

**THE ROLE OF PROCUREMENT REVIEW BODIES POST  
TRANSPOSITION OF THE REMEDIES DIRECTIVE IN EUROPE**

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**ABSTRACT.** This paper proposes to provide a commentary on the introduction and implementation of specialised public procurement review bodies in the wake of the transposition of the European Remedies Directive in member states. The second section of the paper will attempt to assess the impact of the Remedies Directive on the Irish public procurement market and will seek to examine whether an introduction of such a specialised public procurement review body would enhance the efficiencies and effectiveness of the redress rights available to aggrieved tenderers in Ireland.

In times of European economic uncertainty and evolving policy priorities, the European Union must forcefully and urgently ensure that public money is spent in a viable, competitive manner that guarantees best value for European citizens. The suite of Public Procurement Directives are enforced in every member state to ensure that public contracts are awarded in a manner which is open, fair and transparent and which supports cross-border trade in the single market.<sup>1</sup> The Public Procurement Remedies Directive<sup>2</sup> was dramatically modified in 2007 to provide tenderers with an effective, simple and rapid means of redress, whilst also deterring contracting authorities from breaching the procurement rules during each stage of the procurement activity. This paper will seek to examine the impact the Remedies Directive has had on the procurement redress policies adopted by member states, and in particular the paper will study the impact of the adoption of specialised public procurement review bodies post the transposition of the legislation. The second section of the paper will attempt to assess the impact of the Remedies Directive on the Irish public procurement landscape and will examine whether the introduction of such a specialised public procurement review body would enhance the effectiveness of public procurement activities within the state.

The research outlined in the case study section is based on the initial results from an Interreg €3.2 million project “Winning in Tendering” which is being carried out between Dublin City University (DCU), the Irish Institute for Purchase and Materials Management (IIPMM), and Bangor University. The “Winning in Tendering” (WiT) project sits within Priority 1 (Knowledge, Innovation and Skills for Growth), Theme 2 (Skills for Competitiveness and Employment Integration) of the Ireland/Wales 2007-2013 cross-border co-operation programme. It aims to transform the public tendering experience of Small Indigenous Suppliers (SISs) and to influence behaviour of Public Procurers across the Ireland/Wales Interreg region. The project

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<sup>1</sup> DeKoninck and Flamey, 2009

<sup>2</sup> Directive 2007/66/EC of the European Parliament and of the Council of the 11<sup>th</sup> December 2007 amends *Council Directives 89/665/EEC* and *92/13/EEC* with regard to improving the effectiveness of review procedures concerning the award of public contracts.

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was approved under the Interreg 4A call for strategic projects in June 2010.

The Ireland/Wales 2007/2013 cross-border co-operation programme is one of the many Interreg IV structural funds programmes that target specific regions. The Programme has a focus on co-operation to ensure integrated regional development through common strategies through funding projects that address the challenges laid out in EU, Irish and Welsh policies and have a positive impact on local communities in the cross border area.

The “Winning in Tendering” project addresses the barriers faced by small enterprises. The project aims to provide SISs with the following three actions;

- Legal educational guidance and case studies in plain language on the revolutionary 2007 EU Remedies Directive;
- A tender review programme enabling Welsh and Irish SISs to learn why they failed to win past tenders, thus improving skills and encouraging SISs to re-enter the tendering game with renewed optimism;
- An On-line diagnostic ‘health-check’ educational tool to allow SISs to self-evaluate their tender readiness

The project aims to provide Public Procurers with the following two actions;

- A SIS-Friendly Procurement Competency Framework, whereby procurers actively consider SIS vulnerabilities in designing tenders;
- Case studies and educational guidance to help procurers overcome negative impacts of below EU threshold advertising, thus improving SIS access to opportunities.

The project addresses skill gaps of SISs and public procurers, which inhibit the region’s competitiveness and sustainable development, via unique, innovative and complementary targeted interventions including training for procurers and SISs.

This paper focuses on one of the work streams that of understanding the impact of the remedies directive on public

procurement activities. The paper will initially examine the redress rights provided for in the Remedies Directive and will then examine the role of specialised public procurement review bodies in enforcing and upholding these rights. The second part of the paper will examine the single case study of Ireland and will attempt to assess whether such a review body should be adopted in the state.

