



Procurement

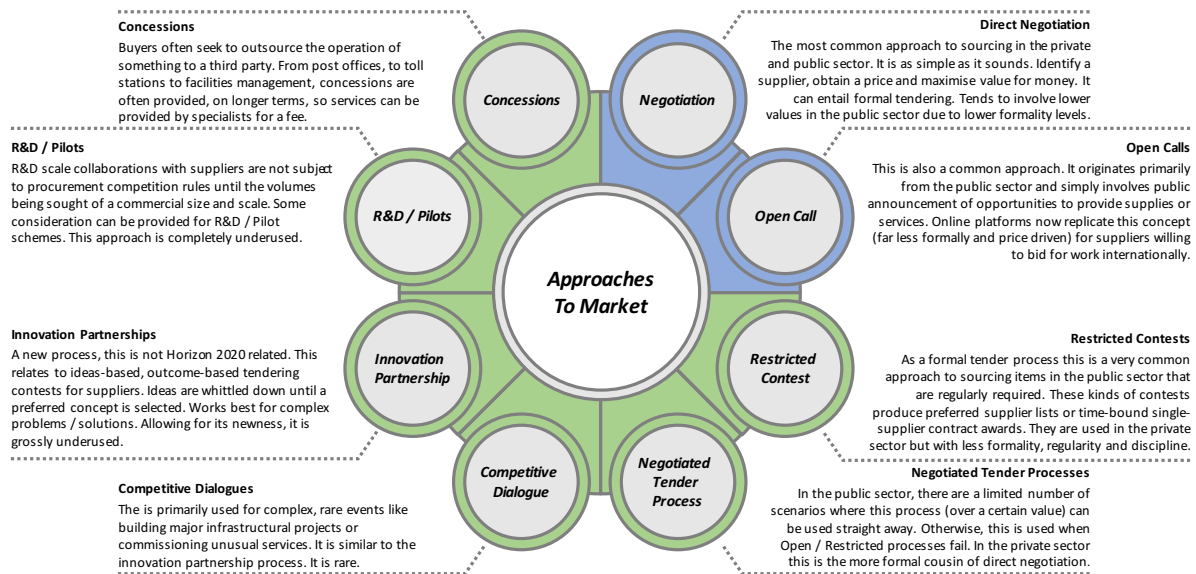
Perspectives on private and public sector approaches to sourcing

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1. Overview

Our experience working with companies in the private sector and public sector organisations has allowed us to develop some insights into the various approaches used by both the private and public sector towards getting what they want from the market.

We will draw out some our observations here before outlining some of the approaches each of the sectors use most frequently in their engagements with suppliers.



We outline, later in this document, the principles behind each of these kinds of competitions and what they are used for. The two highlighted in blue are the commonly used across the public and private sectors (in various contexts). Some of the other processes, designed for use by public buyers, are used on occasion in the private sector.

The main tension between the varying approaches on the public and private sector, all other things being equal, is the balance between a desire for speed, agility and autonomy in the private sector as against a requirement to be fair, open, transparent and deliberative in the public sector. We outline in the sections that follow the various options and what suppliers need to know to work them to their best advantage.

Many in the private sector view public procurement as slow, bureaucratic and expensive to go through. The private sector approach however is prone to confirmation bias, overpaying for items, poor procedural practice and a lack of a clear strategy.

The public sector's approach on the other hand is very conservative and lacks agility, even when the processes available to it, do not really prohibit it. The incentives to change in the public sector are weak so there is a flight to large, well-known brands over smaller more dynamic suppliers that may be better at what they do.

Somewhat bizarrely, we view the public sector as the more rational economic actor as it probably does a better job overall of achieving value for money from the market. The private sector is probably less rational in its speed to achieve things. The difference is that it can change suppliers quickly if it needs to, an agility the public sector lacks over the medium term.

Most of the time, the private sector assembles a shortlist of competent suppliers and works of that. Slightly more advanced buyers may ask a small number of suppliers to quote for their business. Outside of major corporations, processes in the private sector rarely get more complex than this.

2. Private Sector procurement – the main approaches

Outside of major multi-nationals, there is a significant degree of inertia in how most companies go about sourcing and procuring items for their procurement needs. Ireland has relatively little manufacturing so it is not as common to seek the lowest possible price as it is in countries with a larger manufacturing base. Service driven economies are not always as price sensitive because in services, there is significant differentiation and some qualitatively different experiences that people are willing to pay for. This balkanization of the supply offer in service-oriented economies can blur the keen sourcing practices that do occur throughout the Irish SME sector.

