



Oifig um Sholáthar Rialtais  
Office of Government Procurement

## Information Note

# **Covid-19 (Coronavirus) and Public Procurement**

**Update – September 2021**



Rialtas na hÉireann  
Government of Ireland

## National Public Procurement Policy Framework

Public procurement is governed by EU and national rules. The [National Public Procurement Policy Framework](#) sets out the overarching policy framework for public procurement in Ireland and comprises five strands.

1. Legislation (Directives, Regulations)
2. Government policy (Circulars etc.)
3. Capital Works Management Framework for Public Works
4. General Procurement Guidelines for Goods and Services
5. More detailed technical guidelines, template documentation and information notes as issued periodically by the Office of Government Procurement's Policy Unit

The framework sets out the procurement procedures to be followed by Government Departments and State Bodies under national and EU rules. The framework supports contracting authorities, including the Office of Government Procurement, the four key sectors (Health, Education, Local Government and Defence), individual Departments, Offices, commercial and non-commercial State bodies, and private entities which are subsidised 50% or more by a public body, when awarding contracts for works, goods and services. It supports and enables public bodies to adopt procedures to meet their public procurement obligations and facilitates compliance with EU and national procurement rules.

This information note is dynamic in nature and will be subject to amendment and review periodically. Therefore, we would encourage officials to check our website [www.ogp.gov.ie](http://www.ogp.gov.ie) for the most up-to-date version.

It should be noted that this information note is not intended as legal advice or a legal interpretation of Irish or EU law on public procurement.

### Key messages

- The original *Covid-19 (Coronavirus) and Public Procurement Information Note* supported contracting authorities in managing procurements in cases of extreme urgency as the pandemic unfolded.
- The present update emphasises a return to the use of competitive procedures where extreme urgency is no longer a consideration, in particular the onset of the pandemic and the imposition of Government restrictions.
- The updated note covers options that may be considered by contracting authorities in relation to procurements under the [S.I. No. 284/2016 – European Union \(Award of Public Authority Contracts\) Regulations 2016](#) (the Procurement Regulations) which apply to public procurement procedures above certain thresholds.
- Included is a reminder regarding reporting obligations for contracts awarded without a competitive process under [Circular 40/2002](#) and the [Code of Practice for the Governance of State Bodies](#) and a reminder regarding the use of prompt payment procedures.

### Update tracker

- The *Covid-19 (Coronavirus) and Public Procurement Information Note* was first published in March 2020.
- This update, published September 2021, takes account of the utilisation of Regulation 32(2)(c) highlighting that it is generally no longer reasonable to consider the onset of the pandemic or consequent restrictions as adequate reasoning for extreme urgency due to unforeseen events. As such, this updated note incorporates a number of amendments and additions to the text with particular regard to the onset of Covid-19 and consequent Government restrictions.

# 1. Public procurement and use of competitive procedures in the current Covid-19 landscape

At its outset, the Covid-19 (Coronavirus) pandemic created an urgent need for contracting authorities to quickly respond and to protect the health of their staff and the public. The spread, containment and control of Covid-19 meant contracting authorities came under pressure to ensure continued delivery of essential goods and/or services in very challenging circumstances. In addition, contracting authorities had to urgently adapt their existing services, in some cases create new ones, and establish different working environments, be that working from home or in the workplace, which accorded with the Government's framework for restrictive measures, [Reframing the Challenge, Continuing Our Recovery and Reconnecting](#).

In recognition that contracting authorities needed support and assistance in managing procurements in these circumstances, the Office of Government Procurement (OGP) issued the Covid-19 (Coronavirus) and Public Procurement Information Note in March 2020. Because the Covid-19 situation has altered to a significant extent, and because measures put in place in response to the onset of the pandemic are better established than at its beginning, this note has been updated to take account of this progress.

It is critical that the State continues to effectively and efficiently invest in public infrastructure, achieve value for money and provide support to people and businesses impacted by the pandemic. The awarding of contracts on the basis of objective criteria, in accordance with procurement regulations and which ensure compliance with the principles of transparency, non-discrimination and equal treatment are key to achieving value for money through competitive procedures.

