



Public Procurement

Framework Agreements

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Introduction

A number of Member States, including the Nordic countries, France and the UK, have a long tradition of using framework arrangements. This method of purchasing has generally involved the advertisement of an opportunity by a contracting authority (or authorities), which has then entered 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 that renders them subject to the Public Sector Directive (the Directive)¹, and the total estimated value of purchases to be made under that framework arrangement exceeds the relevant EU financial threshold, the framework agreement is then advertised in the *Official Journal of the European Union (OJEU)*, and the economic operators are awarded the framework agreement by using one of the standard procurement procedures provided for in the Directive. See SIGMA Public Procurement Brief 5, *Understanding the EU Financial Thresholds*.

When a requirement arises for works, supplies or services of the type covered by the framework agreement, a contracting authority that is a beneficiary of that framework can award (call off)² its requirements under the framework without having 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 during the lifetime of the framework. The framework agreement thus often permits some flexibility for contracting authority purchasers that 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 on their own behalf or on behalf of a number of contracting authorities. See SIGMA Public Procurement Brief 20, *Central Purchasing Bodies*.

The rationale behind the framework method of purchasing is to achieve savings, in both the costs of the procurement and the 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 SIGMA Public Procurement Brief 11, *Procurement Tools*, and SIGMA Public Procurement Brief 19, *Framework Agreements*.

Prior to the 2004 Public Sector Directive³, no specific provisions in the public procurement directives covered the setting up and operation of framework arrangements. 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 concerns, however, at EU level, about the way in which some frameworks were operating, and the lack of clarity and the absence of specific provisions meant that some Member States did permit the use of frameworks while others did not. The 2004 Directive, therefore, put in place for the first time provisions concerning framework agreements. This approach has continued under the new Directive.

¹ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

² The process of awarding contracts under a framework agreement is sometimes referred to as “call-off” or “calling-off” and contracts awarded under a framework are also referred to as “call-off” contracts.

³ Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 31 March 2004.

Framework agreements under the Directive

The term “framework” can be used to describe a number of commercial and procurement arrangements. However, a definition of a “framework agreement” is given in the Directive, and it is this type of framework agreement that is the focus of the remainder of this Brief.

In Article 33 of the Directive, the manner in which framework agreements may be established and operated is set out. Member States must make framework agreements available to contracting authorities, which signifies that the transposition of the Directive’s provisions on framework agreements into national law is obligatory.

A framework agreement is defined in Article 33(1) 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 period, in particular with regard to price and, where appropriate, the quantity envisaged”.

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 the framework agreement in the *OJEU* and uses one of the standard procurement procedures set out in the Directive for the selection and evaluation of tenders. Following the 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 a single Contract Notice is published in the *OJEU* and a single EU procurement process is carried out, covering 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 the 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, in particular 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 envisaged procurement. In other Member States there is no such obligation. This is a matter of local law and policy.

Framework agreements are usually 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 contracting authority, as a party to a framework agreement, needs to be clearly identified for this purpose in the call for competition or in the invitation to confirm interest. Framework agreements may be used only between those contracting authorities that are clearly identified and those economic operators that are parties to the framework agreement. This requirement is made clear in Recital 60 of the Directive.

“... certain aspects need to be clarified, in particular that framework agreements should not be used by contracting authorities which are not identified in them. For that purpose, the contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given

category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified. Likewise, a framework agreement should not be open to entry of new economic operators once it has been concluded. This implies for instance that where a central purchasing body uses an overall register of the contracting authorities or categories thereof, such as the local authorities in a given geographical area, that are entitled to have recourse to framework agreements it concludes, that central purchasing body should do so in a way that makes it possible to verify not only the identity of the contracting authority concerned but also the date from which it acquires the right to have recourse to the framework agreement concluded by the central purchasing body as that date determines which specific framework agreements that contracting authority should be allowed to use.”

Suitability of a framework agreement

A framework agreement 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 a framework agreement is where a contracting authority has a repeated requirement for works, services or supplies, but where the exact quantities that will be required 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.

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.

Advertising a framework agreement

A framework agreement must be advertised in the *OJEU* by publishing a Contract Notice or, in the case of sub-central authorities, a Prior Information Notice as a call for competition. The requirement to advertise in the *OJEU* applies where the estimated value – excluding value-added tax (VAT) – of all purchases to be made under the framework agreement exceeds the relevant EU threshold for that type of contract.