2.1 Obtaining best price

This is like “below threshold” negotiated procedures except in the private sector, there is no spend limit. This said, this technique is most commonly applied below €100,000. Typically, the Buyer must assemble anything up to five quotes. We tend to see up to five quotes in sectors like manufacturing (especially for expensive parts). For services, it most commonly will see at least two (but normally less than five quotes) pitted against each other to achieve maximum value for money. This approach is most commonly adopted for more routine and transaction purchases.

2.2 Preferred suppliers

Established and trusted suppliers can bring reliability and quality at a good price. Buyers in these circumstances are not as price sensitive as they may be in the private sector. They trust and rely upon their suppliers and so suppliers can charge higher prices. They still need to price at a point that allows them to win. Sometimes this can involve competitive bids and quotes but it may be to ensure compliance with internal procedures or to maximize value for money. The objective for suppliers in these circumstances is however to prevent bids becoming competitive and competitors getting any kind of a foothold.

2.3 Tendering competitions

While many companies will not tender (for various reasons) some companies use formal tendering quite frequently. The tenders can be to establish supplier panels and to award contracts to suppliers. When these contests are run in the private sector, they are by nature negotiated procedures and like OJEU level negotiated procedure in the public sector. There are few barriers to how the private sector can tender for services in this way. We find it most often applies over at least €500,000 in expenditure. Quotes (or extended proposals) but without an extensive brief, are often what is used below this level.

3. Public Sector Procurement – the main approaches

The Public Sector is much more constrained in how it goes to market. It has a range of options to do so however. We will outline, contextually where possible, what each approach to procurement entails, how they operate, and to what targeted end.

3.1 Open Procedures

This quite simply means that the public tender competition is open to any supplier in the European Union (and potential suppliers from third countries).

The value of the contract provides an indication as to whether larger companies are likely to be bidding for the same business as interested small or medium-sized businesses. There are two kinds of open procedure – with notice and without notice.

3.1.1 Open procedures without (OJEU) notice

Contracts with a value below the relevant threshold for the Contracting Authority are simply advertised and placed up on e-tenders in Ireland. E-tenders is the government's website for purchasing goods & services.

Open procedures are open to all suppliers. Circular 10/14 is worth reading as it emphasises a commitment by Government to seriously consider bids from small and medium sized businesses for Public Sector business.

Unless a SME is a global leader in a niche field or deeply specialised in some other kind of way, open procedures without notice are where most SMEs stand their best chance of winning Public Sector business.

3.1.2 Open procedures with (OJEU) notice

A contract for supplies or services with a value in excess of the relevant threshold must be notified to all potential suppliers via the Official Journal of the European Union (OJEU).

As these are larger contracts, they also appeal to suppliers beyond Ireland and have criteria that can increasingly favour larger businesses as the contract value goes up. Certain derogations (higher thresholds) now apply to social and health services reflecting the fact that contracts in sectors like health services can be routine but relatively high value in nature.

There is a best practice trend to break large contracts into lots to ensure that there is greater competition, a better appreciation of relative strengths (i.e. it would be rare set of circumstances where one supplier offers the most compelling solution across all areas of a contract) and that (under/non)-performance risk is spread across several suppliers rather than concentrated in one. The use of lots recognises this trend and seeks to identify the best provider for each service being sought.

Breaking larger contracts into lots is a requirement under the 2014 directives. Where this does not happen (with only a few exceptions), there is a duty to explain why this has not taken place. This is to assist SMEs obtain greater access to public contracts.

3.2 Restricted procedures

Restricted procedures follow a different process with different timelines to open procedures but in substance differ in only one respect. The Contracting Authority must be of the view that only a limited number of suppliers can satisfy their specific needs.

While any supplier can request to participate in a restricted competition, the Contracting Authority is not obliged to issue the public tender documentation to all who express an interest. The Contracting Authority is entitled to restrict the issuing of the public tender to the suppliers it wants to receive a bid from. Unless there are substantive grounds to justify a very small pool of suppliers, at least five bids from five different suppliers are expected in a restricted procedure.

The same thresholds apply for notification purposes as for open tender competitions.

SMEs that have expertise can compete successfully in these tender competitions but they should consider:

- the relative strength of their relationship with the Contracting Authority compared with potential competitors (nationally and internationally);

- their past experiences of bidding for business with the Contracting Authority and the feedback they have received on their previous bids; and
- how strong their product or service is by comparison with the leaders in their field nationally and internationally.