### EUROPEAN PUBLIC PROCUREMENT LEGISLATION

The activity of public procurement involves the disbursement of public money aimed at the acquisition of works, supplies and services for consideration.<sup>3</sup> Public procurement rules establish specific contract award processes to guarantee that public purchases are made in a competitive, transparent and fair manner, which ensures contracting authorities and entities get best value for taxpayers' money.<sup>4</sup> There are several sources of public procurement law governing European member states activities. The primary source is the Directives adopted by the European Parliament and Council – secondary law.<sup>5</sup> The legislation sets out detailed procedural rules and remedial rights for public contracts with a value over the pre-determined EU financial thresholds. The Directives are ultimately underwritten by a series of fundamental freedoms and principles derived from the *Treaty of the Functioning of the European Union* (“TFEU”) – primary law. Despite the fact that the TFEU does not specifically refer to procurement, all member states' contracting authorities must comply with the internal market's fundamental freedoms, namely the free movement of goods, persons, services and capital and the prohibition on anti-competitive measures. Member states' public bodies must conform to the principles derived from the fundamental freedoms for both above and below threshold contracts. Those principles include: transparency; mutual

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<sup>3</sup> Glynn, B. 2012

<sup>4</sup> Mori and Doni 2010

<sup>5</sup> Directive 2004/18/EC of 31 March 2004 OJ (2004) L 134/114, Directive 2004/17/EC of 31 March 2004 OJ (2004) L 134/19

recognition; proportionality; non-discrimination; and equal treatment.<sup>6</sup>

The main objective of the legislation is to promote effective competition in the single market and to prevent domestic protectionist purchasing.<sup>7</sup> Arrowsmith comprehensively notes that the legislation is primarily concerned with opening competition in the single market and it is at the discretion of individual member states to incorporate social and policy goals into the domestic legislation and guidance.<sup>8</sup> This distinction is crucially important for the implementation of redress legislation in member states. The Remedies Directive relies on decentralised compliance and adequate enforcement of the substantive regime in member states. Bovis comments that an effective domestic regime ensures swift resolution of disputes and stringent enforcement of decisions by domestic review bodies which enjoy procedural autonomy.<sup>9</sup>

The Remedies Directive lends itself to decentralised implementation, encouraging the use of specialised procurement review bodies. Aggrieved tenderers can initiate challenges under implementing national legislation subject to general principles of judicial review and contract law. The role of the national courts and enforcement bodies is not to 'second guess' the public body's actions, but to concentrate on how the awarding decision was made.<sup>10</sup> In addition to domestic court litigation, tenderers may seek to remedy a breach of the procurement rules by bringing the alleged infringement to the attention of the European Commission. The Commission has the power to investigate and institute infringement procedures. This paper will concentrate on the options opened to aggrieved tenderers before national courts, and will in particular examine the scope and use of specialised procurement review bodies. The paper will follow a straightforward methodology, it will examine the discretionary review bodies adopted by 13 member states, identifying their common traits and characteristics. The paper will then question

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<sup>6</sup> Case C-507/03, *Commission v. Ireland* [2007] ECR I-9777

<sup>7</sup> Olykke, Grith Skovgaard. 2011.

<sup>8</sup> Arrowsmith, Sue. 2005

<sup>9</sup> Bovis, C. 2006

<sup>10</sup> Little, C and Waterson C. 2011

whether it would be appropriate and beneficial to replicate a specialised review body in Ireland based on the common traits identified in the member states.

### REMEDIES LEGISLATION

Directive 2007/66/EC<sup>11</sup> was introduced on the 11th December 2007 to improve the efficiency of the redress procedure for public awarded contracts. The Directive by imposing common national review procedures encourages rapid, transparent redress procedures for unsuccessful tenderers. The Directive replaces and makes substantial changes to the previous *Remedies Directive for Utilities Sector (Directive 92/13/EEC)* and the *Remedies Directive for the Public Sector (Directive 89/665/EEC)*.

The Directive aims to protect tenderers' redress rights and to create competitive, fair tendering processes by imposing a 'standstill period' and provides for stringent rules against illegal direct awards. The 'standstill period' requires the authorising agent to refrain from signing the contract for a period of ten days after the winning tenderer has been agreed. The standstill period should give unsuccessful tenderers sufficient time to assess whether it is appropriate to initiate a review procedure.<sup>12</sup> The Directive aims to maintain integral and ethical procedures through stern rules against illegal direct awards. The Directive provides for national courts to hold such awards as *ineffective*. This is the first Directive to impose the remedy of ineffectiveness; previously the highest remedy available was the declaration of voidness of contracts found to be illegally awarded.<sup>13</sup>

The Directive outlines the remedies available to injured parties in cases where the standstill period was not adhered to. The contract will be deemed '*automatically suspended*' if the contract was completed during the standstill period, or in circumstances where unsuccessful tenderers were not adequately notified of the winning tender and an explanation of the reasons why the

