



**GUIDELINES IN RELATION TO THE MAKING OF
FINANCIAL COMMITMENTS ON BEHALF OF RTÉ
& COMPLIANCE WITH EU & OTHER PUBLIC
PROCUREMENT REGULATIONS**

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A MESSAGE TO PEOPLE RESPONSIBLE FOR THE MAKING OF FINANCIAL COMMITMENTS AND TO BUYERS GENERALLY

Financial Commitments bind RTÉ and therefore must be authorised and executed entirely in accordance with RTÉ's rules and with its system of internal financial control. The person responsible for managing any given procurement process is by definition also responsible for ensuring that these rules are fully complied with.

A central element of these rules is that all Financial Commitments must receive managerial and financial approval and in the case of significant commitments such approval must be given in advance of any oral or written commitment being offered to a supplier.

RTÉ is a public body and thus its approach to the procurement process reflects not only good business practice in relation to the making of Financial Commitments generally but also encompasses the rules and regulations promulgated nationally and by the EU. In that context, public procurement activity can be defined as the acquisition, whether under formal contract or not, of works, supplies and services by public bodies. It ranges from the purchase of routine supplies or services to formal tendering and placing contracts for large projects.

It is a basic principle of both good internal control and of appropriate public procurement processes that a competitive procedure should be used unless there are justifiably exceptional circumstances. The type of competitive process can vary depending on the size and characteristics of the contract to be awarded.

It is very important to ensure that all procurement activity is discharged honestly, fairly, and in a manner that secures best value for money. RTÉ must be cost effective and efficient in the use of resources while upholding high standards of probity and integrity.

The RTÉ Purchasing Department operates within Group Finance and its principal function is to ensure that there is an appropriate focus on good practice in procurement and that procedures are in place to ensure compliance with all relevant RTÉ Guidelines, National Guidelines, Regulations and EU Directives as well as the provision of practical advice and assistance in relation to certain procurement activities.

The aim of these Guidelines is to guide and inform the people who manage the Financial Commitment process and buyers generally on the different procedures and obligations that must be complied with in order to successfully run and conclude tender competitions. Please read these Guidelines carefully as there are new guidelines and procedures to be followed. It should be used in conjunction with the Purchasing Policies and Procedures handbook.

It is important that the most suitable tendering procedure is selected and is appropriate for the type of project or purchase undertaken. People who manage the making of Financial Commitments and who wish to discuss the most appropriate tender procedure for their acquisition should contact me in the first instance on 3334 or any member of the purchasing team on 3014.

Please note that adequate Commitment/Capital/Budgetary approval must be in place before any tender competition process can be commenced.

Please also note that these Guidelines are subject to review, revision and amendment on a regular basis.

Thank you

Jean Sheridan,
Group Financial Controller

Robby Hill,
Purchasing Manager

November, 2007

Chapter 1
KEY PRINCIPLES



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1.1 KEY PRINCIPLES:

The key principles that apply to procurement are:

- Value For Money;
- Appropriateness;
- Common Sense;
- Transparency;
- Equal Treatment;
- Proportionality; and
- Mutual Recognition.

1.1.1 **Value For Money:** The single most important principle underlying all efficient procurement processes is that the process must ensure that all goods and services are purchased in a manner which facilitates obtaining Value for Money in the resulting transactions.

1.1.2 **Appropriateness:** All items procured must be appropriate to the specified purpose.

1.1.3 **Common Sense:** The purpose of any procurement process is to structure the purchase of a good or service to satisfy a business need and to do so in an efficient fashion in accordance with the rules set out. It is therefore crucial to bear in mind that the satisfactory achievement of the procurement objective is paramount and not the process itself which can be collapsed (see Chapter 8) and recommenced if it is unsatisfactory.

1.1.4 **Transparency:** In public procurement contracts the principle of transparency applies to all aspects of contract awards and in particular:

- Being open and transparent about all aspects of the procurement process;
- Advertising RTÉ's intentions:
 - publishing notices in the Official Journal of the European Union;
 - publishing notices in the daily press, specialist journals or www.etenders.gov.ie;
- Providing the necessary information; and
- Making the outcome of decisions and selections known.

1.1.5 **Equal Treatment** means:

- Applying the same rules to all;
- Giving equivalent rights of access;
- Using objectively fair decisions.

Breaches of equal treatment may include: (i) accepting offers which do not appropriately conform to the specification in a material fashion where alternative compliant responses have been received; (ii) allowing material enhancements to initial offers without providing a similar facility to all tender participants; (iii) inappropriate retrospective adjustments of award criteria; and (iv) materially discriminating negatively on any grounds.

1.1.6 **Proportionality**: means that all measures used have to be both **necessary and appropriate** in relation to the overall objective of the exercise: i.e. the contract award to enable a procurement transaction to occur. In addition, **no excessive or disproportionate conditions, criteria or rules are to be applied.**

Breaches of proportionality may include: insisting on excessive turnover, experience, bonds/guarantees.

1.1.7 **Mutual Recognition**: must be given to:

- Professional qualifications;
- Nationality within the EU;
- Standards and appropriate specifications or the equivalent;
- Performance capability.

Breaches of mutual recognition may include: excluding a company/person from a contract award based on nationality within the EU.

1.2 APPLICABLE LAW:

In addition to the key principles set out in paragraph 1.1 above, the following provisions also apply to procurement:

1.2.1 The following provisions in the EU Treaty also apply to public procurement contracts:

- Article 12 – which prohibits discrimination on the basis of nationality;
- Article 28 – quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States;
- Article 39 – guarantees freedom of movement for workers;
- Article 43 – guarantees freedom of establishment in Member States (includes companies);
- Article 48 – companies are to enjoy treatment equal to that of natural persons;
- Article 49 – guarantees freedom to provide services across Member States.

1.2.2 **Procurement at National Level:** is governed by the guidelines set down in the Green Book, published by the Department of Finance in 1994. The rules set out in the Green Book were supplemented in May 2004 by the Public Procurement Guidelines on Competitive Process – Supplies and Services (“The 2004 Guidelines”).

1.2.3 **Procurement at EU Level:**

1.2.3.1 The EU Public Procurement Directives were streamlined and consolidated into two new Directives in 2004. These are: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC coordinating procurement procedures of entities operating in the water, energy, transport and postal service sectors.

1.2.3.2 Directive 2004/18/EC codified and updated the provisions of the Services Directive (92/50/EU), Public Supplies Directive (93/36/EC) and Public Works Directive (93/37/EC). Directive 2004/17/EC replaces the Utilities Directive (93/38/EC).

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- 1.2.3.3 Directive 2004/18/EC has been implemented in Ireland by the European Communities (Award of Public Authorities contracts) Regulations, 2006 (SI/239/2006) (“Regulations”).
 - 1.2.4 **Remedies:** the Remedies Directive (89/665/EC), implemented in Ireland by the European Communities (Review Procedures for the award of Public Supply and Public Works Contracts) (No. 2) Regulations, 1994 (SI 309/1994) (“1994 Regulations”) enables candidates and tenderers to challenge the decisions made by RTÉ in the procurement process.
 - 1.2.5 **Other Legal Principles:** aside from the specific legislation listed above, it is important to note that other provisions of Irish and EU law will apply to the procurement process. These include, Sale of Goods and Supply of Services Act, 1980, contractual rights and remedies, competition law, judicial review procedures, constitutional rights and freedom of information.
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Chapter 2
IMPORTANT GENERAL ISSUES

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2.1 EXPERTISE

- 2.1.1 Each IBD needs to ensure that staff involved in purchasing or placing contracts for goods or services are familiar with RTÉ Guidelines, National Guidelines, Regulations, and EU Directives that may apply and are aware of the legal and policy framework within which procurement must be conducted.

2.2 CONFLICTS OF INTEREST AND ANTI-COMPETITIVE PRACTICES

- 2.2.1 Purchasers should be aware of potential material conflicts of interest in the tendering process and should take appropriate action to report and disclose them through their reporting lines and where possible to limit and/or avoid them.
- 2.2.2 Care should be taken to try to ensure that project specifications and criteria are first and foremost appropriate to the fulfilment of the business need for which the procurement process is being held in the first instance while where possible, also seeking to set the specifications such that they will not deliberately and/or inappropriately favour one solution or another.
- 2.2.3 The conduct of public bodies and office holders is governed by the Ethics in Public Office Act, 1995. Public bodies include any body, organisation or group established by or under any enactment (other than the Companies Act, 1963 to 1990). This definition includes RTÉ.
- 2.2.4 The penalties for corruption in office are set out in the 1995 Act and may involve a substantial fine and/or prison sentence. In addition, the person may be liable to be ordered to pay to such body, and in such manner as the court directs, the amount of value of any gift, loan, fee or reward received by him or any part thereof.
- 2.2.5 It is important that any member of the RTÉ Authority, or officer of RTÉ or employee of RTÉ does not accept inducements from a third party in order to influence whether RTÉ should enter into a contract with that third party for the supply of goods or services. To do so may render that person liable to be guilty of an offence as outlined above.
- 2.2.6 The 2004 Guidelines state that contracting authorities should not form relationships that might have the effect of limiting
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competition. They should also seek to avoid conflicts of interest where such are known. If possible, open-ended arrangements with exclusive distributors should be avoided where this is, or may be perceived to be, not in the best financial interests of RTÉ. Contracting authorities are warned to be vigilant in watching for anti-competitive practices, such as collusive tendering. They may exclude candidates where they have evidence that such parties have been convicted in court of certain crimes and they should try to ensure that, where practicable, successful candidates comply with statutory provisions such as those regarding minimum pay or legally binding industrial agreements. To safeguard against improper or unethical practices, and in accordance with good financial internal control principles, the functions within the procurement cycle should be separated.

2.3 INPUT FROM IBD FINANCE & GROUP FINANCE

2.3.1 All employees seeking to commit RTÉ through any form of procurement process must obtain the following input/advice from the designated the Financial Directors/Financial Controllers and their authorised representatives in each IBD and Corporate Centre prior to entering into any form of commitment:

- Obtaining approval for the project prior to engaging in the tendering process (A196 etc.) and in accordance with the relevant Managerial and Financial Delegated Authority Approval Limits set out in Appendix 2. These limits must be complied with.
 - Assistance in developing the financial aspects of the invitation to tender – if the contract is large, RTÉ’s invitation to tender may have to provide a template/guidance for the way in which the pricing of the bids should be presented by tenderers etc.
 - Assistance and financial sign-off in the appraisal of all tenders. This is of critical importance where pricing is complex and prices are not directly comparable across bids and would include “normalising” the bids so that they are evaluated on a consistent basis.
 - The prior written agreement of the Treasury section of Group Finance must be obtained in relation to the agreement of Credit Terms and/or other Funding Terms and in relation to the provision of any form of Guarantee by RTÉ.
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2.4 RETENTION OF DOCUMENTS

- 2.4.1 Throughout these Guidelines, reference is made to the importance of retaining written records of the tender process, decisions taken in pursuance of the tender process and all correspondence and communications with candidates and tenderers. **The person making and managing the commitment is primarily responsible for retaining complete written records of the tender process.**

Particular care should be taken to ensure that all records, written or otherwise, including letters, e-mails, meeting minutes and file notes are complete and that the contents are compiled in a professional, succinct and efficient manner which will not give rise to subsequent embarrassment and/or harm to RTÉ or the authors.

It is important to ensure that where possible, all documents and correspondence are retained on file as RTÉ has an obligation under the Regulations to maintain a written report of every competition including reasons why RTÉ terminated the competition. Reports may be requested, in whole or in part, by the European Commission at any time. RTÉ also has obligations to retain written records under Irish legislation. Appendix 3 sets out a checklist of documents that should be retained on file. Depending on the nature and materiality of the particular project, it may be necessary to retain additional documents.

- 2.4.2 **Statutory Minimum Retention Periods:** How long must written records be retained for? Various pieces of Irish legislation set out minimum retention periods for certain types of records. In some cases the rules will be sector specific. Compliance with such minimum retention periods is obligatory.

- **Contractual Claims:** A claim for breach of contract may be taken within 6 years of the date of breach of contract. Contractual documents in relation to contracts of reasonable value and any documentation illustrating compliance with the contract should generally be retained for a period of 6 1/2 to 7 years to allow for claims which might be taken within the final year. In the case of contracts which are under seal (where the company seal is also affixed to the signature page), the statutory time limit is 12 years (although the contract may provide otherwise). Such contracts should be retained for 12 – 13 years (or less if a shorter time period is provided for).

- **Tort Claims:** Claims for tortious liability must be taken within 6 years of the occurrence of the alleged wrong. Examples of possible tortuous claims would be that a business may be causing nuisance (i.e. noise, noxious fumes etc.), or that employees, agents or customers may be trespassing on property belonging to another person.

