

Ref: 033/001/12

10 July 2013

To Heads of Departments / Offices

Circular 05/13: Procurement of Legal Services and Managing Legal Costs

A Dhuine Uasail

1. Purpose

The purpose of this Circular is to remind public bodies of their obligations to ensure that their procurement of legal services complies with the rules and guidelines on public procurement. The Circular also outlines appropriate competitive procedures that can be used in the engagement of legal services **and sets out a number of approaches and tools for public bodies to use in managing legal costs.** Where in-house services are available, such as those provided by the Chief State Solicitor's Office and the Attorney General's Office in the Central Government sector, they should of course be used. This Circular is relevant to all staff in public bodies involved in the procurement of legal services or in the management of legal costs.

Procurement Procedures

2. It is a basic principle of public procurement that a competitive process should be used unless there are justifiably exceptional circumstances.¹ This principle applies to purchases or award of contracts for works, supplies or services by all public bodies. Both EU procurement law and national procurement guidelines make this clear. While legal services are in a category of services not subject to the full scope of EU Directives on public procurement, national guidelines require that best value for money must be obtained by State bodies in all procurements. A competitive process based on appropriate advertising as part of a transparent and objective tendering process is generally accepted as the means of achieving this. It is recognised that many public authorities already tender for legal services. **A key purpose of this Circular is to re-iterate that, in procuring legal services, public competitive tendering should be the norm.**²

3. There are a number of suitable procedures available to contracting authorities when tendering for legal services. Public authorities with a frequent or recurring need for legal services have the option of setting up panels consisting of suitable qualified legal practitioners. This can be done by inviting expressions of interest or tenders through the *eTenders* website (www.etenders.gov.ie) from those qualified and having the expertise to provide the specified service. The process can be used to establish a panel on the basis of suitable criteria (including, as appropriate, competitive pricing criteria). As the need for services arises, qualified candidates from the panel can be invited to submit competitive tenders in "mini-competitions" along the lines provided for in framework agreements set

¹ See "Public Procurement Guidelines Competitive Process" 2004 available at www.etenders.gov.ie

² Arrangements in relation to State litigation, Criminal and Civil Legal Aid costs etc. are being addressed separately. In retaining barristers on behalf of the State, the Prosecution of Offences Act, 1974 applies in relation to the Director of Public Prosecutions and the Attorney General.

up under the EU public procurement rules. Alternatively, a competitive process can be used to select a single legal service provider to provide the appropriate service over a given period (effectively a single party framework).

4. In cases of a “once-off” requirement, in line with current general procurement guidelines, an authority should invite expressions of interest or tenders through the *eTenders website* if the estimated cost exceeds €25,000. For requirements below this level, direct invitation of priced proposals from a number of suitable providers (minimum of three) should be sought³. If, for justifiably exceptional reasons, it is considered that a competitive process is not appropriate, then, in accordance with the public procurement rules for such circumstances, the public body must ensure that the reason is clearly recorded and a verifiable audit trail is maintained.

5. Contracting authorities must take care not to set restrictive conditions for admission of legal practitioners to panels or for tendering competitions. For example, criteria such as unduly high insurance levels, previous State sector experience etc. must be avoided. Contracting authorities should also be mindful not to unduly restrict the field of potential tenderers by for example requiring specific qualifications or membership of specific bodies unless justifiable by reference to the needs of the contract.

6. The Office of Government Procurement will establish a cross-sector group in the coming months to determine if suitable national or collaborative procurement arrangements for legal services would be appropriate.

7. As indicated above, contracts for legal services are not subject to the full scope of EU Directives. Therefore contracting authorities have some flexibility in conducting the appropriate competitive tendering process. For example, they are not tied to the prescribed tendering procedures or timeframes for submission of tenders or expressions of interest and there is scope for dialogue and negotiation conducted in an open and fair objective manner.

Measures to Manage Legal Costs

8. It is important that public bodies take all appropriate steps to manage and contain their costs. Appendix I sets out a summary of measures that can be used by public bodies to manage their legal costs. Public bodies should have regard to these measures and apply them as appropriate both when engaging legal services and in the course of managing legal costs.

Dissemination and Implementation of Guidance

9. You are requested to bring this circular to the attention of –

- (i) all staff in your Department/Office who might be involved in the procurement of legal services and/or the management of legal costs, and
- (ii) all public bodies under the aegis of your Department/Office

and to ensure that arrangements are put in place to implement its terms in the areas under the aegis of your Department/Office.