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<sup>11</sup> Directive 2007/66/EC of the 11<sup>th</sup> December 2007 with regard to improving the effectiveness of review procedures concerning the award of public contracts

<sup>12</sup> Directive 2007/66/EC, Article 2.2(a)

<sup>13</sup> Directive 2007/66/EC, Article 2.2(d)

unsuccessful parties were not selected was not made available. The contract remains suspended until the review procedure has been completed.<sup>14</sup> Contracts that are found non-compliant with the standstill period may also be deemed as 'ineffective' by member states. The Directive provides for the mandatory declaration of ineffectiveness of contracts illegally directly awarded. Contracts will be considered to have been illegally directly awarded in cases where the tender was not published in the Online Journal of the European Union (OJEU) in accordance with Directive 2004/17 and Directive 2004/18 and in circumstances where a tender that fell outside the requirements of a framework agreement or dynamic purchasing agreement did not follow correct procurement procedures.

In certain circumstances the national court can rule an illegal direct award as valid, in cases where declaring the contract ineffective would have detrimental economic consequences and the termination of the contract would provide no financial or social benefits to the awarding agent, the winning tenderer and all unsuccessful tenderers. The court may in these cases impose alternative sanctions including the shortening of the contract or may award damages to the unsuccessful tenderer.<sup>15</sup> The courts can request the contracted parties to complete interim or interlocutory measures.<sup>16</sup> The Directive provides progressive redress and remedy actions for unsuccessful tenderers. It strengthens the review procedure and encourages uniform regulations across member states. The Directive has been implemented in various manners by member states.

### **SPECIALISED PUBLIC PROCUREMENT REVIEW BODIES**

A large majority of the EU member states provide for the remedial rules to be applied to some extent to both below and above the

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<sup>14</sup> Directive 2007/66/EC. Article 1.2(a), Article 2.2(a)

<sup>15</sup> Directive 2007/66/EC of the 11<sup>th</sup> December 2007 with regard to improving the effectiveness of review procedures concerning the award of public contracts. Article 1.2(e), Article 2.2(e)

<sup>16</sup> Note; The Court of Justice re-emphasised the importance of national courts being able to utilise discretionary powers to provide interim solutions to rapidly resolve proven infringements, *Combinatie Spijker Infrbouw- De Jonge Konstruktie v Provincie Drenthe* (C-568/08) P.P.L.R. 2011, 3, NA64-69

pre-determined threshold level contracts.<sup>17</sup> The threshold levels are determined by the European Council and Parliament every two years and public contracts valued at or above these levels are automatically subject to the EU procurement rules. The EU thresholds were updated on 1<sup>st</sup> January 2012. The threshold for supplies and services contracts and design contests awarded by central government authorities are set at a level of €130,000 and the threshold for works contracts, subsidised works contracts and works concession contracts are set a level of €5,000,000.<sup>18</sup> A proportion of the member states have established national specialised procurement review bodies to support the effective use of the legislation. A number of the member states including Germany and Denmark introduced such review bodies in light of the implementation of the initial Remedies Directive. Other member states, in particular, a large proportion of the Eastern European member states adopted such bodies in light of their accession to the European Union. An EU report was published in summer 2011 highlighting the most recent impact of the use of these specialised bodies on their national public procurement markets. The reports findings are summarised below. (Figure 1.1)<sup>19</sup>

(Figure 1.1.)

| MEMBER STATE | PROCUREMENT REVIEW BODIES / ADMINISTRATIVE COURTS | PUBLISHED REPORTED FIGURES | COMMENTARY |
|--------------|---|----------------------------|------------|
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<sup>17</sup> European Commission Internal Market and Services. *EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report 2011*

<sup>18</sup> Commission Regulation 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract

<sup>19</sup> Note; The information contained in Figure 1.1 has been derived from European Commission Staff Working Paper Evaluation Report on the Effectiveness of EU Public Procurement Legislation (Part 1) (2011), European Commission Staff Working Paper Evaluation Report on the Effectiveness of EU Public Procurement Legislation (Part 2) (2011), the Comparative Survey on the National Public Procurement Systems across the PPN Systems (2011) and from member states individual publications.

