



An Bille um Údaráis Phoiblí agus Gnóthais Fóntais (Conarthaí a Ullmhú agus Critéir Dhámhachtana), 2019

Public Authorities and Utility Undertakings (Contract Preparation and Award Criteria) Bill 2019

Mar a tionscnaíodh

As initiated



**AN BILLE UM ÚDARÁIS PHOIBLÍ AGUS GNÓTHAIS FÓNTAIS (CONARTHAÍ A
ULLMHÚ AGUS CRITÉIR DHÁMHACHTANA), 2019**
**PUBLIC AUTHORITIES AND UTILITY UNDERTAKINGS (CONTRACT
PREPARATION AND AWARD CRITERIA) BILL 2019**

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ACTS REFERRED TO

Comptroller and Auditor General Acts 1866 to 1998

European Convention on Human Rights Act 2003 (No. 20)

Irish Human Rights and Equality Commission Act 2014 (No. 25)



**AN BILLE UM ÚDARÁIS PHOIBLÍ AGUS GNÓTHAIS FÓNTAIS (CONARTHAÍ A
ULLMHÚ AGUS CRITÉIR DHÁMHACHTANA), 2019
PUBLIC AUTHORITIES AND UTILITY UNDERTAKINGS (CONTRACT
PREPARATION AND AWARD CRITERIA) BILL 2019**

Bill

5

entitled

An Act to give further effect to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014¹ and to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014² and for those purposes to provide for contract award criteria in public contracts, to promote the use of social considerations and the best price-quality ratio and to establish a procedure for departing from best price-quality ratio, to ensure that section 3 of the European Convention on Human Rights Act 2003 applies to persons carrying out functions for or on behalf of organs of State, to provide for the issuing of guidelines concerning social considerations, to require annual reporting to each House of the Oireachtas concerning certain matters and to provide for matters connected therewith. 15

Be it enacted by the Oireachtas as follows:

Interpretation

1. (1) In this Act—

“body governed by public law” means a body that has the following characteristics: 20

(a) it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) it has legal personality;

(c) it has any of the following characteristics:

(i) it is financed, for the most part, by the State, a regional or local authority, or by another body governed by public law; 25

(ii) it is subject to management supervision by an authority or body referred to in *subparagraph (i)*;

(iii) it has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, a regional or a local authority, or by another body governed by public law; 30

1 OJ No. L 94, 28.03.2014, p.65

2 OJ No. L 94, 28.03.2014, p.243

“case to which the National Development Plan relates” means a case in which the funding, in whole or in part, arises out of capital spending under the National Development Plan;

“contracting authority” means—

- (a) a State, regional or local authority, 5
- (b) a body governed by public law, or
- (c) an association formed by one or more such authorities or one or more such bodies governed by public law;

“contracting entity” has the meaning given by Regulation 2 of the Public Authority Contracts Regulations and by Regulation 5 of the Utility Undertakings Contracts Regulations; 10

“economic operator” means any natural or legal person, a contracting authority or contracting entity, or a group of such persons, authorities or entities, including temporary associations of undertakings, who or which offers—

- (a) the execution of works or a work or both, or 15
- (b) the supply of products or the provision of services, on the market;

“Minister” means the Minister for Public Expenditure and Reform;

“National Development Plan” means the National Development Plan 2018-2027, which was published by the Government in February 2018, together with any amendments to that Plan or any replacement or subsequent Plan published for the same purpose or to like effect; 20

“Public Authorities Contracts Directive” means Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014³ on public procurement and repealing Directive 2004/18/EC;

“Public Authority Contracts Regulations” means the European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. No. 284 of 2016); 25

“Utilities Directive” means Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014⁴ on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC;

“Utility Undertakings Contracts Regulations” means European Union (Award of Contracts by Utility Undertakings) Regulations 2016 (S.I. No. 286 of 2016). 30

- (2) A word or expression that is used in this Act and which is also used in the Public Authorities Contracts Directive or the Utilities Directive has, unless the context otherwise requires, the same meaning in this Act as it has in either or both of those Directives as the circumstances require. 35

Contract award criteria (award of public authority contracts)

- 2. (1) Without prejudice to any law in the State on the price of certain supplies or the remuneration of certain services, a contracting authority shall base an award of public

3 OJ No. L 134, 30.04.2004, p.114

4 OJ No. L 134, 30.04.2004, p.1

contracts on the most economically advantageous tender.