In some cases, SMEs may need to enter public tender competitions to earn the right to bid for work (with no guarantee that they will subsequently get any business). SMEs may need to become a member of a *Supplier Framework Agreement* to get a chance to bid for some restricted tenders. Pre-qualification criteria can make this difficult if the criteria defined to become a member of a supplier framework are onerous.

Circular 10/14 encourages the use of open procedures where possible but Supplier Frameworks (that can last up to four years) are a barrier that SMEs can have difficulties surmounting. The 2014 directives have allowed for shortened tendering timelines for companies that are successful in getting onto a framework. Increasingly, these frameworks should be either regional or sector or regional and sectoral in nature to facilitate maximum openness and competition.

3.3 Negotiated procedures

This procedure is only permissible in certain circumstances. The term implies what happens under this procedure. When it is being used direct communication and negotiation takes place between the contracting authority and the prospective suppliers.

SMEs may be able to compete against bigger companies where they have specific intellectual property or offer a product that has characteristics that give them an advantage. SMEs with expertise in niche areas stand a good chance here but should weigh-up possible sources of competition and any criteria that may mitigate against success before entering a negotiated procedure competition.

SMEs contacted directly by a Contracting Authority to go through a negotiated procedure are being seriously considered as a possible supplier. The list of conditions that may be favourable to SMEs and ones which are more unusual or demonstrably favourable to Contracting Authorities (i.e. buying cheaply from a Receiver) are outlined below.

Negotiated procedures may be employed where:

- Using a different procedure produced irregular tenders that make it too difficult to compare the bids relative to the public tender requirements. Changing to this new procedure cannot alter the original terms of any contract published;
- Where no bids are received from an open or restricted tendering process. SMEs contacted under these rules may be the only one in the process.
- The nature of the contract or the risks attached to a contract prevent prior pricing due to a set of exceptional circumstances;
- Intellectual services (e.g. the design of works like an energy plant) do not permit the level of precision necessary to be able to use an open or restricted procedure;
- Where works are being performed solely for research or testing purposes.
- Where due to unforeseen events and a case of extreme urgency the timelines for an open, restricted and negotiated procedures cannot be met. SMEs contacted under these rules may be the only one in the process.
- Where a supply contract involves products that are manufactured for research and technological development purposes. SMEs contacted under these rules may be the only one in the process.
- For new works or services that need to be designed/developed by an initial economic operator. Such contracts can be awarded for up to 3 years. This specifically plays to niche operators that design and operate a service for the first time.
- For works / services contracts that are worth up to 50% of the value of an original contract for services not included in the original contract but have become necessary through unforeseen circumstances.
- For public service contracts that follow on from a design contest. In these scenarios, the winner of the contest has the right to enter negotiations to agree a contract for the services sought from the design contest. This could benefit smaller engineering firms that are successful.

Applications that are potentially rarer or buyer-friendly

- For deliveries of supplies for up to three years where changing supplier would oblige the contracting authority to buy material that has different technical characteristics (i.e. not sufficiently fit for purpose).
- For supplies quoted and purchased on a commodity market.
- Where for technical or artistic reasons (including the protection of exclusive rights) a contract can only be executed by a specific operator.
- Where a supplier is in receivership / winding up and supplies can be purchased under particularly advantageous conditions.