³ Page 15 Public Procurement Guidelines Competitive Process 2004.

Any queries in relation to the operation of this circular should be addressed to the NPS helpdesk which can be contacted at nps@opw.ie. Any issues in relation to the policy underpinning this circular should be addressed to the National Public Procurement Policy Unit in the Department of Public Expenditure and Reform at procure@per.gov.ie.

Mise le meas,

Paul Quinn
Chief Procurement Officer

Approaches and tools for Public Bodies in relation to engaging Legal Services and managing Legal Costs

This Appendix is to be read in conjunction with Circular 05/13. The Appendix sets out a summary of measures that can be used by public bodies to manage their legal costs. Public bodies should have regard to these measures and apply them as appropriate both when engaging legal services and in the course of managing legal costs.

A. Estimates of costs

Contracting authorities should use, and where appropriate, require their legal advisers to use, the following provisions which will help highlight the likely extent of an authority's exposure to legal costs and thus assist it in budgeting for and deciding its approach in legal proceedings.

■ Under section 68 of the Solicitors (Amendment) Act 1994, solicitors are required, on taking instructions to provide legal services to a client, or as soon as practicable thereafter, to provide:

- particulars in writing of actual charges, or
- where the former is not feasible, an estimate of the charges, or
- where the former is not feasible, the basis on which the charges are to be made by the solicitor or firm for the provision of legal services.

■ The Bar Council Code imposes obligations on practising barristers, on taking instructions to provide legal services or as soon as practicable thereafter, to provide similar information in respect of their charges to the instructing solicitor or (in the case of access under the Direct Professional Access Scheme) the client.

■ In the case of litigation, rules of court enable the court at any stage of the proceedings to require the parties to produce to it and exchange between themselves estimates of the costs which have been incurred in the proceedings⁴. This facility provides scope for a party to a case, by applying to the court, to ascertain the likely extent of the costs which have accrued by the other party up to a particular stage of proceedings, before any award of costs is ultimately made and before any itemised bill of those costs has been produced and taxed.

B. Alternative dispute resolution (ADR); lodgements and tenders; offers

Public bodies should consider the following approaches when deciding on a course of action in relation to litigation or potential litigation.

■ ADR may, depending on the circumstances and nature of the claim, offer a less costly alternative to resolving litigation which is in prospect or has commenced. Rules of court allow the

⁴ Order 99 rule 5(3), Rules of the Superior Courts and Order 66 rule 1(3), Circuit Court Rules.

court, where it has facilitated recourse to ADR, when determining liability for costs to have regard, where just, to a party's refusal or failure without good reason to participate in ADR.⁵

■ Where litigation has commenced, rules of court permit the making of a lodgement (or in the case of certain public entities, a tender) to meet certain types of claim with a view to limiting exposure to costs in the proceedings⁶, and for other types of claim allow the court to take into account offers in writing made to settle a claim when determining liability for costs⁷.

C. Internal Protocols

Public bodies should put in place internal protocols regulating the basis on which access to legal services may be available. This can provide a means of controlling access to legal services and thus controlling legal services expenditure by a public body. When a need for legal advice arises, public bodies should consider whether legally qualified personnel in-house can provide the necessary legal advice.

D. Fixed fee arrangements⁸

Where external advice is required, contracting authorities should seek a fixed fee arrangement in preference to a charge based on an hourly charge-out rate. Charges based on an hourly charge-out rate render it difficult if not impossible to control the budget for a specific legal service. Where advice is required from counsel, contracting authorities should ensure that they agree the quoted fees of counsel with their solicitor before counsel is instructed on their behalf.

Fixed fee arrangements may, depending on the circumstances, be feasible for an authority's solicitor's costs in respect of litigation. Where a brief and refresher fee structure is being used contracting authorities should, prudently, agree brief and refresher fees of counsel with counsel through the instructing solicitor at the time when counsel is being retained.

⁵ Order 99 rule 1B, Rules of the Superior Courts.

⁶ Order 22, Rules of the Superior Courts and Order 15, Circuit Court Rules.

⁷ Order 99 rule 1A, Rules of the Superior Courts and Order 66 rule 1(2), Circuit Court Rules.

⁸ These provisions reflect legal services structures that exist at the date of this Circular and which may be liable to change under pending new legal services legislation.