In the context of this information note, where a procurement is unaffected by Covid-19 related urgency, contracting authorities are obliged to use competitive procedures to ensure value for money, transparency and equal treatment, as detailed in the [National Public Procurement Policy Framework](#) and [Public Procurement Guidelines for Goods and Services](#).

Contracting authorities continue to be responsible for compliance with public procurement regulations and requirements. This updated information note is designed to assist and provide information on relevant procurement options available to contracting authorities.

## 2. Procurement options in cases of unforeseeable events

### Direct award due to reasons of extreme urgency

S.I. No. 284/2016 – European Union (Award of Public Authority Contracts) Regulations 2016 has provisions to allow contracting authorities enable the continuation of essential services at times of extreme urgency.

Regulation 32(2)(c) sets out the following:

*“A negotiated procedure without prior publication may only be used for public works contracts, public supply contracts and public service contracts in any of the following cases:*

*... (c) insofar as is strictly necessary where, for reasons of extreme urgency not attributable to the contracting authority and brought about by events unforeseeable by the contracting authority, the time limits specified for the open procedures or restricted procedures or competitive procedures with negotiation cannot be complied with.”*

Contracting authorities may enter into contracts without a competitive process or advertising the requirement so long as they are able to demonstrate all of the following tests have been met.

1. There are genuine reasons for extreme urgency, for example:
  - the need to respond to Covid-19 consequences immediately because of new and unforeseen public health risks, Government restrictions, the loss of existing provision of goods and/or services at short notice and, in cases of genuine emergency.
2. The events leading to the need for extreme urgency were unforeseeable because, for example:
  - of changes in the virus, or public health restrictions, with consequences that could not have been predicted.
3. It is not feasible to comply with the usual timeframes set out in the regulations because, for example:
  - there is no time to run an accelerated procurement under an open, restricted or competitive procedure with negotiation, and

- there is no time to issue a request for tender or contract under an existing commercial agreement such as a framework or dynamic purchasing system.
- 4. The situation is not attributable to the contracting authority because, for example, of a delay or failure to act on their part that could have led to, or contributed to, the need for extreme urgency.

Contracting authorities are required to keep a written justification that satisfies the above tests. A separate assessment of each test must be completed before undertaking any subsequent or additional procurement to ensure that the conditions of urgency still apply, particularly to ensure that the events are unforeseeable. For example, the onset of the Covid-19 pandemic itself can no longer be viewed as an unforeseeable condition.

A negotiated procedure without prior publication should be limited to only what is absolutely necessary both in terms of what is being procured and the length of contract.

Delaying or failing to procure in a timely manner does not qualify as extreme urgency, unforeseeable or not attributable to the contracting authority as:

- contracting authorities should allow sufficient time and planning to allow for the use of competitive procedures,
- competitive alternatives (for example, an accelerated open procedure) can be completed quickly, and
- knowing that something needs to be done means that it is foreseeable, and a delay or failure to act in a timely manner may mean that the urgency can be attributed to the contracting authority.

Due to the elapsed time since the onset of the Covid-19 pandemic and consequent restrictions introduced by Government and the establishment of new normal working conditions, it is generally no longer reasonable to consider the onset of the pandemic or consequent restrictions as adequate reasons for extreme urgency due to unforeseen events in the application of Regulation 32(2)(c). Circumstances may, however, continue to arise where the application of Regulation 32(2)(c) is appropriate and each situation will require its own assessment and is fact specific. In cases where Regulation 32(2)(c) is relied on, it must be fully justified, including a confirmation that the accelerated procedures would not suffice, the events were unforeseeable by the contracting authority and the reasons for extreme urgency were not attributable to the contracting authority.

Where contracting authorities have entered into interim arrangements established due to urgency, these contracts should now be advertised on the [eTenders](#) platform and the [Official Journal of the European Union \(OJEU\)](#) as appropriate.