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| Bulgaria | Specialised Review Body within the Commission on the Protection of Competition | 1 103 complaints before the Commission for Protection of Competition (court of first instance)<br>799 rulings (2009 data)   | A <i>Public Procurement Agency</i> also operates as an independent body of the Ministry of Economy, Energy and Tourism.  |
| Denmark  | Complaints Board for Public Procurement  | 75 cases in 2009<br>181 cases in 2010<br>12% of the cases were not admissible from procedural point of view<br>About one third of the complaints are upheld by the courts | A <i>Competition Authority</i> operates as an agency under the Danish Ministry of Economic and Business Affairs  |
| Estonia  | Public Procurement Commission  | No figures have been published at an EU level.  | The <i>Public Procurement Office (PPO)</i> supervises the implementation of the Public Procurement Act.  |
| Latvia   | Procurement Monitoring Bureau  | A reported 200 cases per year are brought before the Procurement Monitoring Bureau  | A number of supervisory bodies operate within the <i>Procurement Monitoring Bureau</i> , which carry out <i>ex-ante</i> controls for projects under Structural Funds and acts also as first instance review body. The <i>Corruption Prevention and Combating Bureau</i> , the <i>State Audit Office</i> and the <i>Administrative Court</i> share the responsibility for the supervision of public procurement activities. |
| Hungary  | Public Procurement Council – Arbitration Committee                             | 636 procedures launched in 2008;<br>(20% of the decisions of the first instance review body are challenged)   | The Council acts as a first instance arbitrary review body.  |

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| Malta          | Appeals Board of the Department of Contracts                                     | No figures have been published at an EU level, however it is noted, aggrieved tenderers are reluctant to file complaints due to high cost associated. (administrative fees plus the cost of legal representation)        | The <i>Department of Contracts</i> is responsible for monitoring public procurement activities and is an integrated part of the Ministry of Finance.   |
| Austria        | Federal Award Control Office at Federal Level                                    | 106 review applications (before conclusion of contract 84 above and 22 below thresholds), 90 petitions for interim measures (75 above and 15 below thresholds) and 8 applications for declaratory procedures (2010 data) | The <i>Court of Auditors</i> is responsible for the supervision of public procurement activities on federal, state and municipal level, the <i>Rechnungshof</i> is a body responsible for control of conduct of public procurement procedures at federal, state and municipal level. Contracting Authorities can ask for legal advice from the <i>Verfassungsdienst of the Bundeskanzleramt</i> (at federal level) and to the state administration (at the state and local level). |
| Poland         | Public Procurement Office  | 1 537 cases before the National Board of Appeals (first instance review body) and 277 cases before the courts (second instance review body) (2008 data)  | Along with the <i>Public Procurement Office</i> , a supervision function is also carried out by the Supreme Chamber of Control.  |
| Slovenia       | National Review Commission for the Review of Public Procurement Award Procedures | No figures have been published at an EU level, however it is noted the number of applications for review have decreased recently due to high deposits.   | The <i>Review Commission</i> is also supported by the <i>National Court of Audit</i> and the <i>Department of Public Private Partnership and Public Procurement System</i> , which operates within the Department of Finance.  |
| Czech Republic | Office for the Protection of Competition   | 459 complaints reported 391 (first instance  | <i>National Supervisory Boards</i> operating within the Office for the   |

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|         |                             | rulings) and 89 preliminary rulings (2009 data)  | Protection of Competition are responsible for supervising the award of public contracts. The Boards have the power to impose sanctions for non-compliance.  |
| Germany | Procurement Review Chambers | 1 158 cases before the procurement review chambers (first instance), and 227 cases before the courts of appeal (second instance) (2008 data) | The majority of the federal states have institutionalised bodies (VOB-Stellen) which are responsible for supervising the public procurement procedures. The Federal Court of Auditors is responsible for monitoring the institutionalised bodies.   |
| France  | Administrative Tribunals    | 5000 cases before Administrative Tribunals (2004 data)   | There a number of bodies responsible for supervising public procurement activities at both local and national levels, these include; the <i>Service of state Control</i> , the <i>General Directorate for Competition Policy</i> , the <i>Consumer Affaires and Fraud Control</i> , the <i>Public Accounting General Directorate</i> , ex-ante control of contracts by Government Representatives at local level ( <i>prefets de region, prefets de department or sous-prefets</i> ), <i>State Audit Control</i> and the <i>Regional Audit Offices</i> , the <i>Court of Auditors</i> . |
| Finland | Court of First Instance     | 600 cases brought before the Market Court (first instance) (2009 data)   | A <i>Public Procurement Advisory Unit</i> was established by the Association of the Finnish Local and Regional Authorities and the Ministry of Employment and Economy, the unit focuses on providing both Contracting Authorities and   |