- 2.4.3 **In what format must written records and documents be retained?** Files may be retained in paper format or, since the enactment of the Electronic Commerce Act, 2000 (“2000 Act”), in electronic format. Traditionally, files and documents have been stored in paper format. The 2000 Act enables the storage of certain documents electronically. Retaining files in electronic format is less costly. However, before considering whether to store procurement documents and files electronically, the person managing the commitment process must give consideration to the following issues: (a) whether a secure, centralised database and file storage policy has been put in place by RTÉ; (b) what format the documents are to be stored; and (c) what security measures are in place to ensure the security of the documents against unauthorised access, alteration and deletion. It is not sufficient to store files/documents in an ad hoc manner on individual computers. It may not be possible to access these files if the individual leaves RTÉ or moves department.
- 2.4.4 **Electronic Storage of Files:** The 2000 Act gives legal effect to electronic signatures (Section 13) and provides that a contract shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form or has been concluded by e-mail or other electronic communication (Section 19).
- 2.4.5 **Exceptions:** It is most important to note that these provisions do not affect the laws pertaining to the creation or retention of certain documents. A will, trust or enduring power of attorney must be created in writing. Similarly, the requirement that conveyances of land be in writing is not affected by the 2000 Act. Deeds of conveyance, assignment and leases of land must be in writing. The contract for sale may, however, be in electronic format. Finally, an affidavit or sworn declaration must still be in writing. Once created, these original documents must be retained in hard copy and any amendments or variations must also be in writing.
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- 2.4.6 **Responsibility for Retention of Documents/Records:** The Purchasing Department retains a file on all tender competitions both at National and EU level. It is the responsibility of the person managing the commitment process for each tender competition to retain a complete file of all documentation and correspondence relating to the tender. This file may be held in electronic format as provided in paragraphs 2.4.3 - 2.4.4 above, however, please note the exceptions to holding files and documents in electronic form as set out in paragraph 2.4.5. It is important that the file be retained for the minimum periods of time as set out in paragraph 2.4.2 above.

2.5 NO REFERENTIAL BIDS

- 2.5.1 **What are referential bids?** A referential bid is an offer that is made with reference to the other bids. For example: RTÉ puts the supply of goods out to tender inviting offers from interested parties to submit a response to tender to supply the goods and provide a price for the supply of the goods. If one candidate offers to supply the goods for a price of 10% less than the lowest price tendered by another candidate, this is a referential bid.

Case law on referential bids indicates that if a buyer indicates in his offer that he wants fixed price bids, a referential bid does not meet its description. If a referential bid is accepted in such circumstances and later challenged by an aggrieved, rejected tenderer, it is highly likely that the referential bid will be rejected as being inconsistent with the terms of the buyer's offer and the lowest fixed monetary offer made will be accepted instead.

- 2.5.2 Where RTÉ invites third parties to make offers to RTÉ for the supply of goods and/or services, it is very important to ensure that the wording of any such offer clearly indicates that RTÉ will accept the tenders with a fixed monetary offer only.

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Chapter 3
TENDER PREPARATION

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NOTE: Before contacting the Purchasing Department in relation to a new tender competition, the person managing the commitment process is responsible for ensuring that the necessary financial approvals and information set out in Appendix 1 is in place.

3.1 INVITATION TO TENDER

3.1.1 The person managing the commitment process is responsible for preparing the invitation to tender (ITT). The ITT is an integral part of the advertisement of the tender. The ITT usually contains the following information:

- The scope and objectives of the ITT and project requirements;
- The award criteria applicable;
- Pricing information. Candidates should be requested to show a breakdown of all of the projected costs in Euros, including appropriate cost headings and analysis in order to facilitate understanding of the tender response. The costs should clearly indicate what is included, what is excluded and what is offered as an option as part of the costings. Where applicable, a standard costing template should be included by the person managing the commitment process in the ITT for completion by the tenderers in order to enable comparison of costings between tender responses;
- Details of the specification (see paragraph 3.2 below) and functional requirements for the project;
- Deadline dates for receipt of responses to the ITT and details of any scheduled open days where candidates may have an opportunity to meet with the RTÉ project team;
- Additional terms and conditions applicable to the ITT (eg. confidentiality, responsibility for costs of preparation of responses to ITT, requirement for financial information from tenderers, financial standing of the tenderer, requirement for a performance bond etc.);
- Requirement for tenderers to comply with relevant statutory provisions (please see paragraph 3.4 below); and
- A copy of RTÉ's Terms and Conditions (please see paragraph 3.3 below). While stressing that changes in RTÉ Terms and Conditions are not envisaged or intended to be an everyday occurrence **all ITTs should contain wording reserving the right of RTÉ at RTÉ's sole discretion to amend or vary the RTÉ Terms and Conditions where this is deemed appropriate by RTÉ.**

3.2 SPECIFICATIONS

- 3.2.1 The essential component for any procurement is the identification and clarification of the business need or requirement. The use of standards and specifications assists in the definition of requirements, but they must be used in accordance with the Regulations and the Treaty Principles.
- 3.2.2 Specifications must:
- State the requirement clearly;
 - Contain adequate information to broadly enable a competent supplier to cost their responses;
 - Permit products/services to be evaluated;
 - Provide equal opportunities for suppliers.
- 3.2.3 In relation to technical specifications, recognised standards referred by reference only or specifications to be based on function/performance, they must also:
- Be included in the documents;
 - Not seek to favour or eliminate candidates or products;
 - Not make mention of goods of specific make, source, process, trade mark or patent unless this is essential, and in generally rare circumstances, to ensure that a particular procurement process can be satisfactorily completed.
 - If it is essential to mention any of these, then the term “*or equivalent*” must be used.
- 3.2.4 Depending upon the nature of the requirement and the specification to be drafted, it may be necessary to obtain expert advice from external consultants. It may also be necessary to conduct a tender competition in order to appoint such consultants.

3.3 LEGAL REQUIREMENTS

3.3.1 Seeking Legal Advice:

- 3.3.1.1 Given the scale and value of some projects, and the legal framework governing public procurement, all persons managing material procurement processes are advised to seek legal advice and in particular, **to seek such advice from Legal Affairs at the earliest stage in the procurement process before any irrevocable steps have been undertaken and to avoid needless delays in the tender process.**
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- 3.3.1.2 Either directly or indirectly, whether using in-house resources or external legal firms, Legal Affairs will provide advice in relation to interpretation of the 2004 Guidelines, the Regulations and relevant legislation, advice and assistance in the drafting of an appropriate contract under which the relevant products and/or services will be supplied and subsequent to the tender process, advice and assistance with the negotiation of the contract with the preferred tenderer.
- 3.3.1.3 Where possible, Legal Affairs should be provided with the following documents:
- a copy of the ITT and a copy of any Prior Information Notice(s);
 - a copy of the Tender Specification issued by RTÉ;
 - a copy of the Response to the ITT issued by the successful tenderer;
 - all project documentation (project plans, timetables, commercial documents);
 - a timeframe for selection, award, subsequent contract negotiation and project commencement; and
 - brief outline of the project objectives in order to facilitate understanding.

Depending upon the nature of the tender competition, further information may be required.

3.3.2 Use of RTÉ Purchasing General Terms and Conditions

- 3.3.2.1 The majority of goods and services purchased by RTÉ under public procurement are usually purchased subject to RTÉ Purchasing General Terms and Conditions. The RTÉ Purchasing General Terms and Conditions are also available for reference on the RTÉ website under Help and Information (click on the “Purchasing Policies and Procedures” link).

For IT services and professional/consultancy services, RTÉ Professional Services Terms and Conditions are applicable. A separate project will shortly commence aimed at developing a number of other standard RTÉ Terms and Conditions options aimed at catering for a range of specialised areas of procurement activity.

- 3.3.2.2 If the person responsible for managing the commitment process anticipates that an upcoming project is particularly complex, or
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that the existing RTÉ Purchasing General Terms and Conditions or the RTÉ Professional Services Terms and Conditions are required to be modified, Legal Affairs should be contacted **as soon as possible prior to advertisement of the ITT** so that the standard RTÉ Terms and Conditions may be modified to ensure that in so far as possible, the tender is advertised with a copy of the appropriate terms and conditions attached.

It should be borne in mind that sometimes it will not be possible to issue definitive terms at advertisement stage as all the requirements in the project may not have been identified. Even if modifications have been made to the standard RTÉ Terms and Conditions, further amendments (such as attaching a project plan, functional specification or amendments to specific clauses) may be required. These amendments may only become apparent when analysing responses to tenders received. Accordingly in such cases, a condition should be inserted in the ITT referring to the subsequent issuance of special additional terms and conditions **in addition to the requirement expressed to ensure that in every ITT, wording is inserted reserving the right of RTÉ at RTÉ's sole discretion to amend or vary the RTÉ Terms and Conditions.**

- 3.3.2.3 The advertisement and ITT must either include a copy of the applicable RTÉ Terms and Conditions relevant to the tender or the advertisement must contain a link to the correct RTÉ Terms and Conditions and must make reference to any special terms and conditions which may be applicable to the ITT. This makes it clear that any contract will be awarded subject to these terms. In the event that other additional terms are to be negotiated with the supplier, Legal Affairs should be consulted.
- 3.3.2.4 All awards in a tendering process at EU level are expressly subject to a contract being put in place and an official RTÉ purchase order being issued. Please also see Chapter 7 for procedures in relation to contract award notification and debriefings. It is important to note the following:
- No verbal or other notice of outcome should be provided to any successful applicant unless appropriate RTÉ managerial and financial approval in writing is received in advance in accordance with the relevant Managerial and Financial Delegated Authority Approval Limits set out in Appendix 2.
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- No contracts or orders can be issued by any person in RTÉ until such person is authorised to put a contract in place between RTÉ and a successful tenderer.
- The contractual arrangement between RTÉ and the successful tenderer must be in writing and signed by authorised signatories of both parties in accordance with the relevant Managerial and Financial Delegated Authority Approval Limits set out in Appendix 2.

3.4. STATUTORY PROVISIONS TO BE INCLUDED IN INVITATIONS TO TENDER

- 3.4.1 The ITT should contain a requirement that all tenderers are obliged to comply with statutory provisions relating to minimum pay, legally binding industrial agreements, Environmental Policy and Health and Safety issues and the Disability Act, 2005. As part of the tender evaluation process, the person responsible for managing the commitment process should review each tender response carefully to ensure that all tenderers indicate their compliance with these statutory provisions. An appropriate reference to the need for compliance with such provisions and any other industry/product specific legislation (eg Product Liability Act, Food Hygiene legislative and regulatory requirements) should be included in the ITT and all accompanying tender documents.
- 3.4.2 **Disability Act:** The RTÉ Purchasing Policies and Procedures take account of the provisions as laid down in the Disability Act, 2005. Please note that legislation may be amended and new laws may come into force from time to time.
- 3.4.3 **Environmental Policy:** As a major purchaser of goods and services RTÉ encourages sound environmental practice by suppliers and contractors. Please see RTÉ's environmental policy for further information.
- 3.4.4 **Health and Safety Statement:** All employees, visitors and contractors are obliged to comply with the RTÉ Health and Safety Statement as set down in the Safety, Health and Welfare at Work Act, 2005 in so far as they are present on RTÉ sites.
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- 3.4.5 **Freedom of Information:** All personnel managing the commitment process should be aware that RTÉ is obliged to respond to requests from suppliers and individuals for information and records relating to specific tender competitions under the Freedom of Information Acts 1997 and 2003. Certain records may be exempt from the provisions of the Acts on the grounds of confidentiality or commercial sensitivity. Tenderers are normally requested to indicate, with supporting reasons, any information included with their tenders which they wish to be regarded as confidential and/or commercially sensitive. It is important to note that merely indicating that documents are “*confidential*” and/or “*commercially sensitive*” does not guarantee that they will be exempt from the provisions of the Freedom of Information Acts and decisions may be made without regard to RTÉ’s assessment of the position.

3.5 TAX CLEARANCE

- 3.5.1 It is a mandatory requirement that all Irish companies supplying goods and services to RTÉ must provide an up to date TC2 or C2 Tax Clearance Certificate where the annual purchase value exceeds €6,500. The RTÉ Purchasing Department records and files all new Tax Clearance Certificates and ensures current suppliers provide updated ones.

3.6 ESTIMATING CONTRACT VALUES TO DETERMINE CORRECT PROCEDURE

- 3.6.1 Prior to deciding which tender process to follow (National or EU), an accurate estimation of contract values should be made in order to consider whether the contract falls within National or EU thresholds. The assessment of contract values should be realistic. Regulation 6(1) of the Regulations provides that RTÉ shall estimate the total amount payable (net of VAT) in respect of a public contract that it proposes to award. **When calculating the total contract amount, the person managing the commitment process must take into account any form of option and any contract renewals provided for. The relevant financial approver will be required to sign-off and approve of this estimate in accordance with Appendix 2.**
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For example: RTÉ issues an ITT for a one year contract for the supply of services with a option to renew the contract for a further two years. The annual cost of the contract is €100,000. Because the contract has an option to renew at a further cost of €100,000 per annum, the total contract amount is calculated by adding the cost of the one year term (€100,000) plus the two year option cost (€200,000). The total contract cost is €300,000, bringing the contract within EU thresholds.

- 3.6.2 Regulation 6(2) provides that the estimate must be valid when the contract notice is sent to the Office for Official Publications of the EU for publication or if such a notice is not required, when the contracting authority begins the contract award procedure.
- 3.6.3 Regulation 6(4) provides that a works project or proposed purchase of a specified quantity of supplies or services may not be subdivided in order to prevent the project or purchase from coming within the scope of the Regulations. Regulation 6(6) provides that if the proposed work or purchase of a service could result in contracts being awarded at the same time in the form of separate lots, the contracting authority shall take account of the total estimated value of all the lots.
- 3.6.4 **Leasing, hire rental or hire purchase of a product for fixed term:** Regulation 6(10) provides that if a contract relates to the leasing, hire, rental or hire purchase of a product for a **fixed term**, the value to be taken as a basis for calculating the estimated contract value is as follows:
- if the term is **less than or equal to 12 months**, the total estimated value for the term of the contract
 - if the term is **greater than 12 months**, the total value of the contract, including its estimated residual value.