- (2) The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, including life-cycle costing in accordance with Regulation 68 of the Public Authority Contracts Regulations, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental or social aspects, linked to the subject matter of the public contract in question. 5
- (3) The criteria referred to in *subsection (2)* shall comprise, amongst other things—
- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions, 10
 - (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract, or
 - (c) after-sales service and technical assistance, delivery conditions, including delivery date, delivery process and delivery period or period of completion. 15
- (4) (a) Contracting authorities shall not use price or cost as the sole award criterion, unless a declaration is issued under *section 4*.
- (b) In applying *subsection (2)*, contracting authorities shall not include a best price–quality ratio in a case to which the National Development Plan relates where the price criteria is greater than 50 per cent of the quality criteria unless a decision is issued under *section 4* approving a declaration. 20
- (5) The cost element under this section may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.
- (6) Award criteria shall be considered to be linked to the subject matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in— 25
- (a) the specific process of production, provision or trading of those works, supplies or services, or 30
 - (b) a specific process for another stage of their life cycle,
- where those factors do not form part of their material substance.
- (7) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority concerned.
- (8) Award criteria shall— 35
- (a) ensure the possibility of effective competition, and
 - (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.
- (9) In case of doubt, a contracting authority shall verify effectively the accuracy of the 40

information and proof provided by the tenderers.

- (10) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, other than where this is identified on the basis of price alone. 5
- (11) The weighting referred to in *subsection (10)* may be expressed by providing for a range with an appropriate maximum spread.
- (12) Where the weighting referred to in *subsection (10)* is not possible for objective reasons, the contracting authority shall indicate the criteria in descending order of importance. 10
- (13) Regulation 67 of the Public Authority Contracts Regulations is revoked and a reference in any other enactment to Regulation 67 of those Regulations shall be deemed to be a reference to this section.
- (14) This section applies to public contracts governed by the Public Authority Contracts Regulations. 15

Contract award criteria (award of contracts by utility undertakings)

- 3. (1) Without prejudice to any law in the State on the price of certain supplies or the remuneration of certain services, a contracting entity shall base the award of contracts on the most economically advantageous tender.
- (2) The most economically advantageous tender from the point of view of the contracting entity shall be identified on the basis of the price or cost, using a cost-effectiveness approach, including life cycle costing in accordance with Regulation 92 of the Utility Undertakings Contracts Regulations, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental or social aspects, linked to the subject matter of the contract in question. 20
- (3) The criteria referred to in *subsection (2)* may comprise, amongst other things—
 - (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions, 25
 - (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract, and 30
 - (c) after-sales service and technical assistance, delivery conditions (including delivery date, delivery process and delivery period or period of completion) and commitments with regard to parts and security of supply. 35
- (4) (a) Contracting entities shall not use price or cost as the sole award criterion, unless a declaration is issued under *section 4*.
- (b) In applying *subsection (2)*, contracting entities shall not include a best price-quality ratio in a case to which the National Development Plan relates where the price criteria is greater than 50 per cent of the quality criteria unless a decision is issued under *section 4* approving a declaration. 40

