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### Public Procurement

# Framework Agreements

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**Introduction:** There is a long tradition of using framework arrangements in a number of EU member states including the Nordic countries, France and the UK. This method of purchasing has generally involved a contracting authority (or authorities) advertising an opportunity and then entering into a contract or other arrangement with one or more economic operators for the provision of works, supplies or services over a fixed period.

When the works, supplies or services under a framework agreement are of a type rendering them subject to the Directive, and the total estimated value of purchases to be made under the framework arrangement exceed the relevant EU financial threshold (see *Procurement Brief 5 – Understanding the Financial Thresholds*), the framework agreement is advertised in the Official Journal of the European Union (OJEU) and the economic operators are awarded the framework agreement using one of the standard procurement procedures provided for in the Directive.

When a requirement arises for a work, supply or service of the type covered by the framework arrangement, a contracting authority that is a beneficiary of that framework can call off its requirements under the framework without the need to follow a further tendering process.

A common feature of framework arrangements has been the lack of absolute certainty about the total amount to be procured under the life of the framework. The framework agreement thus often permits some flexibility for contracting authority purchasers who are not able to commit to a fixed level of purchasing at the outset of the arrangement. Frameworks may involve one or more contracting authorities as purchasers and one or more economic operators.

Framework agreements are frequently used by central purchasing bodies acting either in their own name or on behalf of a number of contracting authorities. See also *Procurement Brief 20 - Central Purchasing Bodies*.

The rationale behind the framework method of purchasing is to achieve savings in both costs of procurement and time spent in the procurement process. It is worth noting that the most significant savings are commonly achieved when purchasing using framework agreements is combined with centralised procurement and e-procurement (see *Procurement Brief 17 – E-procurement*).

Prior to Directive 2004/18 (“the Directive”), there were no specific provisions in the public procurement Directive covering the setting up and operation of framework arrange-

ments. Member states using these methods were of the view that there was no need for specific provisions as the existing Directives contained sufficient provisions. There were however concerns at EC level about the way in which some frameworks were operating, and the lack of clarity and of specific provisions meant that some member states did permit the use of frameworks while others don't. .

### **What is a framework agreement according to the Directive?**

The term “framework” can be used to describe a number of commercial and procurement arrangements. There is, however, a definition of a “framework agreement” in the Directive and it is this type of framework agreement that is covered in the rest of this Procurement Brief.

Article 32 of the Directive sets out the manner in which framework agreements may be established and operated. Member states can opt to adopt these provisions, meaning that the use of framework agreements is not obligatory under the terms of the Directive. However, if they are used, the corresponding provisions of the Directive must be applied.

#### **A framework agreement is defined in Article 11(5) of the Directive as:**

*“an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given time limit, in particular with regard to price and, where appropriate, the quantity envisaged”*

This means that a contracting authority setting up a framework agreement advertises the framework and invites economic operators to apply to be appointed to the framework. The contracting authority advertises in the OJEU and uses one of the standard procurement procedures set out in the Directive for selection and evaluation of tenders. Following receipt and evaluation of selection information and tenders, the contracting authority awards the framework agreement to one or more economic operators. The contracting authority and the framework members then enter into a framework agreement that governs the way in which contracts will be awarded to framework members and the terms applying to that award.

A major advantage of framework agreements is that there is a single contract notice published in the OJEU and a single EU procurement process, which covers both the

establishment of the framework agreement and the subsequent award of contracts covered by the framework agreement.

Contracts awarded under the framework agreement may be awarded either directly to framework members without a further competition or by using a mini-competition between framework members only. There is no requirement to advertise again in the OJEU or to conduct a full EU procurement process for the award of contracts under a framework agreement. This is a major advantage as it speeds up procurement timetables and can increase efficiency and significantly reduce costs for both the contracting authority and the economic operators, particularly when combined with centralised purchasing and e-procurement.