Note that under RTÉ's internal commitment approval processes, all Lease/Hire-Purchase/Option arrangements require the prior written approval of the Treasury section of Group Finance.

- 3.6.5 **Leasing, hire rental or hire purchase of a product not for fixed term:** Regulation 6(11) provides that if a contract relates to the leasing, hire, rental or hire purchase for a term that is **not fixed or for a term that cannot be defined**, the value to be taken as a basis for calculating the estimated contract value is **the monthly value multiplied by 48**.

Note that under RTÉ's internal commitment approval processes, all Lease/Hire-Purchase/Option arrangements require the prior written approval of the Treasury section of Group Finance.

- 3.6.6 **Recurring Contract:** Regulation 6(12) provides that if a contract is of a recurring nature, or is likely to be renewed within a specific period, the contracting authority shall determine the estimated contract value on the basis of **one** of the following criteria:
- The total actual value of the successive contracts of the same kind awarded during the preceding relevant period, adjusted (so far as possible) to take account of the changes in quantity or value that are likely to occur during the 12 months following the initial contract.
 - The total estimated value of the successive contracts awarded during the 12 month period following the first supply of products or a service under the contract, or if the financial year of the contracting authority is longer than 12 months, during that financial year.
- 3.6.7 **Service Contract for Fixed Term Without Total Price:** Regulation 6(15) provides that where a service contract is for a **fixed term** but does not specify or provide for a total price, the contracting authority shall use the following to calculate the estimated value of the contract:
- If the contract is for a fixed term of **48 months or less**, the total value of the contract for the full term.
 - If the contract is for a fixed term of longer than **48 months or no term is fixed**, the monthly value of the contract multiplied by 48.
- 3.6.8 Regulation 6(16) provides that where RTÉ enters into a framework agreement or uses a dynamic purchasing system, RTÉ shall take into account the maximum estimated value (free of VAT) of all contracts that it envisages for the total period during which it expects the agreement or system to remain in place.
- 3.6.9 If a contract is not advertised in the OJEU publication and it attracts tenders in excess of the EU thresholds, there is a risk that the award could be subject to infringement proceedings. In such an event RTÉ would be required to justify the original estimation.
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Chapter 4
NATIONAL TENDERING GUIDELINES

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- 4.1 Where the EC Procurement Directives do not apply (i.e. the contract value is less than EU thresholds as set out in Chapter 3), RTÉ must follow the guidelines set down in the Green Book, published by the Department of Finance in 1994. This contains specific rules on the selection of consultants (except management consultants, property transactions, purchase of goods, information technology, planning and design contests and tendering procedures). Additional rules for the engagement of construction related consultants are contained in a Department of Finance circular 11/87, appended to the Green Book.
- 4.2 The rules set out in the Green Book were supplemented in May 2004 by the Public Procurement Guidelines on Competitive Process – Supplies and Services (“The 2004 Guidelines”).
- 4.3 Under the 2004 Guidelines, RTÉ has a choice between open tendering (open advertisement: all interested may tender) and restricted or selective tendering (an invitation to tender is sent to not less than five candidates selected from a list or the contract is advertised and interested parties must pre-qualify to be invited to tender).

4.4 TENDER PROCEDURES UNDER 2004 GUIDELINES

- 4.4.1 For contracts or purchases below the EU threshold values less formal procedures may be appropriate. A summary of the procedures to be adopted is set out in the attached table on page 41 and is set out below.

Note that all commitments entered into at all levels require a financial approval in accordance with RTÉ’s Managerial and Financial Delegated Authority Approval Limits set out in Appendix 2 and as determined by the RTÉ Authority. The relevant financial managers in each area will provide any necessary assistance.

- 4.4.2 Orders for supplies or services **less than €10,000** in value should be decided on the basis of verbal quotations from **one or more** competitive suppliers which should be confirmed by fax or email. The most suitable tender or most suitable price should be selected.
- 4.4.3 Contracts and orders for supplies or services valued between **€10,000 and €50,000** should be awarded on the basis of responses to specifications sent via post or email to at least **three**

suppliers or service providers. Quotations should be held on file for six years to satisfy statutory requirements regarding retention of documents as set out in paragraph 2.4 above.

- 4.4.4 Contracts **below €50,000** need not be advertised, although public bodies are encouraged to do so if the anticipated response would not be disproportionate, having regard to the value of the requirement. It is also important to note the provisions of paragraph 4.6 below on the application of EU Treaty principles to National competitions.
- 4.4.5 Under the 2004 Guidelines, contracts **above €50,000** and up to the value of EU thresholds for advertising in the Official Journal of the European Union (“OJEU”), not part of a “draw down” or framework contract, should either be advertised on the official e-tenders website www.etenders.gov.ie or at least five parties should be invited to tender. The 2004 Guidelines suggest that publication on the www.etenders.gov.ie website generally meets national advertising and publicity requirements.
- 4.4.6 Prior to advertising, the basis must be set for the award of the tender, either **Lowest Price** or **Most Economically Advantageous Tender (MEAT)**. Where using MEAT, the award criteria and the weight to be attached to each criterion should be set and be included in the notice and in the tender documents. If it is not technically possible or it is otherwise inappropriate to indicate criteria weightings in advance, they must be listed in descending order of importance. New or amended criteria must not be introduced in the course of the contract award procedure. If significant additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

4.5 DIRECT INVITATION WITHOUT ADVERTISING

- 4.5.1 Alternatively, a process of direct invitation to tender may be used. **Please note that this procedure can only be used for national competitions.** This selective tendering may involve:
- An invitation to tender sent directly to suppliers deemed appropriately qualified for a particular project. The person making the commitment is responsible for selecting the suppliers deemed appropriately qualified. This may be appropriate for the acquisition of specialised equipment or services where there are a limited number of suppliers. The Purchasing Department should be consulted where a higher value spend is anticipated
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and the EU threshold may be exceeded. (See paragraph 3.6 on estimating correct contract values.)

OR

- An invitation to tender sent directly to suppliers on a list established on an open and objective basis. This is more appropriate where a preferred supplier list is maintained to handle frequent and recurring supplies and services requirements.

4.5.2 Where direct invitations are issued, companies from which tenders are sought should be a good representative sample of all potential suppliers in the market concerned. The number invited to tender should be determined by the size and particular characteristics of the project to be undertaken. The number must be sufficient to ensure adequate competition and should not be restricted for reasons of administrative convenience. If practicable at least **five** companies should normally be invited to make a submission.

4.5.3 A preferred supplier may be appointed at the conclusion of a tender competition provided there is significant expenditure in this category. Under direct tendering procedures, it is important that a preferred supplier list is actively maintained and updated. The Purchasing Department is responsible for maintaining and updating the RTÉ list of preferred suppliers. Where the list of preferred suppliers is used by the person making the commitment as the basis for direct invitation, the preferred list should be used in an open and non-discriminatory manner. Please note that this procedure can only be used for national competitions.

4.6 APPLICATION OF EU TREATY PRINCIPLES

4.6.1 It is important to note that even in the case of procurement which might not be subject to the full scope of the Regulations and Directives, such as non-priority services or where the value of the tender is below the EU thresholds, the EU Commission and European Court of Justice (“ECJ”) have both indicated that the Treaty principles of non-discrimination, transparency, freedom of movement and freedom to provide goods and services must be observed. ECJ case law implies a requirement to publicise and advertise these contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders. According to the Commission, transparency requires publication of a “*sufficiently accessible*” advertisement prior to the award of the contract. RTÉ must decide

the most appropriate media in which to advertise contracts. It should assess the relevance of the contract to overseas EU providers in light of subject matter, value and customary practice. The greater the contracts interest to potential bidders from other EU member states, the wider the advertising coverage should be.

- 4.6.2 The Commission suggests that adequate means of publication include the following:
- a) The internet;
 - b) National official journals or journals specialising in public procurement announcements, newspapers with national or regional coverage, or specialist publications;
 - c) Local means of publication, which may be adequate in special cases, such as very small contracts for which there is only a local market;
 - d) Publication in the official journal of the EU which the Commission indicates is an interesting option particularly for larger contracts.

Notices can be placed on the Public Procurement website by contacting the Purchasing Department.

4.7 RECORD KEEPING

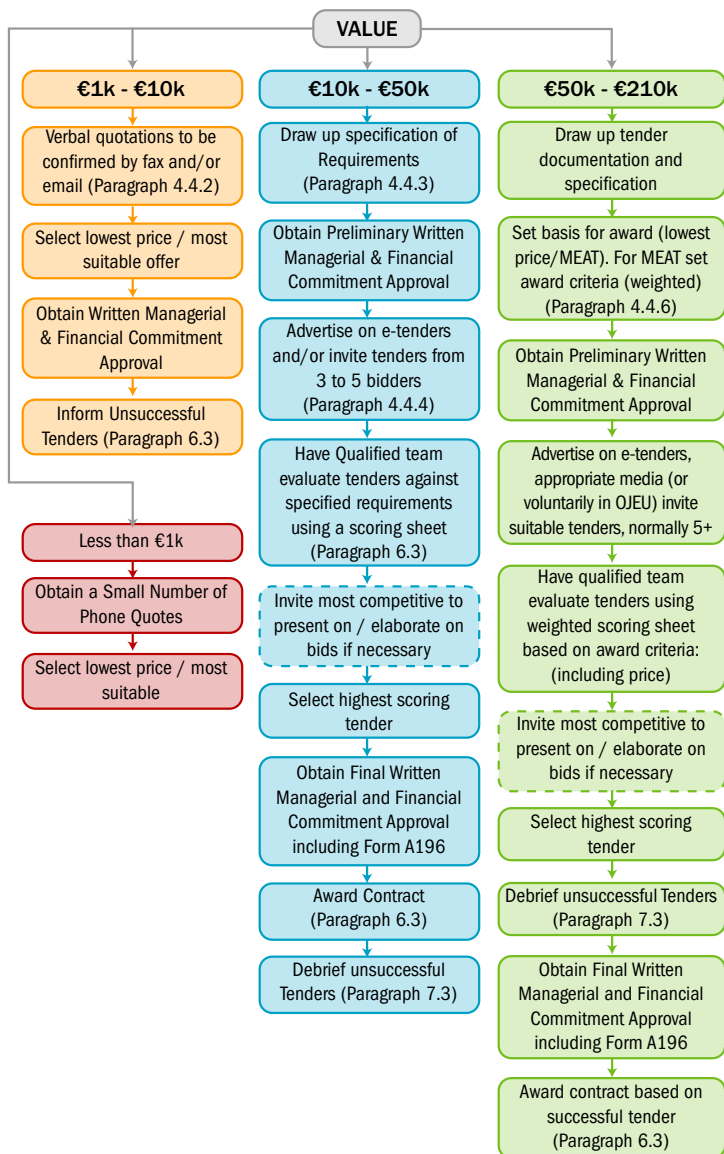
- 4.7.1 It is important to note that values and procedures outlined above are indicative and should be adapted as appropriate to suit the nature and scale of a project. The person managing the commitment process is responsible for ensuring that all documents and correspondence are retained in a file for purchases/tenders under the 2004 Guidelines. Please see paragraph 2.4 above on the structure of a tender file and obligations to retain documents.
- 4.7.2 It is very important that the person making the commitment ensures that all decision making processes and decisions taken to select a supplier under the 2004 Guidelines are documented in writing and retained as part of the tender file.

4.8 RAISING PURCHASE ORDERS

- 4.8.1 A pre-approved official RTÉ purchase order must be raised in all instances for goods and services before any invoice is sent from the supplier as each invoice must have an RTÉ order number reference when received at RTÉ accounts payable. No
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purchase order or written or verbal commitment of any kind can be provided to a supplier by any person in RTÉ until managerial and financial approval has been given covering the transaction under contemplation in accordance with Appendix 2.