The Contract Notice or Prior Information Notice is published at the start of the process to establish the framework agreement. The standard form *OJEU* Contract Notice or Prior Information Notice is used. A framework section in the standard form *OJEU* must be completed, in addition to all other relevant sections. See SIGMA Public Procurement Brief 6, *Advertising*.

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

Procedures for procuring a framework agreement

Article 33(1) provides that any one of the procedures provided for in the Directive may be used for procuring a framework agreement. For further information on procurement procedures, see SIGMA Public Procurement Brief 10, *Public Procurement Procedures*.

It is only when awarding contracts under the framework agreement that different provisions apply. These provisions are specific to framework agreements.

Practical note

Although it is possible to use any one of the five main competitive procedures to procure a framework agreement, in practice the open and restricted procedures are more commonly used. The reason for this is that frameworks are generally more suited to the procurement of straightforward commodities and non-complex purchases, which means 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 that are qualified to provide the works, supplies or services covered by the framework. It is more than a list. 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 the award and for appointment to the framework is the submission of the most economically advantageous tender. For further information on contract award criteria, see SIGMA Public Procurement Brief 8, *Setting the Award Criteria*.

Appointment of economic operators 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 Directive does not define a minimum or a maximum number of economic operators.

The proposed maximum number of economic operators to be appointed to the framework must nevertheless 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, some practical issues have to be considered. For example, the appointment of a very large number of economic operators may be a disincentive for the participation of economic operators, as their 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 that are members of the framework to participate in the competition. Again, economic operators may be disinclined to participate if there are too many of them in the framework. Consideration must also be given to the practical issue for the contracting authority running the framework of the increased amount of administration involved.

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

New participants in a framework agreement after it has been established

The parties to a framework agreement remain fixed for the lifetime of the framework. New contracting authorities or new economic operators cannot join the framework after it has been established.

Duration of a framework agreement

The term of a framework agreement may generally not exceed four years and it may be shorter. The Directive provides that the duration may exceed four years only “in exceptional cases duly justified, in particular by the subject of the framework agreement”.

Recital 62 of the Directive clarifies this issue as follows:

“Such cases, which should be duly justified, in particular by the subject of the framework agreement, might for instance arise where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement.”

A good understanding of the nature of the particular market and of 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 procurement procedures – 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 information and communication technology equipment, where there are rapid technological changes (meaning that products become obsolete quickly) and frequent new entrants onto the market.

Issues covered by a framework agreement

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

Award of contracts under a framework agreement

How are contracts awarded under a framework agreement that has been established with only one economic operator (single-supplier agreement)? When the framework agreement is a single-supplier agreement, the Directive provides that contracts are to be awarded within the limits of the terms laid down in the framework agreement. This provision means that the contracting authority awards the contract directly to the economic operator without a further competition. The contracting authority may contact the economic operator that is party to the framework agreement in writing, requesting it to supplement its tender as necessary. However, no substantial modifications may be made to the terms laid down in 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 that has been established with more than one economic operator (multi-supplier agreement)? Where the agreement has been established with more than one economic operator, the contracting authority has a choice between the following three ways of awarding a contract:

- Option 1: by awarding the contract directly to a particular economic operator by applying the terms and objective conditions laid down in advance in the framework agreement, without re-opening competition;
- Option 2: by re-opening competition between the economic operators that are parties to the framework agreement, inviting all of the economic operators in the framework that are capable of performing the contract to participate (a “mini-competition”);
- Option 3: by awarding the contract partially without re-opening competition, in accordance with Option 1, and partially with re-opening competition between the economic operators that are parties to the framework agreement, in accordance with Option 2.