- (5) The cost element under this Regulation may take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.
- (6) Award criteria shall be considered to be linked to the subject matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in— 5
 - (a) the specific process of production, provision or trading of those works, supplies or services, or
 - (b) a specific process for another stage of their life cycle,
 where such factors do not form part of their material substance.
- (7) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting entity concerned. 10
- (8) Award criteria shall—
 - (a) ensure the possibility of effective competition, and
 - (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. 15
- (9) In case of doubt, a contracting entity shall verify effectively the accuracy of the information and proof provided by the tenderers.
- (10) A contracting entity shall specify in the procurement documents the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone. 20
- (11) The weighting referred to in *subsection (10)* may be expressed by providing for a range with an appropriate maximum spread.
- (12) Where the weighting referred to in *subsection (10)* is not possible for objective reasons, the contracting entity shall indicate the criteria in descending order of importance. 25
- (13) Regulation 91 of the Utility Undertakings Contracts Regulations is revoked and a reference in any other enactment to Regulation 91 of those Regulations shall be deemed to be a reference to this section.
- (14) This section applies to contracts governed by the Utility Undertakings Contracts Regulations. 30

Departing from contract award criteria in accordance with sections 2(4) and 3(4)

- 4. (1) (a) For the purposes of a contract to which *section 2(4)(a)* or *3(4)(a)* applies, a contracting authority or contracting entity shall not, other than in accordance with *paragraph (b)*, use price or cost as the sole award criterion to award a contract. 35
- (b) The requirements of *paragraph (a)* do not apply where the chief decision maker of the contracting authority or contracting entity concerned is satisfied that there is no material difference in quality between the potential options, or that the difference in quality is so immaterial that it is not relevant in the circumstances or can otherwise be justified for stated reasons and, as a consequence, the chief 40

decision maker—

- (i) issues a declaration to that effect, which declaration shall include the justification for the decision, and
 - (ii) causes a copy of the declaration to be sent electronically to the Office of Government Procurement, or such other body as the Minister may designate by notice published in *Iris Oifigiúil*. 5
- (c) For the purposes of a contract to which *section 2(4)(b)* or *3(4)(b)* applies, a contracting authority or contracting entity shall not, other than in accordance with *paragraph (d)*, include a best price–quality ratio in a case to which the National Development Plan relates where the price criteria is greater than 50 per cent of the quality criteria to award the contract. 10
- (d) The requirements of *paragraph (c)* do not apply where the chief decision maker of the contracting authority or contracting entity concerned is satisfied that the inclusion of such a price-quality ratio is so immaterial that it is not relevant in the circumstances or can otherwise be justified for stated reasons and, as a consequence, the chief decision maker— 15
 - (i) issues a declaration to that effect, which declaration shall include the justification for the decision, and
 - (ii) causes a copy of the declaration to be sent electronically to the Office of Government Procurement, or such other body as the Minister may designate by notice published in *Iris Oifigiúil*. 20
- (2) Where a declaration has been issued under *paragraph (b)* or *(d)* of *subsection (1)* by the chief decision maker of the contracting authority or contracting entity concerned and sent to the Office of Government Procurement, that Office shall, as soon as practicable, cause the declaration or a note of the substance of the declaration to be published on its website. 25
- (3) For the avoidance of doubt—
 - (a) Regulation 84 (which relates to reporting and documentation requirements) of the Public Authority Contracts Regulations applies to this Act in so far as it relates to contracts to which those Regulations apply, and 30
 - (b) Regulations 108 and 109 (which relate to reporting and documentation requirements) of the Utility Undertakings Contracts Regulations apply to this Act in so far as they relate to contracts to which the Utility Undertakings Contracts Regulations apply.
- (4) If a declaration is issued by the chief decision maker under *paragraph (b)* or *(d)* of *subsection (1)*, the contracting authority or contracting entity shall include in tender documents concerned— 35
 - (a) in a case to which *subparagraph (i)* of *paragraph (b)* of *subsection (1)* relates, the justification for the decision under that paragraph, and
 - (b) in a case to which *subparagraph (i)* of *paragraph (d)* of *subsection (1)* relates, the justification for the decision under that paragraph, 40and shall include with those documents a copy of the declaration concerned.