Below EU Threshold Values - National Guidelines



Chapter 5
TENDERING PROCEDURES AT EU LEVEL



5.1 BACKGROUND

- 5.1.1 It is a legal requirement that contracts with an estimated value over €211,000 for goods and services and a value over €5,278,000 for building construction works are awarded in accordance with the EU Public Procurement Directives. Any infringement of the terms of the EU Public Procurement Directives and Regulations can give rise to serious legal or financial sanctions.
- 5.1.2 The EU Public Procurement Directives were streamlined and consolidated into two new Directives in 2004. These are: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC coordinating procurement procedures of entities operating in the water, energy, transport and postal service sectors.
- 5.1.3 Directive 2004/18/EC codified and updated the provisions of the Services Directive (92/50/EU), Public Supplies Directive (93/36/EC) and Public Works Directive (93/37/EC). Directive 2004/17/EC replaces the Utilities Directive (93/38/EC).
- 5.1.4 Directive 2004/18/EC has been implemented in Ireland by the European Communities (Award of Public Authorities contracts) Regulations, 2006 (SI/239/2006) (“Regulations”).
- 5.1.5 The Directives and Regulations impose obligations on contracting authorities to:
- Advertise their requirements in the Official Journal of the European Union (“OJEU”);
 - Use procurement procedures that provide open and transparent competition;
 - Apply clear and objective criteria, notified to all interested parties in selecting tenderers and awarding contracts;
 - Use broadly based non-discriminatory technical specifications;
 - Allow sufficient time for submission of expressions of interest and tenders.
- 5.1.6 It is important to note that the procedures set out under the Old Directives in relation to the open, restricted and negotiated procedures (as discussed further in paragraph 5.7) are still relevant.
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5.2 BRIEF OVERVIEW OF CHANGES INTRODUCED BY REGULATIONS

- 5.2.1 The definitions of works, supplies and services have not changed substantially. As under the previous Services Directive, categories of service are set out in the annexes (Annex IIA and IIB). Contracts for the services set out in Annex IIB are subjected to less stringent procedural requirements (i.e. technical specifications and notice of award of contract), whereas all procedure requirements apply to the services set out in Annex IIA. The categories of service which are subject to less stringent procedure requirements have not been substantially amended.
- 5.2.3 The Regulations introduce some new terminology. The concept of an “*economic operator*” is introduced. This is a common term for contractors, suppliers and service providers. Once an economic operator has submitted an expression of interest under the restricted or negotiated procedures, it is referred to as a “*candidate*”. Once an economic operator or candidate submits a tender, it is referred to as a “*tenderer*”.
- 5.2.4 For the purposes of applicable thresholds, the Regulations make clear the distinction between contracting authorities which are “*central government authorities*” and those which are not. Different thresholds apply to central government authorities and all other contracting authorities. A list of the central government authorities for each member state is set out in Annex IV of the Regulations.
- 5.2.5 The concept of a “*framework agreement*”, “*dynamic purchasing system*” and “*electronic auction*” are also new and will be discussed in more detail below.

5.3 NEW THRESHOLDS

- 5.3.1 The thresholds have not changed significantly under the Regulations. The new thresholds for public sector contracts are set out in Regulation 4. They are:
- for works contracts the threshold is **€5,278,000**
 - for supplies/services contracts, there are two thresholds depending on the nature of the contracting authority as follows:
 - for central government authorities, the threshold is **€137,000**
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- for non central government contracting authorities (eg. RTÉ), the threshold is €**211,000**.

- 5.3.2 There are also specific thresholds in respect of certain type of works or related contracts which are subsidised more than 50% by public authorities.
- 5.3.4 The thresholds are subject to review by the European Commission every 2 years from the date of entry into force of the Directive (30th April 2004).

5.4 COMMON PROCUREMENT VOCABULARY

- 5.4.1 The Common Procurement Vocabulary (CPV) is a classification code developed by the EU Commission to describe thousands of types of works, supplies and services. It is being adapted as the official code for classifying public contracts and is maintained and revised by the EU Commission as markets evolve and develop. The Purchasing Department will give support to determine the appropriate code that should be used for describing the subject of the contract on the standard forms when advertising in the OJEU.

5.5 PRIOR INFORMATION NOTICE

- 5.5.1 Where appropriate, project teams planning to undertake large purchase contracts in the future are encouraged to publish an annual Prior Information Notice (PIN) in the OJEU. The PIN is normally submitted at the beginning of the budgetary year and sets out the categories of products and services likely to be procured during the year. The standard PIN form may be found at www.simap.eu.int. The PIN should contain all the information available at that time about the contract.
- 5.5.2 The insertion of a PIN does not commit RTÉ to purchase or proceed with a project if the circumstances change. It is intended as an aid to transparency and is for the benefit of potential suppliers.
- 5.5.3 Publication of a PIN permits RTÉ to **reduce** the minimum time for tendering if the PIN, with the necessary amount of information specified, has been dispatched to the OJEU at least 52 days before, and within 12 months of dispatching the contract notice. **The reduced time limits for tendering if a PIN has been published are set out in paragraph 5.11.**
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5.6 TECHNICAL DIALOGUE WITH SUPPLIERS

- 5.6.1 Prior to commencing a tender competition, the project team may have difficulty setting and/or drafting the technical specification for a particular project. This difficulty may arise due to the complexity of the technology involved, recent innovations involving the technology with which the project team is not familiar with or the complexity of the particular project. To make sure that the project team makes the optimum decision in terms of the technology for an upcoming project, the project team needs to have access to the latest information on the relevant technology. Familiarity by the project team with the technical area and access to information on the technology is an advantage, but usually it is suppliers that have up to date information on the latest product and/or technology innovations.
- 5.6.2 To obtain the information the project team needs to draft an appropriate technical specification, the project team may need to communicate with potential tenderers. Doing so in the context of a tender competition during which discussions are not permitted with the tenderers is often too late.
- 5.6.3 Recital 8 of Directive 2004/18/EC provides for the possibility of discussing technical specifications with potential tenderers in advance of any tender competition. This procedure is referred to in Directive 2004/18/EC as “technical dialogue”. While maintaining the crucial proviso that any discussions should not have the effect of precluding competition, the recital provides that “before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications.....”.
- 5.6.4 It is important to note that technical dialogue is permitted without the need to justify it, other than by reason of necessity or desirability. This is in contrast to the Competitive Dialogue Procedure discussed at paragraph 5.7.3 below.
- 5.6.5 It is very important to ensure that any technical dialogue discussions held with suppliers must not have the effect of precluding competition and so should not provide any potential tenderer with any unfair competitive advantage by, for example, setting the technical specifications by reference to those met by one tenderer, national or otherwise.
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For example: Unfair competitive advantage would occur where the technical specifications include a reference to standards which only one tenderer can meet or to a brand name without allowing for equivalent products.

- 5.6.6 Competition is also likely to be precluded where, when a contracting authority chooses to base its technical requirements on performance or functional characteristics, it seeks to describe those in such a way as to reflect the performance and functional requirements of a product provided by a potential tenderer with whom it has been in discussion.
- 5.6.7 It is important to bear in mind that use of specific references is only permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract, either by reference to the listed standards and specifications or by means of performance or functional characteristics is not possible. The prohibition continues to apply, even where the use of specific references has the effect of favouring or eliminating certain undertakings or certain products.
- 5.6.8 While the technical dialogue procedure is useful, a problem that arises with technical dialogue is that the process of discussing technical issues might tip the ultimate specifications chosen in favour of the tender with whom discussion have taken place. Assessing such a risk and deciding how in might be proven is difficult.
- 5.6.9 It is important to ensure that when conducting any technical dialogue with potential tenderers, that the key principles of transparency, equal treatment, proportionality and mutual recognition are observed at all times.
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5.7 EU TENDERING PROCEDURES

The Regulations and the Directives permit four tendering procedures. These are:

- Open Procedure
- Restricted Procedure
- Competitive Dialogue Procedure (new)
- Negotiated Procedure

The Regulations have also introduced two new procedures: framework agreements and dynamic purchasing systems. These new procedures are discussed below.

5.7.1 Open Procedure

5.7.1.1 The Regulations define the Open Procedure as: “a procedure under which any interested economic operator may submit a tender”. Under the Open Procedure, all interested parties may submit tenders. Information on tenderers’ capacity and expertise may be sought and only the tenders of those deemed to meet minimum levels of technical and financial capacity and expertise are evaluated.

5.7.1.2 If there are minimum requirements it is important that they be made clear in the notice or the specification which must be made available upon request to avoid unqualified companies incurring the expense of preparing and submitting tenders.

5.7.2 Restricted Procedure

5.7.2.1 The Regulations define Restricted Procedure as: “a procedure under which (a) any economic operator may ask to participate, and (b) only those economic operators invited by the relevant contracting authority may submit a tender”. The Restricted Procedure is a two stage process where only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

5.7.2.2 **Step 1:** the requirements of the project are set out on the standard form requesting expressions of interest. The Purchasing Department will complete the CPV codes and the form is sent for publication to the OJEU. RTÉ is required to specify in the contract notice the minimum number of candidates they intend to invite (and where appropriate, the maximum).

- 5.7.2.3 The responses are opened in the Purchasing Department, date stamped and recorded. The person making the commitment assesses the responses and may opt to shortlist qualified companies. Shortlisting of companies who meet the minimum qualification criteria must be carried out by non-discriminatory and transparent rules and criteria made known to companies.
- 5.7.2.4 The Regulations require that a number sufficient to ensure adequate competition are invited to submit a tender bid and indicate a minimum of **five** provided there is at least this number who meet the qualifying criteria.
- 5.7.2.5 **Step 2:** under the Restricted Procedure involves issuing the invitation to tender, including complete specifications and tender documents to companies who possess the requisite level of professional, technical and financial expertise and capacity.

5.7.3 Competitive Dialogue

- 5.7.3.1 The Competitive Dialogue Procedure is a new tendering process set out in Regulations 29 and 30 of the Regulations. This procedure may be used in respect of contracts which are “*particularly complex*” and in respect of which the contracting authority (i.e. RTE) considers that the use of the Open or Restricted tendering procedures will not allow the award of the contract. It is very important to note that the purpose of the Competitive Dialogue Procedure is not to arrive at a common specification but to proceed with one or more preferred solutions.
- 5.7.3.2 The Competitive Dialogue Procedure is defined as: *a procedure conducted by a contracting authority –*
- (a) *in which –*
 - (i) *any economic operator may ask to participate, and*
 - (ii) *the authority holds a dialogue with these economic operators that are admitted to the procedure as candidates with a view to producing one or more alternatives capable of meeting the authorities requirements,*
 - (b) *on the basis of which the candidates chosen are invited to tender.”*
- 5.7.3.3 For the purposes of the Competitive Dialogue Procedure, a public contract is considered to be “*particularly complex*” where the contracting authority:
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- (a) is not **objectively** able to define the technical means capable of satisfying its needs or objectives using the usual provisions on technical specifications, and/or
- (b) is not **objectively** able to specify the legal and/or financial make-up of a project.

5.7.3.4 The use of the word “*objectively*” suggests that the Competitive Dialogue Procedure may not be used lightly nor simply because RTÉ lacks the basic expertise to define the technical requirements. Recital 31 of Directive 2004/18/EC refers to situations where contracting authorities may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This implies that RTÉ must at least have sought to find a solution, even through the purchase of external expertise but should not prevent reliance on the procedure where RTÉ is genuinely not able to define its requirements with sufficient precision. While the Competitive Dialogue Procedure cannot be used for any standardised, or even relatively sophisticated equipment, works or services which can be procured through reliance on the Open or Restricted Procedures, it may be used when RTÉ is genuinely faced with a project for which it cannot, without significant assistance from the market place **going beyond mere technical dialogue**, define its requirements with sufficient precision to obtain what it requires. RTÉ must consider that the use of the Open or Restricted Procedures will not allow the award of the contract.

5.7.3.5 Before embarking on a Competitive Dialogue Procedure, it is recommended that the person making the financial commitment considers: (a) whether the technical dialogue procedure outlined in paragraph 5.6 above is applicable; and (b) that the project is “*particularly complex*” as outlined above.

5.7.3.6 Regulation 51(1)(f) requires a contracting authority to record its reasons justifying the use of the competitive dialogue procedure. These reasons must be recorded in writing and must be recorded **prior** to advertising the call for competition.

5.7.3.7 If the Competitive Dialogue Procedure is used, the “*most economically advantageous tender*” criteria must be applied for the evaluation of the tender.

5.7.3.8 Regulation 30(6) provides that a contracting authority may specify

that payments may be made to participants in respect of expenses incurred by them in participating in the Competitive Dialogue Procedure.

5.7.3.9 Competitive Dialogue Procedure: A number of separate steps are involved in a Competitive Dialogue Procedure up to award of a contract. These are:

- (1) A call for competition (publication of contract notice and descriptive document);
- (2) Initial selection process to reduce the number of candidates based on qualifications of candidates;
- (3) Issue an invitation to the selected candidates to take part in a dialogue with the aim of developing one or more suitable alternatives capable of meeting its requirements, on the basis of which;
- (4) The candidates chosen are invited to tender; and
- (5) The contract is awarded to the successful tenderer.

5.7.3.10 Step 1 – Call for Competition: RTÉ must publish a contract notice in the EU Official Journal. The notice must define RTÉ's "*needs and requirements*" which will be defined in that notice and/or in a descriptive document. There will not be a "*specification*" in the sense that such a term is used in the Open or Restricted Procedures. The rationale of the Competitive Dialogue Procedure is based upon the inability or impossibility for RTÉ of providing such a specification. However, the descriptive document will fulfil the function of setting out RTÉ's functional or output requirements so that the tenderers will know what RTÉ is seeking to achieve, even if it does not know how to achieve it. **The purpose of the notice is to solicit requests to participate in the procedure and not tenders.**

5.7.3.11 Step 2 – Initial Selection Process: As with other procedures, RTÉ is able to restrict the number of candidates whom it will invite to participate in the dialogue. The rules in this context are similar to those which apply in the case of a Negotiated Procedure with a call for competition and **the minimum number that RTÉ will invite must be at least three (3)**, provided a sufficient number of suitable candidates are available. The number of candidates invited shall be sufficient to ensure genuine competition. RTÉ must indicate in the contract notice the objective and non-discriminatory criteria or rules it intends to apply, the minimum number of candidates

it intends to invite and, where appropriate, the maximum number. The permitted selection criteria are those contained in Regulations 52 – 60 of the Regulations (Articles 44-52 of the Directive) (eg. criminal convictions, exclusion from tender process on grounds of bankruptcy, misconduct, non-payment of taxes, economic and financial standing, technical and/or professional ability etc.)

5.7.3.12 It is important to remember, at this stage, the selection is based purely on the qualifications of the candidates since they will not, have been required to submit any proposals or solutions with respect to the descriptive document.