## Direct award due to absence of competition or protection of exclusive rights

Regulation 32(2)(b) sets out that the negotiated procedure without prior publication may be used:

*(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:*

*(i) the purpose of the procurement is the creation or acquisition of a unique work of art or artistic performance;*

*(ii) competition is absent for technical reasons;*

*(iii) the protection of exclusive rights, including intellectual property rights;*

*... only where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.*

Therefore, a contracting authority may make a direct award where the works, goods or services needed can only be supplied by a particular supplier because:

- competition is absent for technical reasons, for example, there is only one supplier with the expertise to carry out the work, produce the product or with capacity to complete on the scale required, or
- the protection of exclusive rights, including intellectual property rights, for example,
  - the supplier owns those rights (including intellectual property rights), and
  - it has the exclusive right to exploit intellectual property rights.

These conditions are applicable where:

- there is no reasonable alternative or substitute available, and

- the contracting authority does not artificially narrow down the scope of the procurement, for example, by over-specifying the requirement.

Contracting authorities are required to keep written justification that satisfies these tests. A separate assessment must be carried out before undertaking any repeat procurement to ensure these tests have been met. Similarly if a government department or a body under its aegis makes a direct award above €25,000 (ex. VAT), this must be reported in line with [Circular 40/2002](#) at the appropriate time.

### 3. Using a standard procedure with accelerated timescales due to urgency

Contracting authorities can reduce the minimum timescales for the open procedure, the restricted procedure and the competitive procedure with negotiation if a state of urgency renders the standard timescales impracticable. While, minimum time limits can vary (see Regulations 27(4), 28 and 29 respectively), for procurements under the open procedure, timescales can be reduced to 15 days for receipt of tenders plus the minimum 10 days for the standstill period. However, reducing the time period for tender responses is likely to impact on the level of interest in the competition.

There is no express requirement for the situation to be unforeseeable or not attributable to the contracting authority but the OJEU notice should set out a clear justification, along the following lines:

*“[explanation of urgency] has given rise to an urgent need for the supply of [description of what is being procured]. This does not give [name of contracting authority] sufficient time to comply with the standard [open procedure / restricted procedure / competitive procedure with negotiation] timescales for this procurement. [Contracting authority] considers this to be a state of urgency which it has duly substantiated. Accordingly, [contracting authority] is using the accelerated time limits permitted under the Public Contract Regulations 2015 (regulation [27(5) for the open procedure / 28(10) for the restricted procedure / 29(10) for the competitive procedure with negotiation]) in respect of this procurement”.*

## 4. Social and other specific services (Light Touch Regime)

Contracting authorities may also consider the use of the Light Touch Regime (LTR) for specific health and social care related services (see Q&A at the end of this note for a list of eligible services). While LTR competitions must be advertised in OJEU and contract award notices published, there is flexibility around the use of the procedure to run the procurement. There is no requirement to use the standard EU procurement procedures (open, restricted and so on). This flexibility also extends to timelines as long as they are reasonable and proportionate.

## 5. Extending or modifying a contract during its term

Regulation 72 sets out the following:

*72. (1) Contracts and framework agreements, including contracts awarded in accordance with Regulation 74, may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases:*

*(c) where the following conditions are fulfilled:*

*(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;*

*(ii) the modification does not alter the overall nature of the contract;*

*2(b) Notwithstanding paragraph (1)(c)—*

*(i) any increase in price shall not exceed 50% of the value of the original contract or framework agreement,*

*(ii) where several successive modifications are made, that limitation shall apply to the value of each modification, and*

*(iii) consecutive modifications referred to in clause (ii) shall not be aimed at circumventing these Regulations.*

Contracting authorities should keep a written justification that satisfies these conditions, including limiting any extension or other modification to what is absolutely necessary to address the unforeseeable circumstance. This justification should explain your decision to extend or modify the particular contract(s) with reference to specific facts. Contracting

authorities are required to publish a notice of such modification of a contract in the OJEU in accordance with Regulation 72(3).

Multiple modifications in this context are permissible, however each one should not exceed the 50% of the original contract value. Contracting authorities should also consider limiting the duration and/or scope of the modification and running a procurement for longer-term/wider-scope requirements alongside it.

There are other grounds available under Regulation 72 for extending contracts, including: if the proposed variation has been specifically provided for in the contract; where a change of contractor cannot be made for economic or technical reasons, and where the modifications are not substantial. If more than one ground is applicable, this should be included in your written justification.