**Note:** In some member states contracting authorities are obliged to use an existing framework if there is one in place covering the procurement envisaged. In other member states there is no such obligation. This will be a matter of local law and policy.

Framework agreements are commonly set up for use by more than one contracting authority – either by a lead authority or a contracting authority acting as a central purchasing body. In this case, in order to satisfy the requirements of transparency, the European Commission (EC) is of the view that the contracting authorities which are a party to the framework agreement must be sufficiently clearly identified in the OJEU contract notice. The EC has commented on this issue in its Explanatory Note on Framework Agreements<sup>1</sup>.

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<sup>1</sup> CC/2005/03\_rev 1 of 14.7.2005

..... framework agreements can only be used “between the contracting authorities and the economic operators originally party to the framework agreement”. When a framework agreement is to be used by several contracting authorities, therefore, these contracting authorities must be identified explicitly<sup>2</sup> in the contract notice, either by naming them directly in the notice itself or through reference to other documents (e.g. the specifications or a list available from one of the contracting authorities [ ], etc.). In other words, framework agreements constitute a closed system which no-one else can enter, either as a purchaser or a supplier.

### **Are framework agreements suitable for all purchasing?**

Frameworks may not be suitable for all types of purchasing. Contracting authorities need to be certain that a framework will provide an appropriate, economic and efficient means of purchasing.

The most appropriate use of framework agreements is where a contracting authority has a repeated requirement for works, services or supplies but the exact quantities are unknown.

In order to assess the suitability of a framework agreement, contracting authorities need to understand the advantages and disadvantages of framework agreements, the different types of framework agreements, how they are set up, and how they operate in practice

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<sup>2</sup> For example, in the case of a framework agreement concluded by a central purchasing body acting as an intermediary rather than as a “wholesale dealer”, it would not therefore be sufficient to indicate that the agreement can be used by “contracting authorities” established in the Member State in question. In fact, such an indication might not render it possible to identify the entities that are parties to the agreement due to the difficulties that may arise in determining whether an entity does or does not meet the definition of a body governed by public law. On the other hand, a description permitting immediate identification of the contracting authorities concerned — for example “the municipalities of x province or of y region” — renders it possible to verify that the provision of Article 32(2), second indent has been observed.

### Some examples of framework agreements:

- A single government department enters into a framework agreement for stationery with three suppliers.
- Four neighbouring local authorities enter into a framework agreement with one economic operator for the maintenance of roads.
- A central purchasing body, acting on behalf of 10 health bodies, enters into a framework agreement with four providers for the supply of emergency vehicles.

### When and how must a framework agreement be advertised in the OJEU?

A framework agreement must be advertised by publishing a contract notice in the OJEU if the estimated value (excluding VAT) of all purchases to be made under the framework agreement exceeds the relevant EU threshold for that type of contract.

The contract notice is published at the start of the process to establish the framework agreement. The standard form OJEU contract notice is used and a frameworks section must be completed in addition to all other relevant sections. See also *Procurement Brief 6 – Advertising*.

Once the framework agreement is established then there is no further requirement to advertise in the OJEU prior to the award of a contract under the framework agreement.

### What procedure is used for procuring a framework agreement?

Article 32(2) provides that any one of the four main competitive procedures may be used for the procuring of a framework agreement. For further information on procurement procedures see *Procurement Brief 10 – What Are the Public Procurement Procedures and When Can They Be Used?*

It is only when it comes to awarding contracts under the framework agreement that different, framework agreement specific, provisions apply.

### **Practical note**

Although it is possible to use any one of the four main competitive procedures to procure a framework agreement, in practice the open and restricted procedures are more commonly used. This is because the frameworks are generally more suited to the procurement of straightforward commodity and non-complex purchases, meaning that the open and restricted procedures are the most appropriate procedures.