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|  |  |  | <p>businesses entities with information and advice on procurement.</p> <p>The Strategic Group on Government Procurement under the Ministry of Finance supports and develops the strategic steering of central government procurement as well as the implementation of the state procurement strategy.</p> |
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This summarised report highlights the disparity between the number of cases brought before the specialised review bodies or administrative courts of first instance. While a high record of complaints may not simply confirm or prove the basic belief that the Remedies Directive is being effectively used in that particular member state, it may more complicatedly indicate a lack of control and guidance for public procurers on the benefits of making effective, productive and compliant award decisions. It could also indicate the redress system is being abused by unsuccessful tenderers who wish to delay the completion of the process without valid aggrieved reasoning. In contrast, a low record of complaints may not indicate that the Remedies Directive has been implemented effectively, with all procurers acting in a fully compliant manner, it could indicate that the legislation has yet to become embedded fully in the public sector institutions.<sup>20</sup>

The findings show a disparity in the manner in which the review bodies and supporting mechanisms are designed and implemented. Each member state has adopted an individual redress approach, some enhancing the powers of the administrative courts to hear and rule on public procurement complaints, others establishing completely new procurement review bodies set up independently or within the realms of the Departments of Finance or Departments of Competition. From the outset, it is hard to make an assumption as to whether the specialised public procurement review bodies are effectively enhancing procurement activities. However, it is clear that the application and enforcement of these review procedures are

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<sup>20</sup> Boyle, R. 2011

providing an open and accessible redress route for aggrieved tenderers. The specialised review bodies share common traits and characteristics, which can be classified into the following;

### **INDEPENDENT STATUS**

A number of the member states have established the review bodies with an independent legal status, similar to the status of competition authorities or of that of the legal status enjoyed by administrative courts. The German administrative review body is designed to be independent in nature and forms an integral part of the German Federal Cartel Office (*Bundeskartellamt*). The review body is also supported with federal Procurement Chambers (*VOB-Stellen / Vergabekammer*) which hear and rule on procurement complaints lodged in connection with an award procedure.<sup>21</sup>

It is integral and vital that the review bodies are established with an independent power to review procurement cases, assessing the actions of both the public procurer and the supplier in an open, transparent and objective manner.

### **POWERS TO INVESTIGATE**

The review bodies share the common and necessary traits of having the responsibility to investigate challenges made against any domestic government department and are responsible for enforcing the domestic and European public procurement legislation against such contracting authorities and entities which are in violation of the rules. The majority of the bodies enjoy the powers derived from the Remedies Directive, including the powers to automatically suspend a contract, the powers to lift an automatic suspension, the powers to declare a contract void, to declare a contract ineffective, to order a contract to be varied and enjoy the power to request the contract to be amended. The Court of Justice of the European Union has ruled on the importance of

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<sup>21</sup> European Commission Staff Working Paper Evaluation Report on the Effectiveness of EU Public Procurement Legislation (Part 1) (2011),

enforcement bodies having the power to effectively enforce the decisions they make.<sup>22</sup>

### LOCUS STANDI/ACCESSIBILITY

The bodies also share a common definition on which entities have the standing '*locus standi*' to bring a complaint before the board or court of initial review. The general agreement appears to allow any entity who has an interest in the contract whether they have or have not tendered for the contract the right to initiate a challenge. The Court of Justice rulings have provided a variety of judgements supporting this view over the last twenty years. In the case *C-230/02 Grossman Air Service*<sup>23</sup> the judgement outlines that a person with an '*interest in obtaining a contract*' should have the right to challenge a decision which was conducted in a discriminatory manner or in manner which was in violation of the public procurement rules. The use of this test, of an entity having at least an interest in obtaining the contract, was reinforced in the case *C-212/02 Commission v Austria*.<sup>24</sup>

Some member states in order to reduce the risk of abuse of fraudulent claims apply an initial challenge fee. However, some states appear to have set this limit too high and as a result appear to limit small businesses' accessibility to the board or administrative court. This appears to be example in both Malta and Slovenia. The boards should adopt a proportionate fee that would reduce the incentive for fraudulent claims whilst also encouraging small and medium enterprises' participation.

### NO POWER TO AWARD DAMAGES

The majority of the boards do not have the power to award damages to the aggrieved party. This right is held exclusively by the higher courts. The Court of Justice has again be vocal on this issue, agreeing the responsibility to provide financial damages

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<sup>22</sup> Judgement of 18 March 2004, Case C-314/01 Siemens Osterreich and ARGE Telekom.

<sup>23</sup> Judgement of 12 February 2004, Case C-230/02 Grossman Air Service

<sup>24</sup> Judgement of 24 June 2004, Case C-212/02 Commission v Austria

should be exercised at a judicial level and may be exercised by administrative courts.<sup>25</sup>

### **RIGHT OF APPEALS TO A HIGHER COURT**

While the independent board or administrative courts may not be able to award damages, aggrieved tenderers which are still not satisfied with the findings and conclusions of the review body may appeal the decision to a higher court. Aggrieved tenderers may be given the option to appeal their case to the higher courts or they may be initiated a judicial review case before the court.<sup>26</sup> The independent body or administrative court should not be designed as the last judicial or administrative option for the challenging entity.<sup>27</sup>

### **ADDITIONAL DUTIES**

A proportion of the member states have designed the independent bodies to promote best procurement practices for both public procurers and suppliers alongside their responsibilities to investigate and hear challenges. This is evident in Estonia, Czech Republic and Poland.

