



**An Bille um Cháilíocht i Sainfháil Phoiblí (Conarthaí a Ullmhú agus Critéir
Dhámhachtana), 2021**

**Quality in Public Procurement (Contract Preparation and Award Criteria) Bill
2021**

Mar a tionscnaíodh

As initiated



**AN BILLE UM CHÁILÍOCHT I SAINFHÁIL PHOIBLÍ (CONARTHAÍ A ULLMHÚ
AGUS CRITÉIR DHÁMHACHTANA), 2021**
**QUALITY IN PUBLIC PROCUREMENT (CONTRACT PREPARATION AND AWARD
CRITERIA) BILL 2021**

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CONTENTS

Section

1. Interpretation
2. Application of Act
3. Contract award criteria (award of public authority contracts)
4. Departing from contract award criteria in accordance with section 3(4)
5. Application of European Convention on Human Rights Act 2003 and related matters
6. Guidelines on social considerations
7. Reporting
8. Short title and commencement

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)

Local Government Act 1991 (No. 11)

Local Government Act 2001 (No. 37)

Local Government Reform Act 2014 (No. 1)



**AN BILLE UM CHÁILÍOCHT I SAINFHÁIL PHOIBLÍ (CONARTHAÍ A ULLMHÚ
AGUS CRITÉIR DHÁMHACHTANA), 2021**
**QUALITY IN PUBLIC PROCUREMENT (CONTRACT PREPARATION AND AWARD
CRITERIA) BILL 2021**

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 for that purpose 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 every contracting authority to which the said Directive relates in respect of a contract equal to or greater than a determinable monetary threshold, 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. 10 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. L94, 28.03.2014, p.65

“contracting authority” means—

- (a) the State,
- (b) a regional assembly within the meaning of the Local Government Act 1991, as amended by the Local Government Reform Act 2014,
- (c) a local authority for the purposes of the Local Government Act 2001 (as so amended), 5
- (d) a body governed by public law, or
- (e) an association formed by one or more of the bodies referred to in *paragraphs (a) to (d)*;

“economic operator” means any natural or legal person or contracting authority, or a group of such persons or authorities, including temporary associations of undertakings, who or which offers— 10

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

“Minister” means the Minister for Public Expenditure and Reform; 15

“Public Authorities Contracts Directive” means Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014²;

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

- (2) A word or expression that is used in this Act and which is also used in the Public Authorities Contracts 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. 20

Application of Act

- 2. This Act only applies to contracts to which the Public Authority Contracts Regulations also apply. 25

Contract award criteria (award of public authority contracts)

- 3. (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 contracts on the most economically advantageous tender. 30
- (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. 35
- (3) The criteria referred to in *subsection (2)* shall comprise, amongst other things—

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

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions,
 - (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 5
 - (c) after-sales service and technical assistance, delivery conditions, including delivery date, delivery process and delivery period or period of completion.
- (4) (a) Contracting authorities shall not use price or cost as the sole award criterion, unless a declaration is issued under *section 4*. 10
- (b) In applying *subsection (2)* in respect of any contract to which the Public Authorities Contracts Directive relates, contracting authorities shall not include a best price-quality ratio in the case of procurements to which *paragraph (c)* relates where the price criteria is greater than 50 per cent of the criteria unless a decision is issued under *section 4* approving a declaration. 15
- (c) For the purposes of *paragraph (b)*, that paragraph applies where the procurements concerned would have a value net of value-added tax that is estimated to be equal to or above a threshold determined by reference to the threshold standing specified under Article 4(a) of that Directive by virtue of the second subparagraph of Article 6(5) of that Directive. 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
 - (b) a specific process for another stage of their life cycle,
- where those factors do not form part of their material substance. 30
- (7) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority concerned.
- (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. 35
- (9) In case of doubt, a contracting authority shall verify effectively the accuracy of the 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 40

economically advantageous tender, other than where this is identified on the basis of price alone.

- (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 at *subsection (10)* is not possible for objective reasons, the contracting authority shall indicate the criteria in descending order of importance. 5
- (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. 10
- (14) This section applies to public contracts governed by the Public Authority Contracts Regulations.

Departing from contract award criteria in accordance with *section 3(4)*

- 4. (1) (a) For the purposes of a contract to which *section 3(4)(a)* applies, a contracting authority shall not, other than in accordance with *paragraph (b)*, use price or cost as the sole award criterion to award a contract. 15
- (b) The requirements of *paragraph (a)* do not apply where the chief decision maker of the contracting authority 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 decision maker— 20
 - (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*. 25
- (c) Except where *paragraph (d)* applies, a contracting authority shall not include in a contract to which *section 3(4)(b)* relates a best price–quality ratio in a case where— 30
 - (i) the price criteria would be greater than 50 per cent of the quality criteria to award the contract, and
 - (ii) the estimated value of the contract, as determined in accordance with *section 3(4)(c)*, would be equal to or above the threshold as so determined.
- (d) The requirements of *paragraph (c)* do not apply where the chief decision maker of the contracting authority 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— 35
 - (i) issues a declaration to that effect, which declaration shall include the justification for the decision, and 40