5.7.3.13 **Step 3 – Dialogue with the Selected Candidates:** Having made its initial selection based on the criteria set out in Regulations 52 – 60 of the Regulations, RTE will open a dialogue with its chosen candidates. It does so by simultaneously and in writing (which also includes electronic communications) inviting the selecting candidates to take part in the dialogue indicating the date and the address set for the start of consultation and the language or languages used together with the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if they are not given in the contract descriptive document. This invitation must contain the following information:

- (a) a reference to the publication of the contract notice (i.e. the contract notice published at the start of the procedure);
 - (b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be prepared;
 - (c) the date and the address specified for the start of consultation and the language or languages used;
 - (d) a reference to any possible accompanying documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with Regulation 53 or to supplement the information referred to in that Regulation and under the conditions prescribed by Regulations 54 and 55;
 - (e) if not specified in the contact notice, specifications or initial descriptive document, the relative weighting of criteria for the award of the contract or, if appropriate, the descending order of importance for such criteria.
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- 5.7.3.14 As in the case of the chosen selection criteria, the award criteria must, under these provisions, be chosen **before** RTÉ has had sight of any of the proposed solutions. It is difficult to see how such criteria may be anything other than very general, particularly in respect of any weighting attributed to the various elements making up what is to be considered most economically advantageous.
- 5.7.3.15 There is little detail and a lot of flexibility contained in the Regulations on how this dialogue phase is to be conducted. Regulation 29(5) provides that the contracting authority will open a dialogue with the invited candidates, the aim of which will be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue, but must treat all candidates equally and without discrimination. The contracting authority shall not provide information in a discriminatory manner that may result in some candidates having an advantage over others.
- 5.7.3.16 Since there has been no outline proposal at this point, this is the occasion on which RTÉ will discover the options open to it. While the Regulations envisage discussions and dialogue, there is no reason why this stage should not also include the more formal submission of written solutions and proposals. It is also clear that RTÉ can discuss all aspects of the contract with the candidates, including price. There is a wide discretion as to the issues which may form part of the dialogue. As discussions continue with one or more of the candidates, it may become apparent that further information is needed.
- 5.7.3.17 It is important to note that the Competitive Dialogue Procedure expressly **prohibits the disclosure of solutions proposed by one candidate to the others, at least not without their agreement.** Therefore, RTÉ may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement. It is possible for the participants to agree to disclosure of their solutions and, it might be open to RTÉ to insert a condition in the descriptive document to the effect that that participants must agree to disclosure, though please bear in mind that this may be open to challenge.
- 5.7.3.18 **Reduction of Possible Solutions:** The dialogue phase also provides RTÉ with the possibility of making a further selection between the candidates based on the proposed solutions provided it has made
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this clear in the contract notice or the descriptive document. RTÉ may conduct the procedure in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The Regulations clearly state that such a selection may take place between solutions but the implication must be that this will generally mean that the selection also take place between candidates. The purpose of the Competitive Dialogue Procedure is not to arrive at a common specification but to proceed with one or more preferred solutions. The award criteria to be applied must have been stated prior to this dialogue, and any reduction on the number of solutions must be based on those award criteria. The dialogue may be continued until RTÉ can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

- 5.7.3.19 **Step 4 – Invitations to submit a Tender:** The dialogue stage must be formally concluded and this decision communicated to all participants. Once this has been done, RTÉ will ask the participants to submit their final tenders on the basis of the solution or the solutions presented and specified during the dialogue. While there appears to be no time limit for the dialogue stage, the invitation to submit a tender must contain the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up (see paragraph 5.7.3.13 above).
- 5.7.3.20 RTÉ may request tenderers to clarify, specify or fine tune information on their tenders, however, this is more limited in scope than the level of post-tender discussion provided for under the Negotiated Procedure.
- 5.7.3.21 **Step 5 – Awarding the Contract:** RTÉ must assess the tenders received on the basis of the award criteria laid down originally in the contract notice or the descriptive document and is limited to using the award criterion of the most economically advantageous tender. Even after the award and at the request of RTÉ, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.
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5.7.3.22 It is important to note that the Competitive Dialogue Procedure cannot be used by RTÉ as an information gathering exercise. It is extremely unlikely that tenderers will disclose sensitive commercial, business and technical information to RTÉ without first entering into a Confidentiality Agreement in order to protect the confidentiality of this information. The tenderers will own all intellectual property rights in all production information, road maps, diagrams, proposed solutions etc. disclosed to RTÉ. If RTÉ enters into a Confidentiality Agreement with the tenderers, RTÉ undertakes to maintain the confidentiality of information disclosed during the Competitive Dialogue Procedure. It is not open to RTÉ to subsequently use or publish this information in a subsequent technical specification under a separate tender process without the prior written consent of the tenderers concerned. If RTÉ discloses confidential information in breach of a Confidentiality Agreement, RTÉ will be sued for breach of confidentiality. Even if disclosure of information by RTÉ is not subject to confidentiality obligations, use and/or disclosure by RTÉ of intellectual property rights belonging to a tenderer without the prior written agreement of the tenderer will also leave RTÉ open to being sued for breach of intellectual property rights.

5.7.4 Negotiated Procedure

5.7.4.1 The Regulations define Negotiated Procedure as: *“in relation to a proposed public contract, means a procedure under which the relevant contracting authority consults the economic operators of its choice and negotiates the terms of contract with one or more of these operators”*. The negotiated procedure may be used only in limited circumstances. There are two types of Negotiated Procedure. These are as follows:

5.7.4.2 **The person making the commitment advertises and negotiates the terms of the contract (Regulation 31):** The Regulations provide for the award of a public contract by means of Negotiated Procedure with prior publication of the contract notice. This process normally involves the submission of formal tenders by at least three potential suppliers pre-qualified as for the Restricted Procedure provided there is that number who meet the qualification criteria. This procedure may be used in the following cases:

- Where tenders submitted in response to an Open or Restricted Procedure, or a Competitive Dialogue Procedure are irregular, or are unacceptable because they do not comply with the rules

of tendering prepared in accordance with the Regulations, but only if the original terms of the proposed contract are not substantially altered;

- Where the nature of the requirement does not permit overall pricing;
- Where it is not possible to specify requirements for a service with sufficient precision to enable tenderers respond with priced tenders; and
- Where an Open, Restricted or Competitive Dialogue Procedure has not attracted acceptable tenders.

5.7.4.3 If RTÉ decides to use this Negotiated Procedure, it will need to negotiate the tender responses submitted by tenderers in order: (a) to adapt those tenders to the requirements that were specified in the contract notice, the specifications and the additional documents (if any); and (b) to seek out the best tender (Regulation 31(3)). During the contract negotiations, RTÉ must treat all tenderers equally and without discrimination and must not provide information in a manner that could give some tenderers an advantage over others (Regulation 31(4)). In order to reduce the number of tenders to be negotiated, RTÉ may provide for a Negotiated Procedure to be conducted in successive stages. The reduction must be achieved on the basis of the published award criteria (Regulation 31(5)).

5.7.4.4 **The person making the commitment negotiates, without advertising, the terms of the contract directly with one or more companies (Regulation 32):** This procedure is a departure from the core principles of openness, transparency and competition and is a very exceptional procedure. The main instances where this procedure may be used are:

- In cases of extreme emergency;
 - When, for technical or artistic reasons or due to the existence of special or exclusive rights there is only one possible supplier or service provider;
 - When an Open or Restricted Procedure has not attracted appropriate tenders provided the companies who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially;
 - Where additional works that were not included in the project when considered initially, or were not included in the original
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contract, have, through unforeseen circumstances, become necessary in order to carry out the works specified in the contract, but only if the award is made to the contractor who is carrying out the original works, and: (i) the additional works cannot be technically or economically separated from the original contract without major inconvenience to the authority, or (ii) the additional works, although separable from the performance of the original contract, are strictly necessary for its completion;

- For the purchase of supplies on particularly advantageous terms, from either a supplier definitely winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure; or
- When new works that repeat similar works are entrusted to the contractor to whom the authority awarded an original contract by means of the Open or Restricted Procedure, provided the works confirm to a basic project for which the original contract was awarded.

5.7.4.5 The person making the commitment contemplating the use of this procedure should ensure that the circumstances justifying negotiation, as set out above exist before deciding on the use of this procedure. The circumstances invoked to justify extreme urgency must **not** be attributable to RTÉ (Regulation 32(8)). It must be noted that definitions of “exceptions” and “urgency” are strictly interpreted by the EU Commission and the Courts. Factors giving rise to urgency must be unforeseeable and outside the control of RTÉ. Delay on the part of RTÉ in commencing the tendering process is not sufficient reason for applying exceptional circumstances. Where one of the exemptions is invoked, the person making the commitment must be able to justify the use of the exemption. Companies must always be treated fairly and objectively in negotiations.

5.7.4.6 The person making the commitment may provide for the procedure to take place in successive stages in order to reduce the number of suppliers by applying the award criteria in the contract notice or the specifications. The Purchasing Department must be consulted prior to initiating any tender competition under this procedure.

5.7.5 Framework Agreements

5.7.5.1 The Regulations now recognise the concept of framework agreements which was already provided for under the old Utilities

Directive. A “framework agreement” is defined as: “an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a specific period (including the terms relating to price and, where appropriate, the quantity of works to be carried out, or the products or services to be supplied)”.

- 5.7.5.2 This definition covers both single supplier and multi-supplier frameworks. Regulation 33 expressly authorises frameworks and provides that contracting authorities must follow the rules and procedures set out in the Regulations in order to choose the party or parties to the framework agreement.
- 5.7.5.3 Each contract must then be awarded in accordance with the procedures set out in Regulations 34 and 35. This means that, in the case of multi-supplier contracts, the winner may be selected without reopening the competition (by reference to the original tenders and the framework agreement) or by a simplified transparent competition where new tenders are submitted (“mini-tender”). This provides a good deal of certainty for contracting authorities when dealing with framework agreements.
- 5.7.5.4 The term of a framework agreement may not exceed four years except in cases where this is duly justified, in particular by the subject of the framework agreement. Contracting authorities are precluded from making substantial amendments to the terms of the framework agreement. Regulation 33(6) provides that a contracting authority may not use framework agreements in such a way as to prevent, restrict or distort competition.
- 5.7.5.5 While RTÉ does not currently use the framework agreement process, it is open to RTÉ to do so in the future.

5.7.6 Dynamic Purchasing System

- 5.7.6.1 Regulation 36 introduces the concept of a “dynamic purchasing system”. This is an electronic procedure which is particularly suited to a series of contracts where there will be a large number of bidders which is likely to be substantially the same in each case. Regulation 3 defines a “dynamic purchasing system” as a: “completely electronic process which is open throughout its validity to any economic operator that: a) satisfies the relevant selection criteria and has submitted an indicative tender that complies with the relevant specifications; and b) is designed for the purchase by
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a contracting authority of commonly used items generally available on the market.”

- 5.7.6.2 The contracting authority must advertise the establishment of a dynamic purchasing system and must follow the rule of the open procedure up to the award phase in order to select bidders to be added to the system. All bidders satisfying the selection criteria must be added to the system which is essentially a large database of contractors. Each tenderer submits an indicative tender in respect of price etc. which may be updated by the tenderer at any time.
- 5.7.6.3 The purchasing system must at all times be open to new tenderers to submit tenders for admission to the dynamic purchasing system. Further, prior to each new contract being awarded, the contracting authority must publish a notice in the OJEU inviting all interested parties to submit a tender for admission to the system within a time limit, which may not be less than 15 days. Once this has been done, all parties to the system must be invited to submit tenders in respect of the individual contract within a time limit to be set by the contracting authority.
- 5.7.6.4 It appears that the requirement to advertise for tenderers to be admitted to the purchasing system prior to inviting tenders for each individual contract may be excessive and undoes the benefits of this type of contracting system. A dynamic purchasing system may not last for longer than four years, except in circumstances determined by the contracting authority as exceptional (Regulation 36(13)).
- 5.7.6.5 A contracting authority should not use a dynamic purchasing system to prevent, restrict or distort competition (Regulation 36(14)). Regulation 36(15) provides that a contracting authority should not charge interested economic operators or parties for access to a dynamic purchasing system operated by the authority.

5.8 SET AWARD CRITERIA

- 5.8.1 Prior to advertising the tender in the OJEU, the basis must be set for the award of the tender, either **Lowest Price** or **Most Economically Advantageous Tender (MEAT)**. Where using MEAT, the award criteria and the weight to be attached to each criterion must be set and must be included in the notice or in the tender documents. If it is not technically possible to indicate criteria weightings in advance, they must be listed in descending order of
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importance. New or amended criteria must not be introduced in the course of the contract award procedure. If significant additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

5.9 ADVERTISING IN THE OJEU

5.9.1 Regulation 46 of the Regulations sets out the procedure for publication of contract notices. OJEU contract notices are drawn up using the standard form by the person making the commitment and the Purchasing Department. A copy of the relevant form can be found on www.simap.eu.int. All contract notice advertisements must be sent by the person managing the commitment process to the Purchasing Department. **The RTÉ Group Purchasing Department are solely responsible for issuing the contract notice online for publication in the OJEU. All advertisements sent to the journal are automatically published on the Government www.etenders.gov.ie website.**

5.9.2 The OJEU Notice may be supplemented by advertisements in the national media to ensure the widest possible competition for the contract. It is important to note that advertisements **should not** appear in the national media before the date of despatch to the OJEU and must not contain any additional information to that in the OJEU. **Only people responsible for the management of the commitment process should liaise with the Purchasing Department regarding any additional advertising requirements. It is important to note that Purchasing Department personnel only are authorised to publish a notice in the OJEU and the national and trade media.**

5.9.3 Please note the comments at paragraphs 3.1, 3.2 and 3.3 above regarding the inclusion of the Invitation to Tender, Specification and RTÉ Terms and Conditions in the advertisement.