It is important to understand that a framework agreement is not a list of selected economic operators who are qualified to provide the works, services or supplies covered by the framework. It is more than this. In order to be awarded the framework agreement, the economic operators will have both qualified and submitted tenders, which are evaluated by the contracting authorities. It is these tenders that provide the basis for future awards under the framework agreement. The criterion for award and appointment to the framework may be either lowest price or most economically advantageous tender.

### **How many economic operators are appointed to a multi-supplier framework agreement?**

When the contracting authority intends to appoint more than one economic operator and sets up a “multi-supplier” framework agreement, the minimum number of economic operators is three- provided that there are three suitably qualified economic operators.

There is no statutory limitation on the maximum number of economic operators appointed to a multi-supplier framework agreement. The proposed number or maximum number of economic operators to be appointed must, however, be indicated in the OJEU contract notice.

### **Practical note**

Although there is no statutory limitation on the number of economic operators that may participate in a framework, there are practical issues to consider. For example, the appointment of a very large number of economic operators may be a disincentive for economic operators to participate, as the likely share of business from the framework may be rather small.

Furthermore, if the mini-competition process is used (see below), it may be necessary at this second stage to invite all of the economic operators on the framework to participate in the competition. Again, economic operators may be disinclined to participate if there are too many of them on the framework. There is also the practical issue for the contracting authority running the framework of the increased level of administration involved.

The contracting authority should assess carefully the market, their requirements and resources during the preparation stage in order to decide on the appropriate number of economic operators for a particular framework agreement.

### **Can new contracting authorities and new economic operators join the framework agreement after it is established?**

No, the contracting authorities and economic operators which are parties to the framework agreement remain fixed for the life of the framework. New authorities or new economic operators cannot join the framework after it is established.

### **What is the duration of a framework agreement?**

The term of a framework agreement may generally not exceed four years and may be shorter. The Directive provides that the duration may only exceed four years “in exceptional cases duly justified, in particular by the subject of the framework agreement.” The Directive does not discuss what constitutes due justification for exceeding the four year time limit.



### **The EC has commented on this issue as follows:**

“..... framework agreements may have a longer duration in “exceptional cases duly justified, in particular by the subject of the framework agreement”. Thus, for example, a longer duration could be justified in order to ensure effective competition for the contract in question if its performance required investment with a depreciation period of more than 4 years. This is because the development of effective competition in the public procurement sector is one of the objectives of the Directives dealing with this area, as recalled by established case law 17 and the second recital of the Classic Directive. Moreover, it should be noted that the public procurement directives do not operate in a legal vacuum — both Community and national competition rules apply to them.”

EC Explanatory Note – Framework Agreements – Classic Directive CC/2005/03\_rev 1 of 14.7.2005 at paragraph 2.1

A good understanding of the nature of the particular market and the purchases to be made is essential when deciding on the contract duration. Careful consideration needs to be given to balancing the benefits of longer term arrangements – such as reduced procurement costs and speedier procurements – with the effects of potentially limiting competition for a fixed period. For example, it may be more appropriate to award a shorter term framework agreement for the supply of certain types of IT -based equipment for which there is rapid technological change (meaning that products become out of date quickly) and frequent new entrants in the market.

### **What issues does the framework agreement cover?**

The content of the framework agreement is not specified in the Directive although national legislation may cover this. A framework agreement will typically include details of: parties, duration, subject matter, contract terms to apply to the contracts to be awarded under the framework, how contracts will be awarded including the criteria for call offs or arrangements for further (“mini”) competitions and criteria to be applied, and tendered costs or a costing methodology for future awards.

## How are contracts awarded under a framework agreement established with only one economic operator (single supplier agreement)?

When the framework agreement is a single supplier agreement, the Directive provides that contracts shall be awarded within the limits of the terms laid down in the framework agreement. This means that the contracting authority awards the contract directly to the economic operator without a further competition. No substantial amendments may be made to the original terms under which the economic operator was appointed to the framework agreement, and the framework must not be used in an improper manner or in such a way as to prevent, restrict or distort competition.