## 6. Records and reporting obligations

Contracting authorities are obliged to document the reasons for choosing a non-competitive procedure in accordance with Regulation 84(1)(f) of the Procurement Regulations and these should be retained for audit purposes.

All awards of contracts above €25,000 ex VAT (including extension or roll-over of existing contracts beyond the procured term) undertaken without a competitive process must be reported to the Comptroller & Auditor General in accordance with [Circular 40/2002](#) with a copy submitted to OGP. Accounting Officers are required to confirm that, for all such procurements, the contract prices were fair and reasonable and represented best value for money. Such reports are required to be submitted promptly by the end of March each year.

For state bodies, adherence to the relevant procurement policy and procedures and details of non-competitive procurement should be reported in the chairperson's comprehensive report to the Minister in accordance with the [Code of Practice for the Governance of State Bodies](#). A State body's statement on its system of internal controls should also include confirmation that the body is in compliance with current procurement rules and guidelines as set out by OGP.

## 7. Further advice from Office of Government Procurement

OGP are advising contracting authorities to continue to monitor their supplier bases to assess their exposure to potential supply chain disruption as a result of Covid-19 restrictions both nationally and internationally and, also, in respect to [Brexit](#). This information-gathering exercise should identify the extent to which contracting authorities are dependent on markets which may be impacted by restrictions as result of Covid-19.

The potential impact on their ability to provide services if there is a disruption to these supply chains should be considered. Contracting authorities should also consider and implement mitigation steps to ensure the continuation of services.

Accordingly, OGP advises contracting authorities to manage their risks and to develop a clear understanding of how any supply chain disruption will impact on the contracts that underpin them. Each contracting authority is best placed to gauge its level of exposure either directly or indirectly. While it is acknowledged that each organisation will have different supply needs, the following are some areas that should be considered when carrying out new procurement procedures and managing current contracts:

- Consult the Government's information sources for updates on Covid-19 including [www.gov.ie](http://www.gov.ie) and [HSE](#).
- Consult [OGP website](#) for the latest information on public procurement rules.
- Check what public procurement frameworks are in place through the five central purchasing bodies, [OGP](#), [Education Procurement Service](#), [Defence](#), [Health Business Service](#) and [Local Government Operational Procurement Centre](#).
- Examine all categories and sub-categories for the following:
  - location of suppliers and sub-suppliers,
  - current delivery time and the transport route of the goods or supplies concerned,
  - if there is the possibility of inconsistent or delayed delivery of goods, examine how might this impact on your organisation's ability to deliver public services,
  - if necessary you may need to plan or develop your organisation's capacity to buy in bulk (cash-flow implications) and hold stock (warehousing options) or manage supply to take account of possible delays in delivery, and

- examine the market to gain knowledge of alternative sources or routes of supply.

In short, contracting authorities should assess each supplier's relative importance and take appropriate action to ensure continuity of essential services.

## 8. Reminder of prompt payment procedures

The Government is committed to making every effort to pay its suppliers promptly. In this regard, the Government extended the non-statutory requirement applicable to central Government departments to all public bodies from July 2011, to reduce the payment period by contracting authorities to their suppliers from 30 to 15 days. Every effort, consistent with proper financial procedures, is being made to ensure that all suppliers are paid within this timeframe. In this regard suppliers can help by ensuring that:

- correct invoices are sent in the manner that has been instructed by the contracting authority, and
- accurate bank account details are provided.

In the case of all public sector contracts of a value of €10,000 (inclusive of VAT) or more within any 12-month period, the contractor will be required to produce a valid tax clearance certificate. This is a mandatory requirement. Full details on tax clearance procedures may be found on the [Revenue Commissioners](#) website.

## 9. Outline of prompt payment of accounts legislation

Payment of invoices is governed by the Prompt Payment of Accounts Act, 1997 as amended by the European Communities (Late Payment in Commercial Transactions) Regulations 2012 - S.I. 580 of 2012. The Regulations, which apply equally to the public and private sectors, provide an automatic entitlement to interest and compensation if payment for commercial transactions is late (valid invoices which are unpaid after 30 days from the date of receipt).

Payment of interest and compensation cannot be waived by the supplier and must be included with the amount payable for the goods or services without demand for its payment being made by the supplier.