5.10 ISSUE OF ADDITIONAL DOCUMENTS

5.10.1 Additional information requested in good time by tenderers should be issued promptly and at least **six** days before the latest date for receipt of tenders. In order to avoid giving unfair advantage, additional information supplied to one supplier in response to a request should be supplied to all tenderers if it could be significant in the context of preparing a response to tender.

5.11 TIME LIMITS FOR REPLIES

- 5.11.1 Regulation 46 of the Regulations sets out the deadlines for receipt of tenders and requests to participate. Minimum time limits are set down for the different stages of the particular contract award procedure chosen. In all cases the times specified in days relate to calendar days. When fixing the timescales for submitting expressions of interest, requests to participate or receive tenders, the person making the commitment should take account of the complexity of the project and time needed for drawing up tenders (Regulation 46(1)), however, this does not affect the minimum time limits prescribed by the Regulations. Expressions of interest, responses and tender submissions must always be addressed for the attention of The Purchasing Manager, Radio Telefis Éireann, Donnybrook, Dublin 4.
- 5.11.2 The minimum time limits, which are reckoned from the date of dispatching the notice to the OJEU, are as follows:
- 5.11.2.1 **Open Procedure:** Under Regulation 46(7), where a public authority is awarding a contract by means of an Open Procedure and where a contracting authority has sent a notice to the Office for Official EC Publications by **electronic** means:
- The deadline for receipt of tenders under the Open Procedure is reduced to **45 days**.
 - If a PIN has been published – as a general rule the minimum time may be reduced to **36 days (normally) but not less than 22 days (exceptionally)**.
- 5.11.2.2 **Restricted and Negotiated Procedure and Competitive Dialogue:** Under Regulation 46(7), where a public authority is awarding a contract by means of a Restricted Procedure, a Negotiated Procedure with publication of a contract notice or a Competitive Dialogue, and where a contracting has sent a notice to the Office for Official EC Publications by **electronic means**:
- The deadline for receipt of requests to participate for a Restricted Procedure, Negotiated Procedure with prior publication of a contract notice and Competitive Dialogue under Regulation 46(3)(a) is reduced to **30 days**.
 - The deadline for receipt of tenders under the Restricted Procedure under Regulation 46(3)(b) remains at **40 days**.
 - If a PIN has been published – as a general rule the minimum
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time for the bidding stage of Restricted and Competitive Dialogue may be reduced to **26 days**. There is **no reduction** in the time frame for receipt of expressions of interest.

5.11.2.3 **Restricted Procedure, Negotiated Procedure with prior publication of a contract notice and Competitive Dialogue Procedures (Regulations 46(3) and 46(4)):** The minimum times for responses outlined in paragraph 5.11.2.2 above may be **reduced by a further 5 days where all tender documentation is made available electronically in accordance with the provisions of Regulations 46(7) and 46(8)**.

5.11.2.4 Where “*genuine urgency*” renders these time limits impracticable, shorter time limits may be applied in relation to the Restricted Procedure or a Negotiated Procedure following publication of a contract notice as follows:

- For receipt of expressions of interest – not less than **15 days** from the date of dispatch of the notice (Regulation 46(10)(a)). If the notice inviting requests is sent to the OJEU electronically in accordance with the Regulations – not less than **10 days** from that date (Regulation 46(10)(b)).
- For receipt of tenders under a Restricted Procedure – not less than **10 days** from the date of issue of the invitation to tender (Regulation 46(11)).

NOTE: The use of the urgent procedures or accelerated procedures, as referred to in the Regulations and Directives, must be justified and have been caused by unforeseeable events outside the control of the contracting authority. The EU Commission and ECJ interpret “urgency” very strictly. Delay or inaction on the part of RTÉ is not sufficient reason for applying exceptional procedures.

NOTE: In respect of European Competitions, in addition to the time limits set out in paragraph 5.11 above, the person managing the commitment process must take account of the fact that a formal agreement cannot be put in place between RTÉ and the preferred bidder until 14 days have elapsed from the date of the notification (see Chapter 7).

Steps in conducting a Competitive Process for contracts above EU Thresholds



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Chapter 6
OPENING & EVALUATION OF TENDERS

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6.1 OPENING OF NATIONAL AND EU TENDERS:

6.1.1 The following procedures should always be followed for opening **all** material tenders to prevent tenders being mislaid or any impropriety at this stage:

- All tender responses should be addressed for the attention of the RTÉ Purchasing Manager and clearly marked with the project title.
- All tender responses shall remain sealed until the formal opening of all tender responses takes place in the Purchasing Office as outlined below.
- If a tender response is received electronically (via e-mail), the tender response documents attached to the e-mail must not be opened. The Purchasing Department will retain this tender response until the formal opening of all tender responses takes place. If the tender response is received electronically or via post by the person managing the commitment process, it must be forwarded unopened to the Purchasing Department for retention until the formal opening of all tender responses.
- All tenders shall be opened together in the Purchasing Office in the presence of a purchasing representative, an auditor and the person making the commitment as soon as possible after the designated latest time and date set for receipt of tenders.
- If it is confirmed by the tenderer that a submission was sent and was delivered to RTÉ, but was not received by the Purchasing Department by the required deadline, RTÉ reception and RTÉ Goods Inward will be checked prior to opening the tender responses already received by the Purchasing Department.
- Tenders received after the closing time for receipt of tenders will not be accepted.

6.1.2 When each tender response is opened, each tender submission is date stamped and signed by each person attending the opening. The Purchasing representative records relevant details of company name and total price tendered.

6.2 CRITERIA FOR AWARDING CONTRACTS

6.2.1 At the issuing of the invitation to tender stage, the person managing the commitment process will have selected details of the award criteria applicable to the particular tender competition and will have received Managerial and Financial approval in

advance concerning the appropriateness of these criteria and the relative weightings to be attached. As previously advised, under the Regulations and Directives it is open to RTÉ to award contracts on the basis of:

- The lowest priced tender; **or**
- The most economically advantageous tender (MEAT) specifying, in addition to price, various other criteria including running costs, service costs, level of after sales service, technical merit, environmental characteristics etc.

6.2.2 When a contract is being awarded on the most economically advantageous basis, the notice or the tender specifications must state all of the criteria being applied in the process, giving the relative weightings for each criterion. If it is not technically possible to indicate criteria weightings in advance, they must be listed in descending order of importance. New or amended criteria must **not** be introduced during the course of the contract award procedure. If significant additional information or material is supplied to a tendered upon request or otherwise, it must then be supplied to all tenderers.

6.3 PROCUREMENT UNDER THE 2004 GUIDELINES

6.3.1. EVALUATION AND SELECTION

6.3.1.1 The methods and criteria for selecting companies to be invited to tender and for awarding contracts should be documented and should be objective, transparent and proportionate. It should be clearly understood that whether responses are to an advertisement or to a direct invitation, all parties in the process must be treated on the same fair and objective basis. Selection may be based on factors such as overall suitability to the particular project by reference to experience, technical competence, capability and financial standing.

6.3.1.2 Decisions on selections for smaller purchases can sometimes be based on the lowest price only and should be recorded with the minimum of formality but in all cases selection criteria must receive managerial and financial approval. However, it is important to note the provisions of paragraphs 2.4 and 2.5 in relation to maintaining a tender file, keeping accurate records and retention of the file.

- 6.3.1.3 **Opening Tenders:** Please see paragraph 6.1 above for applicable procedures.
- 6.3.1.4 **Evaluation of Tenders:** The 2004 Guidelines suggest that it should be normal practice for projects valued at **€50,000 or higher**, which are being awarded on the basis of the most economically advantageous tender (MEAT), to have the evaluation of tenders carried out by a project team with the requisite competency. The primary responsibility for the analysis and evaluation of tenders is with the person managing the commitment process and his or her line and financial managers. If a project team is assembled this may include a competent person from outside the area directly involved with the placing of the contract or an external consultant. Transparency and objectivity are best demonstrated by the use of a scoring system or marking a sheet based on the relevant weighting criteria including price and indicating a comparative assessment of tenders under each criterion (see Appendix 4 for sample scoring criteria). The person managing the commitment process is also responsible for ensuring that a project team sets the scoring and evaluation criteria appropriately and for ensuring that such criteria are approved in advance by the relevant line and financial manager approvers.
- 6.3.1.5 As an aid to understanding and clarity, it may be appropriate to invite the most competitive tenderers to present or elaborate on proposals for technical or consultancy projects.
- 6.3.1.6 It should be noted that any dialogue with tenderers can only concern clarification of the bids submitted. Activities that could be construed as “*post tender negotiation*” on price or which result in very significant changes to a submission or to the original tender specifications must generally be avoided and if it arises it must be subjected to close independent scrutiny by financial managers responsible for the area in question.
- 6.3.1.7 The Purchasing Department should be informed of the result of a tender competition without delay after the decision has been made (please also see Chapter 7). The Purchasing Department will write to all tenderers advising the results (see specimen letters in Appendices 5 - 8).
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PROCUREMENT UNDER THE REGULATIONS AND EU DIRECTIVES:**6.4 CLARIFICATION OF TENDERS**

- 6.4.1 Additional information and clarification may be required after tenders have been submitted. However under the Open or Restricted Procedures, substantial alterations to bids after they have been submitted is not permissible. In particular any adjustment to the price which could improve the competitive position of a bid is not permitted.

6.5 EVALUATION AND SELECTION

- 6.5.1 **Opening Tenders:** Please see paragraph 6.1 above for applicable procedures.
- 6.5.2 The evaluation process for tenders above the EU threshold will be similar to that for larger projects below the EU threshold described at paragraphs 6.3.1.4 and 6.3.1.5. Tenders which do not comply with the requirements specified should be rejected.

Evaluation of tenders should be carried out by the person managing the commitment process and his or her line and financial managers and project team comprising a suitably competent team. The evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. This is best achieved by the use of a scoring system based on all the relevant weighting criteria, indicating a competitive assessment of tenders under each criterion (see Appendix 4 for sample scoring system).

- Where price is the sole criterion, the contract will be awarded to the lowest priced bid complying with the specified requirements.
 - Where MEAT is the basis for the award, the contract must be awarded to the tender which best meets the relevant criteria. In addition to price they will include other criteria relevant to the subject of the contract. The criteria with the relevant weightings will have been already made known to the tenderers, either in the contract notice or in the tender specifications document.
- 6.5.3 The scoring system must include “*price*” and not “*value for money*” or “*cost effectiveness*” as a specific criterion. Value for money/cost effectiveness/economic advantage is largely the outcome of the complete evaluation. The criteria can be sub-divided for the purpose of scoring if it assists in the evaluation process but this

must **not** involve a departure from the pre-established criteria and weighting.

- 6.5.4 Under the Restricted Procedure, care should be taken to ensure that the pre-qualification criteria are not used inappropriately in the evaluation process. Tenderers will be deemed to have met the minimum requirements in regard to their capacity to perform the contract. Therefore criteria relating to past experience and track record of the company will not feature at the evaluation stage. Tenders should be assessed solely on the basis of how they meet the award criteria related to the actual project.
- 6.5.5 In Open and Restricted Procedures the most competitive or advantageous tenderers are frequently asked to make a presentation on their proposals for technical or consultancy projects. These presentations are used for the purposes of elaboration and clarification. Any dialogue on price or significant changes to criteria or tender specifications contravenes the Regulations and Directives and is not allowed.
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Chapter 7
TENDER RESULT NOTIFICATION AND DEBRIEFING

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7.1 CONTRACT AWARD NOTICE FOR NATIONAL COMPETITIONS

7.1.1 The Purchasing Department will write to the successful and unsuccessful tenderers notifying them of the outcome of the tender competition. Sample letters are set out in Appendices 7 - 8. **In the case of national competitions, there is no requirement under the 2004 Guidelines for a “cooling off” period after the date of contract award notification and prior to putting an agreement in place between the parties.** Please also note the provisions of paragraph 7.3 below regarding voluntary debriefing of unsuccessful tenderers.

7.2 CONTRACT AWARD NOTICE FOR EUROPEAN COMPETITIONS

7.2.1 Regulation 41 requires that the Purchasing Department publish certain information on contracts awarded on the OJEU site within **48 days** of the contract being awarded. Particulars including the type of contract, the procedure and award criteria used, the number of tenders received, the name of the successful tenderer, the value of the contract or the range of prices tendered are published. The necessary information will be submitted electronically on the “Contract Award Notice”. It is important that the Purchasing Department are notified of the results of a tender competition without delay by the person managing the commitment process so that the Purchasing Department may proceed to publish the information required in accordance with Regulation 41.