3.4 Competitive dialogue

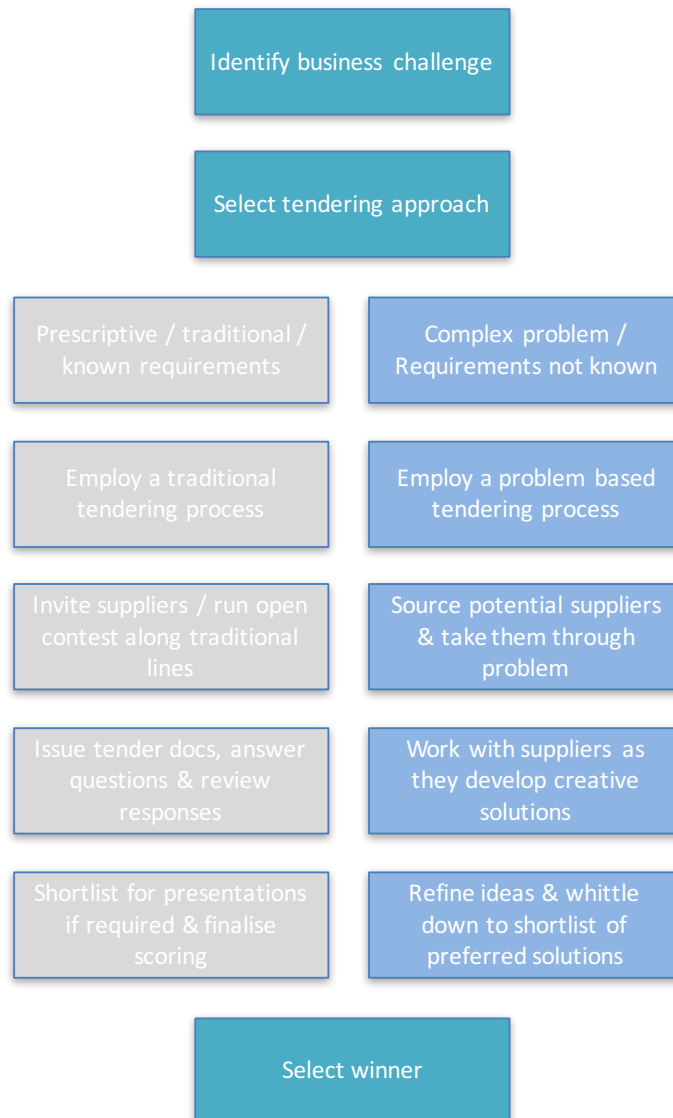
This process is used for complex contracts where a Contracting Authority has difficulty defining the technical solution it is seeking to go to market on. Typically, this is used for large infrastructural projects like PPPs but this is not always the case. Complexity is the key word. As this article is being written in January 2015, this process is being used to procure a provider to develop a genealogical service to be run out of the National Archives. The proposed (genealogical) service is highly specialised and requires very specific skills and so this process is being used. Notwithstanding this, it is most frequently used for infrastructure projects.

The Contracting Authority must publish a contract notice that includes award criteria and invite at least three candidates to conduct a dialogue. A discussion ensues with the selected candidates until all technical, economic, legal and other requirements to define a solution have been determined. Once the dialogue is concluded, the selected candidates can submit their bids.

Contracts are awarded in accordance with the award criteria and on a MEAT basis.

3.5 Innovation Partnerships

These have been designed to try and help introduce innovation into the public sector’s supply chain. There are concerns held that these processes will be abused by the public sector to commission work from large multinationals. At this stage, it is too early to assess whether this is indeed the case. Few, if any, of these have been attempted in Ireland so far. We believe that the innovation partnership is one teeming with potential to transform public service, particularly public services with complex components to them. They suit outcome-based tendering processes and idea-driven or problem-driven contests.



As the diagram shows above, this process works in an inverse way to traditional tendering. Suppliers are whittled down until a preferred supplier / solution has been selected following objective reviews of solutions. It best suits solutions that are being designed / developed from scratch or contests that are seeking to solve specific issues.

3.6 Concessions

Concessions are contests that are run to identify a supplier / service provider capable of running a complex service for an extended duration. It is not uncommon for concessions to be awarded for eight years or more. Examples of concessions include the National Lottery, Prize Bonds, National Toll Roads and Catering contracts. They are governed by their own directive. The difference with a concession is that the state is providing a third party with exclusive rights to make money (it takes a share from this like a franchisor from a franchisee). Procurement law however governs the affording of benefit, not merely how the State spends its money. Hence the governance of concessions.

3.7 R&D

R&D is not competitive and where a supplier obtains an organisation's permission to run pilots of their (product / service), they can be paid for non-commercial volumes of their product. Once the contracting authority wishes to commission commercial volumes, they must go out to tender but typically, the company involved in pilots is best placed to win the subsequent tender, assuming they submit a strong bid.

4. Summary perspectives

For most companies, the usefulness of this document is to heighten the awareness of the kinds of contests and their aims. An understanding of the aims of these contest types, whether in the private or the public sector, should aid companies as they formulate negotiating positions and consider the kinds of tactics they intend on deploying locally.

While it is not widespread in Ireland at present, outcome-based tendering (the commissioning of complex solutions that do not currently exist) is a long term international trend. These contests can be facilitated through a few of the processes. The difference is all down to price elasticity and demand. On the public side, where there are greater controls over these things, pricing in Open and Restricted contests cannot be negotiated (typically downwards) following a contest as it changes the award criteria used in the contest. Price is more elastic in the other contest types and it is useful for SMEs to be aware of this. SMEs need to ensure that they know who owns what IP so they do not compromise their intellectual property if they develop a concept in partnership with a public body (but the solution is not subsequently commissioned).

A secondary benefit is in being able to influence the buyer. Companies that understand these contests can influence how the organization goes to market. This can include the context for tendering and the competition type run by them.

Significant additional material is available for consultation free of charge on the Keystone Procurement website.