From 1 July 2021, the late payment interest rate is 8% per annum (based on the ECB rate of 0.00% plus the margin of 8%). This rate equates to a daily rate of 0.022%. Penalty interest

due for late payments should be calculated on a daily basis. The ECB rate can be checked on the [Central Bank](#) and Financial Services Authority of Ireland website or on the [European Central Bank](#) website.

It should be noted that the legislation does not oblige payment to be made to a supplier who has failed or refused to comply with a request to produce a tax clearance certificate and it expressly extends the statutory time limit for payment where there are delays in furnishing a tax clearance certificate. Also, the Act does not affect the deduction of withholding tax from any payment to a supplier.

## 10. Actions by Office of Government Procurement

OGP, as part of the Department of Public Expenditure and Reform, has been addressing the implications of Covid-19 as part of the Government's overall response. OGP will continue to engage with our public sector clients and, in particular, the HSE to forecast additional demands for key goods. We are working with suppliers on our frameworks to understand any potential supply chain implications and to manage their impact. This includes framework members that supply critical goods/services, such as, food, cleaning, hygiene supplies and fuel, to assess and advise on any likely supply disruptions. In order to ensure continuity of services, contracting authorities should continually assess their supply chains for any possible impact that Covid-19 related events might have on a given supply.

It is important to recognise that there may be no one single solution and each contract and solution may need to be tailored for each individual business need. OGP can offer support in terms of operational management and supply chain expertise. Please contact our helpdesk at [support@ogp.gov.ie](mailto:support@ogp.gov.ie).

### Capital Works Management Framework

Since the onset of the pandemic in early 2020, OGP has issued regular guidance to contracting authorities party to a standard-form public works contract regarding the closure, re-opening, and forthcoming tenders of public works projects in the era of Covid-19.

Between March 2020 and May 2021, this guidance included providing several releases of guidance and contractual documents designed to give effect to a scheme of ex gratia payments for contractors on projects shut down due to the Government's Covid-19 health measures. The purpose of these ex gratia payments was to share the costs of site closure—for which, otherwise, the public works contracts provided no relief—in order to protect the [National Development Plan](#) and the delivery of works projects across the public sector.

In May 2020, when sites were first permitted to re-open, OGP issued further guidance designed to ease the return to sites. This included a template 'pre-start' checklist as well as a new contract letter agreement, namely the [Covid Co-operation Framework](#). This framework was drafted to provide employers with the contractual means to share the additional costs of on-site construction operations due to the implementation of a new [Return to Work Safely Protocol](#).

Most recently, in July 2021, OGP published amended versions of the template public works contracts themselves. These amended contracts now place provisions similar to those of the ex gratia scheme on a permanent footing within the public works contracts, providing a clear process for both the extension of time and the sharing of costs in the event of any future shutdown of the construction sector or any individual construction site due to public health restrictions associated with controlling the spread of Covid-19. Aside from enabling employers and contractors to move quickly to stabilise the project in the event of any such closure, this amendment also enables contractors to more accurately price the risk of Covid-19-related shutdowns when tendering for public works projects, providing the state with greater price certainty.

Full details of the above measures, as well as any future updates, can be found on the Capital Works Management Framework website, [constructionprocurement.gov.ie](https://www.constructionprocurement.gov.ie).

## 11. Further information in relation to Covid-19

For regular updates on Government contingency planning in relation to Covid-19, please visit [www.gov.ie](https://www.gov.ie).

Further information is also available from:

- [COVID-19: Reframing the Challenge, Continuing Our Recovery and Reconnecting](#)
- [Health Service Executive](#) (HSE)
- [Health Protection Surveillance Centre](#) (HPSC)
- [World Health Organization](#) (WHO)
- [European Centre for Disease Prevention and Control](#) (ECDC)
- [European Commission \(Coronavirus response\)](#)

**Note: Please check OGP website to ensure that you have downloaded the most recently published version of this information note.**

## Questions and answers relating to issues that may arise in relation to public procurement and Covid-19

Q. What are the options for contracting authorities in the event of supply chain disruption because of restrictions or requirements imposed because of Covid-19?

A. 