7.2.2 Where possible, all tenderers must be informed of the result of a tender competition without delay. A draft letter notifying the tender of its preferred bidder status is set out in Appendix 5. Any notification is **always** provisional and is **always** made without prejudice and subject to contract. **Under EU rules, a formal agreement cannot be put in place between RTÉ and the preferred bidder until 14 days have elapsed from the date of the notification.**

During this 14 day period, an unsuccessful tenderer can seek a review of the decision if they feel that the process has been unfair or unlawful. This implies that any notification to the tenderer deemed successful during this interval must be provisional and not constitute a contractual arrangement (see sample notification

at Appendix 5). In the Alcatel case (Case 81/98/ECJ), it has been held that there should be a **mandatory pause** between the decision as to who the preferred bidder is with which to conclude the contract in a process and the actual conclusion of a contract. The reason for this pause is to allow the opportunity of a full and proper debriefing to losing bidders giving full reasons as to why they were unsuccessful. Failure to do this denies them the right to either challenge the process or challenge the award of the contract. The absence of such a pause would thereby undermine the effectiveness of the Remedies Directive.

7.2.3 Proposals in a tendering process are normally submitted on a confidential basis. In order to preserve the integrity of the process and to respect the commercial and competitive positions of tenderers, details of the responses to tender should be kept confidential at least until the evaluation process is concluded and as a matter of good business practice it is generally unwise to subsequently reveal details of one tenderer's bid to another tenderer unless this information has subsequently become freely available or is in the public domain in any event. However after the award of a contract certain information must be disclosed. Under the Regulations and Directives, RTÉ is required to provide certain information on contracts above the EU thresholds.

7.2.4 Two particular provisions on disclosure of information in the Directives require that:

- Any eliminated company or tenderer who requests it must be informed promptly (**within 15 days**) of the reason for rejection and of the characteristics and relevant advantages of the successful tenderer as well as the name of the successful tenderer.
- Certain information on the contract awarded including the name of the successful tenderer and the price must be submitted on a standard form for publication in the OJEU not more than 48 calendar days after the award.

NOTE: The Purchasing Department is the only party authorised to release this information and such release in respect of material contracts will be carried out after consultation with both Group Finance and Legal Affairs.

- 7.2.5 However, information may be withheld from publication if the release:
- Would be contrary to public interest.
 - Would prejudice the legitimate commercial interests of particular undertakings.
 - Might prejudice fair competition.

7.3 VOLUNTARY DEBRIEFING OF UNSUCCESSFUL TENDERERS

- 7.3.1 Apart from observing the legal obligations where the provisions of the procurement Directives apply, where contracts are awarded on the basis of the most economically advantageous tender it is good practice to adopt a constructive policy on debriefing unsuccessful tenderers. As a minimum unsuccessful tenderers should be informed of the outcome of their submission. It is good practice to give tenderers the reason for their unsuccessful bid by reference to their relative performance under the relevant criteria used in the competition, for example, uncompetitive on price. For smaller procurements feedback by telephone should be sufficient.
- 7.3.2 **National Procurement:** The 2004 Guidelines provide that all tenderers should be informed of the results of a tendering process without delay. The Department of Finance has also published Guidance on the Disclosure of Information and the Debriefing of Unsuccessful Tenderers (“Guidance”). For smaller projects, the Guidance provides that, as a minimum, unsuccessful candidates should be informed of the outcome of their application. An offer of feedback by telephone should normally be sufficient. A written record should be kept of the telephone conversation. For larger contracts, for example, those above €50,000, unsuccessful tenderers should be offered an opportunity of a debriefing meeting. A notification letter of the award decision should be sent.
- 7.3.3 A structured approach for any formal debriefing should be adopted. It is prudent practice to have two representatives from RTÉ in attendance, one of whom should be from the project team. In addition, a note of the meeting should be kept for record keeping purposes. The meeting should address the tenderer’s offer against the evaluation criteria focussing on the relative strengths and weaknesses of the tender without being an explicit comparison between the tenderer’s offer and any other offer.
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- 7.3.4 In the debriefing, care should be taken to ensure that information such as the identity of the other tenderers (including the successful tenderer), the price or pricing strategies of the other tenderers (including the successful tenderer) or information that could compromise the competitive situation or infringe the intellectual property rights of others (including the successful tenderer) is not disclosed. The debriefing should not become a forum to debate the process of how bids were evaluated or to discuss the merits of the award decision. Constructive and effective debriefing will be very much assisted if clear, objective criteria for qualification and award of the contract have been pre-established. In general if there has been an objective and properly conducted tendering process, an open and constructive debriefing should provide reassurance to unsuccessful tenderers.
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Chapter 8

TERMINATION OF TENDER PROCESS AND REMEDIES

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8.1 TERMINATION OF TENDER PROCESS

- 8.1.1 RTÉ may decide to terminate a tender subsequent to advertising the tender, receiving tenders or at any other stage of the competition. The European Court of Justice has held that, provided European Community law and the principles of equality, transparency and non-discrimination are complied with, contracting authorities have a broad discretion in terms of deciding whether to terminate a tender competition.
- 8.1.2 It is important to note that it is open to candidates and tenderers to challenge the decisions made by RTÉ in this regard under the Remedies Directive 89/665/EC (implemented in Ireland by the European Communities (Review Procedures for the award of Public Supply and Public Works Contracts) (No. 2) Regulations, 1994 (SI 309/1994) (“1994 Regulations”). However, unless the applicant can demonstrate that the reason for terminating the tender competition was contrary to European Community law (for example: the reason was anti-competitive, discriminatory or unfair), then it is unlikely that any such challenge would be successful.
- 8.1.3 Under Regulation 49 of the Regulations, RTÉ, as a contracting authority, must as soon as practicable after making a decision in relation to a public contract, inform candidates of the decision by the most rapid means of communication possible (such as via e-mail or facsimile). This would also include informing tenderers of a decision to terminate the tender competition. If tenderers are informed by e-mail or facsimile, RTÉ must confirm the decision in writing if a candidate so requests.
- 8.1.4 It is important that all correspondence is retained on file as contracting authorities have obligations under Regulation 51 to maintain a written report of every competition including reasons why the contracting authority terminated the competition. Reports may be requested, in whole or in part, by the European Commission at any time. Please also see paragraph 2.4 above on retention of documents.
- 8.1.5 While it is not mandatory under the Regulations, it would also be prudent to transmit a notice to the OJEU formally terminating the competition. This notice may take the form of the standard contract award notice.
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8.2 REMEDIES UNDER EU PROCUREMENT AND 2004 GUIDELINES:

8.2.1 The issue of remedies in public procurement law and under the Directives usually arises because of a defect in the process involving the award of the contract. The European Commission and European Court of Justice (“ECJ”) aim to take an approach which maximises the rights of complainants and the obligations on contracting authorities to run procurement processes in accordance with the principles of equal treatment, non-discrimination and transparency. The imposition of these obligations in a series of recent cases means that greater vigilance on the part of contracting authorities in running a tender process is required.

8.2.2 The Remedies Directive required Member States to take relevant steps to put in place a system of adequate remedies for infringements of general EU public procurement law in the area of works and services. It stated that systems should be put in place to provide for the following remedies:

- Interlocutory procedures which would allow for the suspension of the contract award procedure;
- The setting aside of a decision or contract made unlawfully under the EU legislation; and
- Damages.

There is also the possibility of sending complaints to the European Commission and enforcement action via the ECJ.

8.2.3 Article 6 of the 1994 Regulations gives the High Court the power to:

- Declare the relevant contract, or any of its provisions, void; or
- Declare the relevant contract may have effect only subject to such variation as the Court thinks fit, including any variation required to protect the interests of a party to the contract who was not responsible for the infringement of the law concerned; or
- Make such other order concerning the validity of the relevant contract or any of its provisions as the Court thinks fit.

Article 7 of the 1994 Regulations provides where a contract has been concluded subsequent to its award, the High Court may award damages to any person harmed by an infringement whether

or not it decides to exercise the other powers conferred on it by the 1994 Regulations.

8.2.4 2004 Guidelines:

8.2.4.1 Judicial Review: Where a contracting authority fails to comply with the 2004 Guidelines, judicial review may provide a remedy. Judicial review proceedings may be taken on the basis that a decision by a public body to award a contract to a particular tenderer was not made reasonably, was not based on appropriate criteria or the proper procedure followed. It is important to understand that the courts are not concerned with reviewing the merits of a decision under challenge, but rather the legality of the decision, including the decision-making process itself. The grounds for judicial review in Ireland are essentially that a decision maker has acted *ultra vires* (beyond its powers). This may be for any of the following reasons:

- Illegality;
- Unreasonableness;
- Procedural impropriety (such as failing to comply with the 2004 Guidelines);
- Legitimate expectation (where a public body has caused individuals to believe that they will be treated in a certain way, the courts may prevent that authority from acting otherwise provided it would have been within the power of the authority to act as it indicated it would).

Though not inflexible, the 2004 Guidelines do constitute best practice and failure to observe them may result in the overturning of a contract award and/or an action for damages.

8.2.5 Other Remedies: In addition to the remedies outlined above, disappointed tenderers may also have remedies under contract law and competition law.

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Chapter 9
CONTRACT NEGOTIATION

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9.1 CONDUCTING NEGOTIATIONS

- 9.1.1 After the award of the tender, any discussions or exchanges, whether verbal or documented via e-mail that occur between the person managing the commitment process and all tender personnel involved in the tender should be made **“SUBJECT TO CONTRACT/CONTRACT DENIED”**. This phrase should be used where possible to ensure that person managing the commitment process does not inadvertently enter into a binding contract with the tenderer before all the terms have been fully explored and documented. Any e-mail exchanges that occur should carry this phrase as a heading. This phrase signifies that any exchanges verbal or oral do not from RTÉ’s perspective, represent a contract. Its use has the advantage that where discussions take place over a long period of time without any apparent definite conclusion, that the other side cannot seek to enforce the terms which it may argue had been agreed during the course of those particular discussions.

9.2 RTÉ TERMS AND CONDITIONS

- 9.2.1 At the ITT stage, the successful tenderer will have received an appropriate copy of the relevant version of RTÉ’s Terms and Conditions to review (see Chapter 3, paragraph 3). In the response to tender, the tenderer should list their issues with the tender specification and raise issues (if any) with the RTÉ Terms and Conditions. Issues raised by tenderers with the RTÉ Terms and Conditions should count towards the bid evaluation criteria.

The person managing the commitment process may wish to seek advice from Legal Affairs on issues raised by tenderers at this stage. As pointed out in paragraph 3.3 above, it is important that ITT contains wording to reserve the right of RTÉ at RTÉ’s sole discretion to amend or vary the RTÉ Terms and Conditions but it also needs to be communicated to tenderers that such changes generally are exceptional. Otherwise whilst this device enables RTÉ to make amendments to RTÉ’s Terms and Conditions as may be required after negotiation with the successful tenderer it can also result in substantial cost escalations when the full effects of any changes are appreciated by the tenderer.

9.3 CONTRACT OVERVIEW

9.3.1 Some basic information on the type of terms to be found in a contract and the structure of a contract are set out below.

9.3.2 **Express and Implied Terms in Contracts:** A contract contains written terms agreed by both parties. These terms in the contract can be divided into “*express*” terms and “*implied*” terms.

9.3.3 The “*express*” terms of a contract are those terms explicitly stated in the written agreement or in the oral communications which passed between the parties. An express term in a contract leads to an automatic right to sue when there is a breach. There are a number of criteria to determine whether a statement is a term of the contract or is a representation (i.e. an inducement made to enter into the contract).

9.3.4 The “*implied*” terms of a contract are those terms that are not expressly written or are orally stated but still form part of the contract. There are three situations where terms are implied into contracts. These are:

- (a) where terms are implied due to the customs and trade practice in the business;
- (b) where terms are implied into contracts by the courts in order to make common sense of the contract; and
- (c) where terms are implied into contracts by legislation.

An important example of terms being implied into contracts by legislation is the Sale of Goods Act, 1893 as amended by the Sale of Goods and Supply of Services Act, 1980. The Act implies conditions as to title, merchantability and fitness for purpose in relation to the sale of goods. In relation to the supply of services, where the supplier is acting in the course of business, he must have the necessary skill to render the service, he must supply the service with due care, skill and diligence and that the goods supplied here as part of the service must be of merchantable quality.

9.3.5 **Conditions and Warranties:** Although terms in contracts may be express or implied as pointed out above, not all of the terms of a contract, whether express or implied carry equal weight. There is an important difference between a condition and a warranty. Basically, the rule is as follows – where a condition of a contract is breached such a breach entitles the party to repudiate and

withdraw from the contract whereas a breach of a contractual warranty entitles a claim in damages only and does not permit either party to repudiate the contract. It is often difficult to identify what is a condition of a contract and what is a warranty. In order to have certainty when contracts are being drafted, it is advised that if the parties want a term to be a condition they should expressly stipulate in the contract that each party may withdraw from the contract if such a condition is breached. The Sale of Goods legislation also sets out what implied terms provided for in the Sale of Goods legislation are conditions.

9.3.6 **Exemption Clauses/Exclusion Clauses:** An exemption clause is a contractual term where one party attempts either to limit the scope of his contractual duties or to regulate the other parties right to damages. There are two types of exclusion clauses:

- (a) procedural exclusion clauses – where recovery is barred after a failure to conform with certain specified requirements (eg. must return goods within three days); and
- (b) substantive exclusion clauses preventing the injured party from claiming any compensation for non-performance of the contract.

There is a basic rule of contract law that applies to these clauses – the more unusual a contractual term is, the greater the effort the person seeking to rely on the term must make in bringing it to the attention of the other party. This requirement will vary depending upon the severity of the clause.