While the independent specialised procurement review bodies are not designed uniformly across member states, they do structure a clear, transparent and in most cases an effective redress path for unsuccessful tenderers. The bodies have given substance to the rules derived from the Remedies Directive and have successfully implemented them into the every day procurement activities of the member states.

Ireland at present does not incorporate such a body, an aggrieved tender must firstly make the complaint to the contracting authority and if they are not satisfied with the contracting authority's response they can then initiate a proceeding before the High Court. The modern Irish legal system is derived from the traditional English common law system, and as such it does not incorporate administrative courts of first instances. The High

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<sup>25</sup> Judgement of 24 September 1998, Case C-76/97 Walter Togel

<sup>26</sup> DeKoninck and Flamey, 2009

<sup>27</sup> Judgement of 24 September 1998, Case C-76/97 Walter Togel

Court is a superior court and has original jurisdiction and as well as appellate jurisdiction from courts of local jurisdiction. The final section of the paper will attempt to assess whether the Remedies Directive is being effectively utilised in Ireland and will comment on whether it would be practical to adopt a public procurement review body in the state.

### IRELAND AS A CASE STUDY

The Remedies Directive was required to be transposed into national law by the 20<sup>th</sup> December 2009. Ireland, however was unsuccessful meeting this requirement and did not transpose the Directive into legislation until the 25<sup>th</sup> March 2010. The *European Communities (Award of Public Authorities' Contracts) (Review Procedures) Regulations 2010*<sup>28</sup> and the *European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010*<sup>29</sup> implements Directive 2007/66 into Irish law. The Irish Regulations impose a duty of responsibility onto the unsuccessful tenderer to inform the contracting authority in the first instance of any alleged infringement and of an intention to seek judicial proceedings. If the unsuccessful tenderer is not satisfied with the conclusion provided by the contracting authority they can then initiate proceedings before the Irish High Court. The High Court enjoys all redress powers deriving from the Remedies legislation and has limited financial penalties to 10% of the contract value.<sup>30</sup>

As part of the research undertaking for the *Winning in Tendering* project, a series of interviews and workshops were conducted with 60 Irish small indigenous suppliers (SISs) and legal experts to assess the impact of the legislation over a six month period. The SISs were asked a series of questions varying from knowledge of the regulations, understanding of standstill and debriefing requirements and perceived barriers to initiating challenges. The overall findings found that the SISs had limited or no knowledge

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<sup>28</sup> S.I. No. 130 of 2010

<sup>29</sup> S.I. No. 131 of 2010

<sup>30</sup> Note; The Court of Justice reiterated the remedy of damages must be made available under the Remedies Directive in *Stadt Graz v Strabag AG* (C-314/09) P.P.L.R. 2011, 3, NA59-63

of the Remedies Directive and the redress rights available to them. The suppliers also indicated little knowledge, understanding and experience of standstill periods and where unable to identify what information was available to them during debriefing and feedback sessions. The SISs also highlighted a number of factors which would discourage the aggrieved tenderer from initiating a legal challenge, the factors ranged from high cost of legal representation, time period to initiate a challenge and reputational risk. The main findings are detailed below.

### IMPLEMENTATION OF REGULATIONS

An initial finding found from the research indicated that SISs believed the Remedies Directive had no direct impact on them since its transposition as it is only applicable to above threshold contracts.

This concern is justified, Ireland only applies the Directives to above threshold contracts. Below threshold contracts are subject to the fundamental principles laid out in the Treaty of the Functioning of the European Union (TFEU), mainly the principles of transparency, mutual recognition, proportionality and non-discrimination, and subject to various national guidance documents published by the Department of Finance. A comprehensive guidance document *Public Procurement Guidelines – Competitive Process*<sup>31</sup> was published in 2004 in light of the development of the Public Procurement Directives. The document sets out steps to be followed by contracting authorities and entities in conducting processes for both above and below threshold values. Further guidance documents and templates, including the Department of Finance *Circular 10/10 Guidance on measures to Facilitate Participation of SMEs in public procurement* and *Circular 1/11 promoting the use of the Standardised Suite of Public Procurement Templates*, adopt the basic principles of the Remedies Directive. The guidance documents encourage contracting authorities to apply standstill periods and debriefing sessions in their below threshold public

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<sup>31</sup> Public Procurement Guidelines – Competitive Process Supplies and Services. 2004. (Updated 2010) Available at; [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=3004](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=3004)

procurement procedures. However, contracting authorities and entities are not obliged to apply these principles and the guidance documents fail to outline or provide any remedial rights for aggrieved unsuccessful tenderers.