- **Modifying a contract**

The options in relation to modifying a contract are outlined in section 5 above.

- **Terminate a contract**

Procurement legislation requires contracting authorities to include provisions in all above EU threshold contracts that allow them to terminate the contract where the contract has been subject to substantial modification that would have required a new procurement procedure. Contracting authorities should consider other short-term arrangements, rather than termination, where contracted suppliers may not be in a position to supply goods or services at this time through no fault of their own. The important issue in the short term is to ensure the continued provision of public services. Such 'arrangements' ought to only be utilised for as long as strictly necessary.

- **Utilisation of centralised procurement arrangements**

Contracting authorities which have been impacted by Covid-19 are urged to consider, where appropriate, if there are any current sectoral<sup>1</sup> arrangements in place, that is, framework agreements that could meet requirements and have 'direct award' call-off contracts which may be utilised in a short space of time. In such cases, all procedures of the framework agreement would have to be followed, including the scope of any call-off contract.

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<sup>1</sup> [OGP](#), [Education Procurement Service](#), [Defence](#), [Health Business Service](#) and [Local Government Operational Procurement Centre](#).

Q. Will OGP standard template documents for goods and general services change to take account of Covid-19?

A. No. However, OGP constantly reviews all guidance and template documentation and will be considering any appropriate amendments necessary as a result of Covid-19 contingency measures.

Q. Have OGP standard template documents for works been changed to take account of Covid-19?

The template Public Works Contracts have been updated as set out in section 10 above. For further information, see the Capital Works Management Framework website, [constructionprocurement.gov.ie](http://constructionprocurement.gov.ie).

Q. What constitutes a verifiable audit trail?

A. Accurate written records (including computer records) are essential in demonstrating that proper ethical standards have been observed. Therefore, appropriate records should be maintained throughout the purchasing process. eTenders provides a detailed audit trail of the procurement process from contract notice through to award notice and contract management. A checklist for assessing the necessary elements of a procurement and contract file is available in the [Public Procurement Guidelines for Goods and Services](#), Appendix VII: Checklist for Procurement and Contract File.

Q. What happens if the situation regarding Covid-19 worsens resulting in further unforeseen and urgent circumstances?

A. It is recognised that in some cases, public bodies may need to make use of the provisions (Regulation 32(2)(c)) set out in procurement law relating to exceptional circumstances in order to award contracts without competitive processes.

In addition, there are a number of important considerations:

- A contracting authority may at its own discretion decide not to award any contract and to cancel the entire contract award procedure at any time during the procurement process. This may be necessary where resources are to be reallocated or diverted from the original procurement including for reasons related to Covid-19.
- Depending on the nature of the supply chain and exposure to international markets, contracting authorities should assess the market to determine whether

delaying the procurement procedure would make sense. Contracting authorities may also assess whether extensions of tender procedures/deadlines are required in ongoing competitions are necessary, to allow sufficient time for economic operators to respond etc.

- Contracting authorities need to keep communicating with suppliers to understand their supply chain.
- Location – the contracting authority should identify as far as possible its contractor's supply chain to determine any potential issues.
- Delivery, risk and payment – contracting authorities may need to consider purchasing items in bulk or alternatively requiring the contractor to hold a certain level of stock within Ireland for the contracting authority. This could be construed as a change to the contract and as such contracting authorities may also need to amend the tender documents and possibly the contract notice to reflect this.

Furthermore, assistance and support is available via our telephone and email services at [support@ogp.gov.ie](mailto:support@ogp.gov.ie) or 076 100 8000.

**Q. What services fall under the Light Touch Regime?**

A. Services that fall within this category are explicitly listed (with CPV codes) in Annex XIV of Directive 2014/24/EU. There are 14 categories of services and these are listed below:

- Health, social and related services
- Administrative social, educational, healthcare and cultural
- Compulsory social security services
- Benefit services
- Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
- Religious services
- Hotel and restaurant services
- Legal services not excluded by Article 10(d) of Directive 2014/24/EU
- Other administrative services and Government services

- Provision of services to the community
- Prison related services, public security and rescue services not excluded by Article 10(b) of Directive 2014/24/EU
- Investigation and security services
- International services
- Postal service
- Miscellaneous services