9.3.7 The courts generally treat exemption clauses with a high degree of suspicion and have adopted special rules that they apply in interpreting these clauses. Firstly, where the clause is ambiguous or uncertain as to meaning, the courts will construe the clause against the person who drafted it. Secondly, the words used in an exemption clause will be given a narrow meaning by the courts.

9.3.8 An example of an exemption clause is a limitation or exclusion of liability clause where either party to a contract seeks to exclude or limit its liability for any loss or damage arising out of any non-performance under the contract. These clauses must be clearly drafted and must not be too broad in scope.

9.4 CONTRACT STRUCTURE

9.4.1 The precise format of each contract will differ depending upon the subject matter covered by the contract. However, most contracts contain the following clauses and follow this format:

- (a) **Parties to the Contract:** The full title, address, registered company number (if applicable) for each party to the contract must be inserted.
- (b) **Recitals:** This is a brief description of the contract and the matters to be covered by the contract. It is optional whether to include this section.
- (c) **Definitions Clause:** This clause sets out definitions of the terms to be used throughout the contract. Defined terms include: “Effective Date”, “Intellectual Property Rights”, “Broadcast Rights”, “Term”, “Services” etc. Various standard or “boilerplate” clauses which aid interpretation of terms used throughout the contract are also included. An example includes: “The headings to the clauses are for convenience only and have no legal effect.”
- (d) **Subject Matter of the Contract:** This clause sets out the terms of engagement, what equipment/services are to be supplied and/or licensed under the contract, which party is responsible for the supply and/or licence and what rights are granted to the party receiving the licence. An example of this type of clause is as follows:

“RTÉ engages the Producer to provide the Services to RTÉ and the Producer hereby agrees to provide the Services from [insert dates] inclusive upon the terms and conditions set out in this Agreement.”

- (e) **Obligations of both parties:** The obligations of both parties under the contract are set out. Examples of obligations: (a) the equipment/services to be supplied by a certain date, (b) the equipment/services to comply with the specifications provided, and (c) which party is responsible for taking out appropriate insurance.
 - (f) **Fees payable:** The fees payable and the payment conditions must be set out clearly. If the fees payable are subject to VAT, this also needs to be clearly set out. It may also be necessary to include a clause requiring the supplier to provide evidence from the Revenue Commissioners of tax clearance status.
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- (g) **Warranties:** Any warranties applicable to the supply of the equipment/services must be set out. A warranty is defined under the Sale of Goods Act, 1893 as “*something collateral to the main purpose of the main contract*”. A warranty is a contractual representation. Examples of warranties include: “*The equipment shall comply with the specification furnished and shall be of merchantable quality and fit for the purpose for which it is intended*” and, “*The services shall be supplied with all due skill, care and diligence*”.
- (h) **Indemnities:** An indemnity is an undertaking by one person to meet a specific potential legal liability of another. An indemnity entitles the person indemnified to a payment if the event giving rise to the indemnity takes place. Unlike a claim for breach of warranty, there is no need for the indemnified person to establish that he has suffered loss. An example of an indemnity is an indemnity regarding ownership or non-infringement of intellectual property rights.
- (i) **Limitation/exclusion of Liability:** Under Irish law, there are two types of loss flowing from an event giving rise to the loss. These are “*direct*” loss and “*indirect*”/ “*consequential*” loss. Direct loss arises where the event giving rise to the loss or damage is reasonably foreseeable as resulting from the activity. Indirect/consequential loss arises where the event giving rise to the loss is not reasonably foreseeable. Examples of direct loss include: (a) the fees paid under the contract or (b) the cost of replacement products/services. Examples of indirect/consequential loss include: (a) loss of profits (provided such loss was not reasonably foreseeable).
- Exclusions and limitations must be clear and unambiguous. They must clearly extend to the exact loss or damage that is to be excluded or limited. If there is any doubt as to the effect of an exclusion or limitation clause, then the clause will be interpreted against the interests of the person trying to rely on it. It is important to note that some types of liability may not be excluded at all. For example: it is not possible to exclude or limit liability for death or personal injury.
- (j) **Termination:** This clause will set out the circumstances under which, a party may terminate the contract. Examples of events giving rise to the right of one party to terminate the contract include where the other party is declared insolvent

or where the party supplying the goods and/or services fails to supply goods/services in accordance with the terms of the contract.

Typically, this clause will also set out what both parties rights are post termination and what clauses of the contract will survive termination and remain in effect.

- (k) **Dispute Resolution/Mediation/Arbitration:** Some contracts include a procedure enabling both parties to the contract resolve disputes by using an agreed procedure, such as a mediation or arbitration process. The clause will set out how the dispute is to be dealt with and to whom the dispute is to be escalated to within each organisation.

Dispute Resolution/Dispute Escalation: Sets out an internal escalation process to enable both parties refer the dispute for internal resolution.

Mediation: Both parties involved in the dispute agree to use a neutral third party to help solve the dispute. The terms of the agreement are decided between the parties with the help of the mediator (or Alternative Dispute Resolution body). Generally, decisions made in mediation are not legally binding but they can be made so if both parties agree to it.

Arbitration: Both parties involved in the dispute agree to go to an arbitrator to resolve issues. The decision of the arbitrator is legally binding and the process is governed by laws (Arbitration Acts, 1954 – 1998). A company/individual may represent itself but it may benefit from legal representation if a dispute is taken to an arbitrator.

- (l) **General Provisions:** This clause usually contains provisions such as the governing law of the contract.
- (m) **Signature block:** The contract will contain a signature page enabling all parties to the contract to sign. It is important that the correct signatories sign on behalf of companies and other legal entities in order to ensure a valid contract.
- (n) **Schedule(s)/Statement of Work:** The schedule(s) contain a detailed description of the services to be performed or products to be supplied, project plan, functional specification delivery times, installation schedule, acceptance testing and product inspection.
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9.5 CAPACITY TO SIGN CONTRACTS

9.5.1 It is important to check the capacity of the person signing the contract both on behalf of RTÉ and on behalf of the tenderer. The RTÉ person responsible for managing the commitment process must be satisfied that he/she can sign contracts on behalf of RTÉ and bind RTÉ and that he or she has received specific written managerial and financial authorisation to execute the commitment being entered into.

The party signing on behalf of the tenderer must also have the capacity to sign contracts and bind the company. Usually, a director or officer of a company is the only party entitled to sign contracts on behalf of the company. In certain situations, a company may delegate authority by way of a board resolution to a nominated individual (who is not a director or officer of the company) to sign certain contracts (usually up to a certain value) on behalf of the company.



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APPENDICES



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Checklist Of Information Required by the Purchasing Department

1. Details of appropriate financial approval (see Appendix 2) and copy of signed A196 (where appropriate).
 2. Outline of project timeline (date of advert, closing date(s) for tender, notification of award, contract etc.).
 3. Value of the project (please see chapter 3, paragraph 3.6) for advice on calculation of correct values of project.
 4. Details of anticipated project start dates.
 5. Depending upon the nature of the project, confirmation as to whether Legal Affairs has been contacted regarding an appropriate agreement.
 6. Confirmation on the status of the specification (eg. specification complete/preparation of specification underway).
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Managerial & Financial Delegated Authority Approval Limits

Requisition Line Amount	Approver	Temporary Approver	Finance IT
€0 - €10,000	Costpool Manager	If Costpool Manager is unavailable, a Temporary Approver is assigned by IT Finance	If approvers are unavailable, Temporary Approvers will be assigned by IT Finance
All requisition line items > €10,000	Central Purchasing	"	"
€10,001 - €100,000	Costpool Manager + Senior Manager + FD of IBD	"	"
€100,001 - €250,000	Costpool Manager + Senior Manager + FD of IBD + MD of IBD	"	"
€250,001 - €750,000	Costpool Manager + Senior Manager + FD of IBD + MD of IBD + C.F.O.	"	"
€750,000+	Costpool Manager + Senior Manager + FD of IBD + MD of IBD + C.F.O. + D.G.	"	"

Checklist for Tender Files

The following checklist lists the key documents which should be included in the tender files.

No.	Document	On File ✓
1.	Brief outline of the project objectives and the reason for undertaking the tender	
2.	Outline of project timeline (date of advert, closing date(s) for tender, notification of award, contract etc.)	
3.	Description of the tender method used (direct invitation, open, restricted etc.) and the rationale for the method used	
4.	Copy of tender notification, newspaper adverts etc.	
5.	Copy of invitation to tender	
6.	Details of the numbers invited to tender, invited to respond etc.	
7.	Correspondence with suppliers to clarify terms in the invitation to tender (where applicable)	
8.	Response to the invitation to tender received from suppliers (electronic copy will suffice)	
9.	The scoring methodology used to evaluate responses to tenders (to include evaluation criteria and weightings)	
10.	Names of individuals undertaking the tender evaluation	
11.	Result of evaluation (scoring sheets or similar)	
12.	Copy of the letter to inform successful and unsuccessful tenderers	
13.	Copies of all correspondence between all tenderers and RTÉ including letters, faxes, e-mails, written notes of telephone conversations.	
14.	Copies of all draft terms and conditions, project plans, functional specifications, schedules negotiated and amended by the parties.	
15.	Copies of all correspondence relating to the document negotiation phase of the tender process	
16.	Copies of all final documents signed by RTÉ and the tenderer.	

Sample Score Sheet for evaluation of tenders – for delivery and management of a service.

Award Criteria	Quality of proposal for providing services detailed in ITT	Management & services structure proposed	Expertise and skills of personnel assigned for this project	Timeframe For delivery	Proposed cost of providing serviced	Total marks awarded
Total Mark Available	70	30	30	20	50	200
Company A	60	24	22	12	30	148
Company B	60	30	27	15	45	177
Company C	45	15	12	15	50	137
Company D	55	22	25	14	40	156
Company E	50	25	16	15	35	141

Completed by:

Date:

**SAMPLE DRAFT LETTER TO PREFERRED BIDDER
FOR EUROPEAN CONTRACTS**

Title: []

Address: []

Date: []

**WITHOUT PREJUDICE
SUBJECT TO CONTRACT / CONTRACT DENIED**

Re: *[insert name of project]*

Dear Sir/Madam,

I refer to your recent response to tender submitted in response to invitation to tender dated ___ day of _____ with a closing date of _____ *[insert closing date]* in respect of the above tender.

The tender evaluation process has now been completed and I am pleased to inform you that you are the preferred bidder in accordance with the published award criteria. It is anticipated that a contract will be concluded with your organisation in due course, subject always to receipt of an appropriate Tax Clearance Certificate from the Irish Revenue Commissioners and contractual terms being finalised and agreed by both parties.

Please note that under EU rules a formal agreement with you reflecting the conclusion of the contract may not be put in place until 14 days have elapsed following the date of this notice.

I would emphasise that this notification is provisional and does not create legally binding relations with any party.

To avoid delay you are requested to forward a current Tax Clearance Certificate from the Irish Revenue Commissioners to us as soon as possible.

Meanwhile, I shall contact you shortly with regard to the conclusion of the contract.

Yours sincerely,

Robby Hill

Purchasing Manager.

SAMPLE DRAFT REGRET LETTER FOR EUROPEAN CONTRACTS

Title: []

Address: []

Date: []

Re: *[insert name of project]*

Dear Sir/Madam,

I refer to your response to tender submitted in connection with the supply of _____ *[insert title of project]* to RTÉ.

The evaluation process has now been completed and I regret to inform you that based upon the formal published award criteria your tender has not been selected for contract award.

A contract is expected to be concluded shortly with the successful tenderer, when final agreement has been reached on contractual terms. At that stage an Award Notice will be published on the Official Journal of the EU.

I would like to take this opportunity to thank you most sincerely for your participation in the competition and wish you every success in the future.

Yours sincerely,

Robby Hill

Purchasing Manager.

**SAMPLE DRAFT LETTER TO THE PREFERRED BIDDER
NATIONAL CONTRACT**

Title: []

Address: []

Date: []

**WITHOUT PREJUDICE
SUBJECT TO CONTRACT / CONTRACT DENIED**

Re: [insert name of project]

Dear Sir/Madam,

I refer to your recent response to tender submitted in response to invitation to tender dated ___ day of _____ with a closing date of _____ [insert closing date]

Evaluation of the data received has been completed and I am pleased to inform you that _____ [insert name of company] has been successful in being selected as RTÉ's preferred supplier.

It is anticipated that a contract will be concluded with your organisation in due course, subject always to receipt of an appropriate Tax Clearance Certificate from the Irish Revenue Commissioners and contractual terms being finalised and agreed by both parties. The project manager will be in contact you in the near future to begin this process.

I would emphasise that this notification is provisional and does not create legally binding relations with any party.

To avoid delay you are requested to forward a current Tax Clearance Certificate from the Irish Revenue Commissioners to us as soon as possible.

Yours sincerely,

Robby Hill
Purchasing Manager.

SAMPLE DRAFT REGRET LETTER FOR NATIONAL CONTRACTS

Title: []

Address: []

Date: []

Re: *[insert name of project]*

Dear Sir/Madam,

I refer to your response to tender submitted in connection with the supply of _____ *[insert title of project]* to RTÉ.

After reviewing these submissions, the Project Evaluation Team has reached its decision and I regret to inform you that _____ *[insert name of company]*, has not been successful in securing the contract on this occasion.

May I on behalf of RTÉ thank you for your submission and I look forward with interest to your involvement in future competitions.

Yours sincerely,

Robby Hill
Purchasing Manager.



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