### **KNOWLEDGE AND UNDERSTANDING OF THE DIRECTIVE**

The SISs were asked to indicate their level of knowledge and understanding of both the Public Procurement Directives<sup>32</sup> and the Remedies Directive.

Approximately 45% of the SISs had limited or good awareness of the Public Procurement Directives, while only 20% had a limited to good awareness of the Remedies Directive. The participants who expressed an awareness of the Remedies legislation indicated that they were made aware of its existence by attending public procurement training seminars or reading the Directive in its entirety. Only two participants indicated that they had an extensive knowledge and understanding of the Directive.

A link to the Remedies Directive is available on the National Procurement Service<sup>33</sup> and e-Tenders website.<sup>34</sup> However, no informal guidance document on this piece of legislation is available from either site.

### **STANDSTILL PERIOD**

The standstill period forms a principle part of the Remedies Directive. It is the first remedial right available to aggrieved unsuccessful tenderers. However the primary research undertaken indicates that the initial remedial right may be under exposed and limitedly used.

Only 25% of the participants interviewed indicated a basic knowledge of the standstill principle and experienced the inclusion of this principle in a tender competition. As previously mentioned, the contracting authorities are only obliged to apply a standstill period to above threshold contracts and are only

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<sup>32</sup> Directive 2004/18/EC of 31 March 2004 OJ (2004) L 134/114, Directive 2004/17/EC of 31 March 2004 OJ (2004) L 134/1

<sup>33</sup> Available at; [www.procurement.ie](http://www.procurement.ie)

<sup>34</sup> Available at; [www.e-tenders.ie](http://www.e-tenders.ie)

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encouraged to do so for below threshold contracts by the national guidance documents.

#### **DEBRIEFING**

The Remedies Directive also requires contracting authorities and entities to provide unsuccessful tenderers with adequate reasons to why they were not selected.

While 60% of the participants interviewed indicated that they were aware of their right to debriefing information, they were not able to identify what information they were entitled to seek.

#### **UNINTENDED CONSEQUENCES OF REMEDIES DIRECTIVE**

The participants through both the interviews and workshops highlighted a number of concerns and consequences relating to the implementation of the Remedies Directive. The most commonly commented on include;

- A. Cost of Legal Representation
- B. Reputational Risk
- C. Duration of Legal Proceedings
- D. Time period to initiate a Challenge
- E. Time period to initiate a Legal Proceeding

These concerns may also be justified, if an aggrieved tenderer wishes to initiate a challenge to an above threshold contract, they are restricted to the standstill period time limitations, if the tenderer is not satisfied with the contracting authorities' response to the challenge they must initiate legal proceedings within a 30 day period. The proceedings must only be initiated before the High Court.<sup>35</sup>

The objective of the Remedies Directive is to provide rapid, transparent and effective redress rights to unsuccessful tenderers, it is questionable whether this has been achieved and promoted through the implementation of the rules in Ireland.

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<sup>35</sup> S.I. No. 130 of 2010 Arrangements of Regulations 8/9/13. / S.I. no. 131 of 2010 Arrangements of Regulations 8/9/13. / Public Contracts (Amendment) Regulations 2009 and the Utilities Contracts (Amendment) Regulations 2009. Amendments of the Principle Regulations. 3(C) 47c / 47f / 47n

Rapid and transparent review procedures are available to aggrieved tenderers in above threshold competitions, but they are costly and time consuming. The Remedies Directive is applied through soft law mechanisms for below threshold competitions, however the government guidance documentation makes no reference to the redress procedures for tenderers.

### **SHOULD IRELAND INTRODUCE AN INDEPENDENT PROCUREMENT REVIEW BODY?**

From the surface, it appears the Irish public procurement landscape would benefit from the introduction of a specialised procurement review body. The current system appears to discriminate against small business and does not provide an effective rapid national review system. If a body was to be created, it should embody the traits of the current review bodies operating across the member states. The body should be established to be independent in nature, have the power to investigate, allow complaints from all interested parties, have the power to award the remedies outlined in the Directive with the exception of the power to award damages and should allow for appeals to the High Court. There are three possible ways to incorporate such a body into the Irish landscape;