- (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*.
- (2) Where a declaration has been issued under *paragraph (b) or (d) of subsection (1)* by the chief decision maker of the contracting authority 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. 5
- (3) For the avoidance of doubt 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. 10
- (4) If a declaration is issued by the chief decision maker under *paragraph (b) or (d) of subsection (1)*, the contracting authority shall include in tender documents concerned—
 - (a) in a case to which *subparagraph (i) of paragraph (b) of subsection (1)* relates, the justification for the decision under that paragraph, and 15
 - (b) in a case to which *subparagraph (i) of paragraph (d) of subsection (1)* relates, the justification for the decision under that paragraph,
 and shall include with those documents a copy of the declaration concerned.
- (5) In this section—
 - “chief decision maker”, in relation to a public authority, means— 20
 - (a) where relevant, the accounting officer of such authority for the purposes of the Comptroller and Auditor General Acts 1866 to 1998,
 - (b) where *paragraph (a)* does not apply, the chief executive officer (however described) of such authority, or
 - (c) where the holder of the post to which *paragraph (a) or (b)*, as the case may be, relates 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 the holder of that post; 25
 - “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 Minister may designate by notice published in *Iris Oifigiúil*. 30

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

- 5. (1) When carrying out a function (being a function to which section 2 of the European Convention on Human Rights Act 2003 relates) under a contract governed by the Public Authority Contracts Regulations— 35
 - (a) the contracting authority concerned shall perform such function in accordance with section 3 of that Act, and
 - (b) (i) it shall maintain a note to that effect for the period referred to in paragraph (5) of Regulation 84 of those Regulations as if a reference to such a note were included with the documentation referred to in paragraph (4) of that 40

Regulation, and

- (ii) where appropriate, the other provisions of the said Regulation 84 shall apply accordingly to such a note.
- (2) Where in performing its functions for the purposes of 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 contracting authority under Public Authority Contracts Regulations, then—
 - (a) 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
 - (b) where appropriate, the other provisions of the said Regulation 84 shall apply accordingly.
- (3) For the purposes of *subsection (1)* and *(2)* but without prejudice to the reference in either of those subsections to functions, the note referred to in *subsection (1)* and the documentation referred to in *subsection (2)* shall, in particular, record information on the preparation, allocation and granting of contracts governed by the Public Authority Contracts Regulations.
- (4) For the purposes of the annual review by the Minister under *section 7(2)(f)*, a contracting authority to which *subsection (1)* or *(2)* applies shall make a return to the Minister, within such time and in such form as he or she designates, in respect of the performance by the authority concerned of the matters to which those subsections relate during the period concerned.

Guidelines on social considerations

- 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, and without prejudice to the generality of the foregoing such guidelines shall include guidance—
 - (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, qualitative, environmental, social, human rights and equality considerations that may arise in such procurement.
- (2) The Minister shall cause a copy of any guidelines issued under *subsection (1)* to be laid before each House of the Oireachtas as soon as practicable.
- (3) Contracting authorities shall comply with any guidelines issued under *subsection (1)*.
- (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)*.

- (5) 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 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)*.

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. 10
- (2) The report referred to in *subsection (1)* shall include a review of the following:
- (a) the operation of this Act and the Public Authority Contracts Regulations;
 - (b) the use of award criteria including qualitative, environmental, social, human rights and equality considerations by each contracting authority; 15
 - (c) the operation and effectiveness of Regulation 18(4) of the Public Authority Contracts Regulations;
 - (d) the operation and effectiveness of *section 4*;
 - (e) the number of declarations issued by each contracting authority under *section 4*;
 - (f) a review of the compliance by contracting authorities with *section 5*; 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 Quality in Public Procurement (Contract Preparation and Award Criteria) Act 2021.
- (2) This Act comes into operation eight months after the date of its passing or on such earlier date than the said eight months as the Minister may by order appoint. 25

An Bille um Cháilíocht i Sainfháil Phoiblí
(Conarthaí a Ullmhú agus Critéir
Dhámhachtana), 2021

BILLE

(mar a tionscnaíodh)

dá ngairtear

Acht do thabhairt tuilleadh éifeachta do Threoir 2014/24/AE ó Pharlaimint na hEorpa agus ón gComhairle an 26 Feabhra 2014 agus, chun na críche sin, do dhéanamh socrú maidir le critéir dhámhachtana conarthaí i gconarthaí poiblí, do chur úsáid cúnsí sóisialta agus an chóimheasa is fearr idir praghas agus cáilíocht chun cinn agus do bhunú nós imeachta le haghaidh imeacht ón gcóimheas is fearr idir praghas agus cáilíocht, dá chinntiú go mbeidh feidhm ag alt 3 den Acht fán gCoinbhinsiún Eorpach um Chearta an Duine, 2003 maidir le gach údarás conarthach lena mbaineann an Treoir sin i leith conradh atá comhionann le tairseach airgid inchinn nó is mó ná sin, do dhéanamh socrú maidir le treoirlínte a bhaineann le cúnsí 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 Ní Uiginn, Lynn Ní Ruadháin, Proinséas Ní Dhuibh agus Eileen Ní Fhloinn a thug isteach,

8 Márta, 2021

Quality in Public Procurement (Contract
Preparation and Award Criteria) Bill 2021

BILL

(as initiated)

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An Act to give further effect to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 and for that purpose 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 every contracting authority to which the said Directive relates in respect of a contract equal to or greater than a determinable monetary threshold, 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, Lynn Ruane, Frances Black and Eileen Flynn,

8th March, 2021

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR

Le ceannach díreach ó

FOILSEACHÁIN RIALTAIS,

52 FAICHE STIABHNA, BAILE ÁTHA CLIATH 2.

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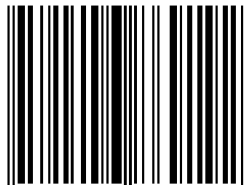
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