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

Option 1 – Award to an economic operator without further competition: The contracting authority may use the first option, where all of the terms are laid down in the framework agreement. Where the contracting authority wishes to use this option and award a contract directly to one of the economic operators in the framework:

- it must do so following the terms and conditions laid down in the framework agreement, which should set out:
 - all of the terms governing the provision of the works, services or supplies concerned;
 - the objective conditions for determining which of the economic operators, party to the agreement, is to perform the works, services or supplies concerned;
- the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement;
- 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 (1) the contract is always offered first to the first-ranked economic operator; or (2) the award of contracts may rotate between the economic operators; or (3) the economic operators may be awarded a pre-agreed percentage of the total value or number of contracts awarded under the framework agreement. Care needs to be taken to ensure that whichever method is used is transparent and ensures equal treatment of the economic operators that are parties to 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. The general requirement is that the mini-competition process must be based on the same terms as those applied for the award of the framework agreement. The Directive provides, however, that in a mini-competition process those terms may be “more precisely formulated”. It also allows for other terms that are referred to in the procurement documents for the award

of the framework agreement to be used. This provision 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 in the framework that are 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 33(5) sets out the basic requirements for the conduct of the mini-competition:

- The contracting authority must consult the economic operators that are capable of performing the contract.
- The contracting authority must inform the economic operators in writing of the mini-competition.
- The time frame fixed for the return of tenders must be sufficiently long to allow tenders to be submitted for the specific contract, taking into account factors such as the complexity of the subject matter of the contract and the time required to submit tenders.
- The tenders are to be submitted in writing.
- The content of the tenders is to remain confidential until the stipulated time limit for submission has expired.
- The contract is to be awarded to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents of the framework agreement.
- The award must not be made improperly or in such a way as to prevent, restrict or distort competition.

No statutory time limits are specified and the manner of inviting economic operators to participate and submit tenders is not set out in detail, but 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 general law principles and with the Treaty⁴ principles, including the requirement to carry out the process in a transparent manner so as to ensure equal treatment and non-discrimination. It is permissible to use electronic auctions when conducting a mini-competition.

Option 3 – Award partially with and partially without re-opening competition: The contracting authority may use this option where the framework agreement sets out all of the terms governing the provision of the works, services or supplies concerned.

The award of contracts may be performed partially in accordance with Option 1 (without the re-opening of competition) and partially in accordance with Option 2 (with the re-opening of competition). The use of this option must be stipulated in the procurement documents for the framework agreement.

Where this option is used, the objective criteria to be used to determine the award of a contract, i.e. with or without the re-opening of competition, must be set out in the procurement documents for the framework agreement. The procurement documents must also specify which terms may be subject to the re-opening of competition.

⁴ Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012. The Treaty is referred to in the Procurement Brief as “TFEU” or “Treaty”.

It is important to note that these provisions also apply to any “lot” in a framework agreement, for which all of the terms governing the provision of the works, services or supplies concerned are laid down in the framework agreement. These provisions apply regardless of whether all of the terms governing the provision of the works, services or supplies concerned under other lots have been laid down.

Again, 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.

Notification and standstill

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 agreement exceeds the relevant EU financial threshold. See also SIGMA Public Procurement Brief 6, *Advertising*.

There is no obligation in the Directive to publish a contract award notice when a contract is awarded under a framework agreement. However, Member States may provide that contracting authorities are to group notices of the results of the procurement procedures for contracts based on the framework agreement on a quarterly basis. In that case, the contracting authorities are to send the grouped notices within 30 days of the end of each quarter.

The requirements to notify and comply with standstill requirements when a contract is awarded vary according to national legislation. The reason for this is that 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. See SIGMA Public Procurement Brief 12, *Remedies*.

Practical note – Management of the framework

The contracting authorities running a framework agreement need to manage and monitor that framework proactively. It is important, for example, that the 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 in such a way as to distort competition and are not used improperly.

Utilities

The provisions in the Utilities Directive⁵ on framework agreements are far less detailed and proscriptive than the provisions in the Directive.

- Contracting entities must not use framework agreements “improperly or in such a way as to prevent, restrict or distort competition”.
- The definition of a framework agreement is essentially the same as in the Directive.
- The maximum duration of a framework agreement is eight years “save in exceptional cases duly justified, in particular by the subject of the framework agreement”.
- Contracts based on a framework agreement are to be awarded on the basis of objective rules and criteria, which must ensure equal treatment of the economic operators that are party to the framework agreement.
- Contracting entities may use mini-competitions, but the Utilities Directive includes no detailed rules on their conduct. Mini-competitions must nevertheless be organised as follows:
 - The mini-competition must be between the economic operators that are party to the framework agreement.
 - The contracting entity must set a time frame for the mini-competition that is sufficiently long to allow tenders to be submitted.
 - The award of a contract must be made on the basis of the award criteria laid down in the specifications of the framework agreement.

⁵ Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

Further information

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