## How are contracts awarded under a framework agreement established with more than one economic operator (multi-supplier agreement)?

Where the agreement is with more than one economic operator, the contracting authority has a choice. There are two ways of awarding a contract:

- Option 1: awarding the contract directly to a particular economic operator by application of the terms laid down in advance in the framework agreement without reopening competition; or
- Option 2: by running a further competition, inviting all suitably qualified economic operators on the framework to participate (a “mini-competition”).

When advertising and setting up a multi-supplier framework, contracting authorities should clearly indicate how contracts will be awarded, and the framework agreement should include provisions covering the manner of the contract award process.

**Option 1 - Award to an economic operator without further competition:** Where the contracting authority wishes to use the first option and award a contract directly to one of the economic operators on the framework:

- it must do so on the terms laid down in the framework agreement;
- the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement;
- and the award must not be made improperly or in such a way as to prevent, restrict or distort competition..

In practice, awards can be made in a number of ways, depending on the terms of the framework agreement. For example, ranking may be used so that the contract is always offered first to the first ranked economic operator; the award of contracts may rotate between the economic operators; or economic operators may be awarded a pre-agreed percentage of the total value or number of contracts awarded under the frame-

work agreement. Care needs to be taken to ensure that whatever method is used is transparent and ensures equal treatment of economic operators on the framework.

**Option 2 - Award using a mini competition:** The contracting authority may use the second option of a mini-competition where not all terms are laid down in the framework agreement. This process allows the terms referred to in the specification to be introduced or existing terms to be more precisely formulated. This is still subject to the principle that the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement.

All of the economic operators on the framework capable of performing the contract are invited to participate in a competition on this basis so as to ensure equal treatment, non-discrimination and transparency.

Article 32(4) sets out the basic requirements for the conduct of the mini competition:

- the contracting authority must consult the economic operators capable of performing the contract
- the contracting authority must consult the economic operators in writing
- the time limit fixed for return of tenders must be sufficiently long to allow tenders for the specific contract to be submitted, taking into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders
- tenders are to be submitted in writing
- the content of tenders shall remain confidential until the stipulated time limit for reply has expired
- the contract shall be awarded to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement
- the award must not be made improperly or in such a way as to prevent, restrict or distort competition

There are no statutory time limits specified and the manner of inviting economic operators to participate and submit tenders is not set out in detail. This does not mean that the process should be undertaken in a vague or unstructured manner. The award process must be conducted in compliance with the general law principles and Treaty principles, including the requirements to run the process in a transparent manner which ensures equal treatment and non-discrimination. It is permissible to use electronic auctions when conducting a mini competition.

## Do economic operators need to be notified, a standstill period run, and a contract award notice published?

The awarding contracting authority must comply with the usual notification and standstill requirements when the framework agreement is established. A standard contract award notice must be published in the OJEU when the estimated total value of the contracts to be awarded under the framework exceed the relevant financial threshold. See also *Procurement Brief 6 – Advertising*.

There is no obligation in the Directive to publish a contract award notice when a contract is awarded (called off) under a framework agreement. The requirements to notify and comply with standstill requirements when a contract is awarded will vary according to national legislation. This is because the provisions in the Remedies Directive covering this situation contain derogations, meaning that it is up to each member state to decide whether or not to adopt these derogations.

### Practical note - Management of the framework

The contracting authorities running a framework agreement need to manage and monitor the framework agreement proactively. It is important, for example, to ensure that contracting authorities only purchase within the scope of the framework as advertised and that the method of award is in line with the framework agreement and the provisions of the Directive.

Care must also be exercised to ensure that framework agreements are not set up so as to distort competition and that they are not used improperly.

### Further reading:

- European Commission's Explanatory Note – Framework Agreements – Classic Directive CC/2005/03\_rev 1 of 14.7.2005
- World Bank – Introduction to Framework Agreements