### **NATIONAL PROCUREMENT SERVICE**

The National Procurement Service (NPS) was established in 2009 within the Office of Public Works and the Department of Finance. It was established to coordinate the purchasing of common supplies and goods. The NPS is tasked with organising networks of public service professionals, developing targeted and accredited training and is responsible for integrating government policies into best practice guidelines.<sup>36</sup>

The NPS could possibly take on the additional redress and enforcement role. There would be a number of core benefits to support this possibility; the NPS employs highly specialised and trained staff in the area of public procurement, who would be competently able to assist in the reviewing and training

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<sup>36</sup> Available at; [www.procurement.ie](http://www.procurement.ie)

requirements. The NPS have built a valuable network of contacts both supplier and procurer based over the past three years through dedicated training and networking events. There is an element of trust and knowledge surrounding the NPS and its duties which may eliminate the suppliers' perception of the reputational risk associated with filing complaints against contracting authorities.

However, there is one major drawback the NPS is one of the state's largest buying entities. The NPS is responsible for the organisation of framework agreements in the areas of stationary, print services, ICT goods, supplies and services, energy services, training services among many other agreements.<sup>37</sup> It is necessary that the review body would be essentially independent in nature so as to assure complaints are reviewed in an open and objective manner. This drawback alone would make the NPS an unsuitable organisation to adopt the role of a review body.

### **COMPETITION AUTHORITY MODEL**

An entity similar to that of the Competition Authority model could be established to review procurement challenges. The Competition Authority is an Irish state body responsible for enforcing Irish and European competition law. It is an independent body that is tasked with the responsibility to promote competitive corporate behaviour and to discourage and block mergers, cartels, and monopolies. The Authority cooperates with the work being undertaken by European Competition Network (ECN), the European Competition Authority (ECA), the Organisation for Economic Cooperation and Development (OECD) and with the International Competition Network (ICN).

The Competition Authority can hear complaints raised by citizens and corporate, social or public entities. The Competition Authority enjoys the right to seek a criminal prosecution or to pursue a matter in the civil courts or both for any found breaches of the domestic or European legislation. The Authority notes that the majority of its investigations are completed before court proceedings are commenced either because the Authority found

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<sup>37</sup> Available at; [www.procurement.ie](http://www.procurement.ie)

that no breach had occurred or the parties involved have taken action to rectify the Authority's concerns.<sup>38</sup>

The specialised procurement review body could be designed on this model, it would provide a cost effective and rapid alternative to the current litigated approach. The aggrieved tenderer would be able to present their complaint to an independent body and would still be able to bring Court proceedings if they so wished. This model appears to be a viable option on the surface level.

### **NATIONAL SUPERVISORY BODY**

The European Directives are currently being reviewed with the view of the Public Procurement Directives 2004/18/EC and Directives 2004/17/EC being replaced by the end of 2012. The main goals of the reforms are to modernise and simplify the current rules, to introduce more flexible and innovative procedures and to codify current Court of Justice case law. If the proposals are accepted, member states will be required to designate a single national authority in charge of monitoring, implementation and control of public procurement activities. It would be required to provide feedback on the functioning of the rules and potential weaknesses to the European Commission. It would also be tasked with the responsibility to inspect the texts of concluded contracts. Contracting authorities would be required to transmit high value contracts to the oversight body, which may in turn be accessed by any interested persons.<sup>39</sup>

At present there is no detailed information available on the operation and functioning of such an oversight body. However, if such an oversight body is enforced through European Directives it should be examined as to whether the body would have the capability of hearing national procurement complaints. There would be more merit in combining the two objectives into one institution rather than incorporating a national supervisory body and a national procurement review body.

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<sup>38</sup> Available at; [www.tca.ie](http://www.tca.ie)

<sup>39</sup> European Commission 2011/0438 (COD) Proposal for a Directive of the European Parliament and of the Council on Public Procurement

## CONCLUSION

There is evidence from the European member states that national specialised public procurement review bodies enhance the effectiveness and efficiency of redress procedures. The most effective bodies appear to be characterised by being designed to be independent in nature, enjoying the powers to issue corrective manners and allowing aggrieved tenderers to appeal to higher courts for the remedy of damages.

It is unclear whether the adoption of such a body would enhance the redress rights available to aggrieved tenderers in Ireland. At present, tenderers can avail of each of the remedial rights provided for in the European legislation.

However, the state should address the current complaints with the domestic constraints, in particular the costs associated with application to the High Court.

Ireland can certainly learn from the member states examples, the Remedies Directive appears to have little impact on the Irish public procurement landscape. Ireland could greatly enhance the successfulness of public procurement procedures by adopting an independent review body similar to those operating across the European states or by addressing the current national restraints.

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