(5) In this section—

“chief decision maker” means—

(a) where the contracting authority is a Minister of the Government, then such Minister,

(b) where the contracting authority is not an authority to which *paragraph (a)* of this definition relates, then— 5

(i) the accounting officer of that authority for the purposes of the Comptroller and Auditor General Acts 1866 to 1998,

(ii) the chief executive officer (however described) of that authority, or

(iii) where the holder of the post of accounting officer or chief executive officer 10
is incapacitated or is unable to act for legal reasons or the post concerned is vacant, the person who is duly authorised to undertake the functions of that holder or of that post;

“Office of Government Procurement” means the office within the Department of Public Expenditure and Reform that is known as such or such other body as the 15
Minister may designate by notice published in *Iris Oifigiúil*.

Application of European Convention on Human Rights Act 2003 and related matters

5. (1) An economic operator or person shall, when carrying out a function within the meaning of section 2 of the Act of 2003 for or on behalf of a contracting authority or contracting entity under a contract governed by the Public Authority Contracts Regulations or the Utility Undertakings Contracts Regulations, perform such function in accordance with section 3 of the Act of 2003 and a note to that effect— 20

(a) shall be maintained for the period referred to in paragraph (5) of Regulation 84 of the Public Authority Contracts Regulations, where those Regulations apply, as if a reference to such a note were included with the documentation referred to in 25
paragraph (4) of that Regulation and, where appropriate, the other provisions of that Regulation shall apply accordingly to such a note, and

(b) shall be maintained for the period referred to in paragraph (5) of Regulation 108 of the Utility Undertakings Contracts Regulations, where those Regulations apply, as if a reference to such a note were included with the documentation 30
referred to in in paragraph (4) of that Regulation and, where appropriate, the other provisions of Regulation 108, and Regulation 109, of those Regulations shall apply accordingly to such a note.

(2) *Subsection (1)* shall not relieve a contracting authority or contractual entity of any obligation imposed by or under the Act of 2003 on the authority or entity concerned. 35

(3) Where in performing its functions under section 42 of the Irish Human Rights and Equality Commission Act 2014, a public body within the meaning of section 2 of that Act is also—

(a) a contracting authority or contracting entity under Public Authority Contracts Regulations, then— 40

(i) in addition to complying with paragraph (4) of Regulation 84 of those

Regulations, it shall maintain documentation to record the manner in which it has complied with the said section 42 as if it were required to be included in that paragraph, and

- (ii) where appropriate, the other provisions of Regulation 84 of those Regulations shall apply accordingly,

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or

- (b) a contracting entity under the Utility Undertakings Contracts Regulations, then—

- (i) in addition to complying with paragraph (4) of Regulation 108 of those Regulations, it shall document the procedures whereby it has complied with the said section 42 as if it were required to be included in that paragraph, and

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- (ii) where appropriate, the other provisions of Regulation 108, and Regulation 109, of the those Regulations shall apply accordingly.

- (4) In this section “Act of 2003” means the European Convention on Human Rights Act 2003.

Guidelines on social considerations

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- 6. (1) The Minister shall, as soon as practicable, but not later than 12 months after the passing of this Act, issue guidelines concerning qualitative, environmental, social, human rights and equality considerations that may arise in contracts governed by the Public Authority Contracts Regulations or the Utility Undertakings Contracts Regulations, and without prejudice to the generality of the foregoing such guidelines shall include guidance—

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- (a) concerning the use and incorporation of qualitative, environmental, social, human rights and equality considerations in the preparation of the procurement procedure of such contracts, and

- (b) identifying, to contracting authorities or contracting entities, qualitative, environmental, social, human rights and equality considerations that may arise in such procurement.

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- (2) The Minister shall cause a copy of the guidelines issued under *subsection (1)* to be laid before each House of the Oireachtas as soon as practicable.

- (3) Contracting authorities and contracting entities shall, where applicable, comply with any guidelines issued under *subsection (1)*.

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- (4) For the purposes of the Public Authority Contracts Regulations, a contracting authority shall include within a report to which Regulation 84 of those Regulations relates a record of compliance with any obligations arising under the guidelines issued under *subsection (1)*.

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- (5) For the purposes of the Utility Undertakings Contracts Regulations, a contracting entity shall include within a report to which Regulation 108 or 109 of those Regulations relates a record of compliance with the guidelines issued under *subsection (1)*.

