so as to maintain flexibility for contracting authorities.

8.3 Period of exclusion

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.

The CIF is of the view that the time period of exclusion should be dependent of the severity of the ground on which said exclusion is based. At the very least, where a tenderer has been excluded on a particular ground, that tenderer should remain excluded until such time as the situation giving rise to the ground for exclusion has been rectified.

**QUESTION 9: TENDER ASSESSMENT**

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

a. Do stakeholders have any difficulty with the provision allowing contracting authorities to ask for incomplete or incorrect information to be supplemented by economic operators and, if so, why?

The CIF does not have any difficulty with the provision allowing contracting authorities to ask for incomplete or incorrect information to be supplemented by economic operators as it is of the view that it would not be sensible for the Government to impose restrictions.

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.

The CIF is of the view that it would be preferable to prohibit the use of price only or cost only as the sole award criterion. The use of price as the only award criterion can lead to a situation of below cost tendering, which can more easily be avoided where quality is also taken into account in awarding a contract. Should the Government opt to retain the use of price only or cost only, it should be allowed as the sole award criterion only in very limited circumstances, to be set out in guidelines.

Consultation will need to take place with the CIF in regards to the criteria other than price to be used for the awarding of contracts, with the value of the project to be taken into account in considering the appropriate weighting and criteria to be used. It is essential to ensure that criteria to be used in the award of public contracts can be objectively assessed to ensure consistency of approach across the public sector, and to ensure that the criteria used do not confer an advantage on larger contractors and cause a detrimental impact on SMEs.

**QUESTION 10: SUB-CONTRACTING**

There are a number of choices:

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.

The view of the CIF is that requiring bidders to indicate in their proposal ANY share of the contract that they may intend to sub-contract to third parties and the details of any proposed subcontractors may be difficult deal with at tender stage. However, where it is appropriate the sub-contractors should be named. In such circumstances it may also be appropriate to consider the use of novation as an alternative.

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

Placing a requirement on main contractors to provide information about its sub-contractors and supply chain to the contracting authority places an administrative burden on both the main and sub contractors and in the view of the CIF is simply not feasible. If the government were to decide to implement such an obligation, the specific information required should be clearly delineated so as to limit such burden.

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.

The requirement to replace subcontractors where mandatory grounds for exclusion apply, and possibly where discretionary grounds for exclusion apply, could result in considerable programming delays for main contractors. Any requirements to replace subcontractors should be accompanied by arrangements to compensate main contractors for consequent losses, particularly in cases where the subcontractor was selected by the contracting authority. As has been stated in relation to exclusionary grounds for main contractors, any discretionary grounds for exclusion should not be made mandatory, so as to maintain flexibility for contracting authorities.
Appendix D

d. Whether or not to provide for direct payments to contractors

In the event that Government opts to allow direct payments to subcontractors, the circumstances where such payments will be made and if applicable, the trade packages and subcontractors involved, must be clearly identified in the tender documents. In the absence of adequate upfront information concerning the arrangements for direct payments, such payments should only be permitted in limited appropriate circumstances, such as where a dispute has arisen and the client has exercised a step-in right. Any arrangement permitting direct payments must include a procedure allowing the main contractor to object to such payments, and ensure that his objections are taken into account before any decision on direct payments is made.

QUESTION 11: TERMINATION OF CONTRACTS

Stakeholders are asked to indicate if they disagree with the proposed approach, which would be that the S.I. states 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.

While the proposed approach is indeed in the nature of a right to cancellation rather than automatic termination and this flexibility is welcomed by the CIF, substantial guidance will need to be provided on the circumstances in which it is appropriate to terminate in the event that one of the grounds for termination applies, in order to ensure consistency of approach across the public sector. Irrespective of the manner in which Government opts to fulfil these obligations, it will be of vital importance to address not only the circumstances giving rise to the termination but also the applicable procedures (e.g., requiring notice of termination to be given, mechanisms for determining existences of the right to cancel, appeals procedures, redress), and any consequential matters that may arise from the termination including the question of compensation for the incumbent contractor.

QUESTION 12: LIGHT TOUCH REGIME

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

As this regime is not applicable to construction works, the CIF has no view on its implementation.