- (6) Not later than 3 years after the Minister has, under *subsection (2)*, caused a copy of the guidelines to be laid before each House of the Oireachtas, the Minister shall

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either—

- (a) lay a revised set of guidelines before each House of the Oireachtas, or
- (b) lay a report before each House of the Oireachtas stating that, in his or her opinion, no revision is required to the subsisting guidelines,

and thereafter shall periodically, but not later than 3 years after the last set of guidelines or report was so laid, comply with *paragraph (a)* or *(b)*. 5

Reporting

7. (1) The Minister shall prepare an annual report and cause a copy of the report to be laid before each House of the Oireachtas.
- (2) The report referred to in *subsection (1)* shall include a review of the following: 10
- (a) the operation of this Act, the Public Authority Contracts Regulations and the Utility Undertakings Contracts Regulations;
 - (b) the use of award criteria including qualitative, environmental, social, human rights and equality considerations by each contracting authority and contracting entity; 15
 - (c) the operation and effectiveness of Regulation 18(4) of the Public Authority Contracts Regulations and Regulation 35(4) of the Utility Undertakings Contracts Regulations;
 - (d) the operation and effectiveness of *section 4*;
 - (e) the number of declarations issued by each contracting authority and contracting entity under *section 4*; 20

and shall contain such other information as the Minister considers appropriate.

Short title and commencement

8. (1) This Act may be cited as the Public Authorities and Utility Undertakings (Contract Preparation and Award Criteria) Act 2019. 25
- (2) This Act comes into operation 8 months after the date of its passing or on such earlier date than the said 8 months as the Minister may by order appoint.

An Bille um Údaráis Phoiblí agus Gnóthais
Fóntais (Conarthaí a Ullmhú agus Critéir
Dámhachtana), 2019

BILLE

(mar a tionscnaíodh)
dá ngairtear

Acht do thabhairt tuilleadh éifeachta do Threoir 2014/24/AE an 26 Feabhra 2014 ó Pharlaimint na hEorpa agus ón gComhairle agus do Threoir 2014/25/AE an 26 Feabhra 2014 ó Pharlaimint na hEorpa agus ón gComhairle agus, chun na geríoch sin, do dhéanamh socrú maidir le critéir dámhachtana conarthaí i gconarthaí poiblí, do chur úsáid cúinsí sóisialta agus an chóimheasa is fearr maidir le praghas-cáilíocht chun cinn agus do bhunú nós imeachta chun imeacht ón gcóimheas is fearr maidir le praghas-cáilíocht, dá áirithiú go mbeidh feidhm ag alt 3 den Acht fán gCoinbhinsiún Eorpach um Chearta an Duine, 2003 maidir le daoine a bheidh ag comhall feidhmeanna d'orgain Stáit nó thar a gceann, do dhéanamh socrú maidir le treoirlínte a bhaineann le cúinsí sóisialta a eisiúint, dá cheangal tuairisciú bliantúil a dhéanamh do gach Teach den Oireachtas maidir le nithe áirithe agus do dhéanamh socrú i dtaobh nithe a bhaineann leis an méid sin.

Na Seanadóirí Alice-Mary Higgins, Prionsios Ní Dhuibhe, John G. Dolan, Colette Kelleher agus Lynn Ruane a thug isteach,

27 Márta, 2019

Public Authorities and Utility Undertakings
(Contract Preparation and Award Criteria)
Bill 2019

BILL

(as initiated)
entitled

An Act to give further effect to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 and to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 and for those purposes to provide for contract award criteria in public contracts, to promote the use of social considerations and the best price-quality ratio and to establish a procedure for departing from best price-quality ratio, to ensure that section 3 of the European Convention on Human Rights Act 2003 applies to persons carrying out functions for or on behalf of organs of State, to provide for the issuing of guidelines concerning social considerations, to require annual reporting to each House of the Oireachtas concerning certain matters and to provide for matters connected therewith.

Introduced by Senators Alice-Mary Higgins, Frances Black, John G. Dolan, Colette Kelleher and Lynn Ruane,

27th March, 2019

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