



Brief 11

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Public Procurement

Procurement Tools

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Authorised for publication by Karen Hill, Head of the SIGMA Programme

Member States have the option of deciding whether or not to implement provisions permitting the use of four specific types of procurement tools: framework agreements¹, electronic auctions, dynamic purchasing systems, and electronic catalogues.

Each of these procurement tools uses one or more of the main competitive procedures as a starting point for the procurement process to be followed.

Framework agreements

The term “framework” can be used to describe a number of commercial and procurement arrangements. However, the Public Sector Directive (the Directive)² provides a specific definition of a “framework agreement”:

“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”.

In other words, a framework agreement is a general term for agreements with economic operators that set out the terms and conditions under which specific purchases may be made. The advantage of a framework agreement is that, provided that it is advertised at the outset in the *Official Journal of the European Union (OJEU)* and set up and operated in accordance with the provisions of the Directive, there is no need to advertise again in the *OJEU* or to carry out a full tender process when contracts are awarded under that framework agreement.

Who can set up a framework agreement? A framework agreement can be set up by:

- an individual contracting authority;
- a number of contracting authorities in a joint procurement;
- a contracting authority acting on behalf of itself and a number of contracting authorities;
- a central purchasing body acting on behalf of itself or a number of contracting authorities.

Where a framework is set up for the benefit of a number of contracting authorities, in order to satisfy the requirements of transparency, the *OJEU* Contract Notice must then clearly indicate the contracting authorities that are party to the framework agreement. That indication should be made either by name or by other means, such as a reference to a given category of contracting authority within a clearly delimited geographical area (e.g. “the municipalities of X province or Y region”) so that the contracting authorities concerned can be easily and unequivocally identified.

The contracting authorities that are party to the framework agreement remain fixed for the duration of the agreement, and therefore new authorities may not join the framework once it has been established.

¹ Framework agreements are also referred to as “frameworks”.

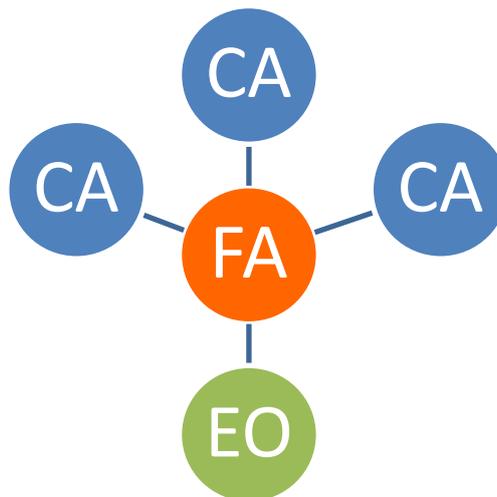
² Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

Some examples of how framework agreements are set up

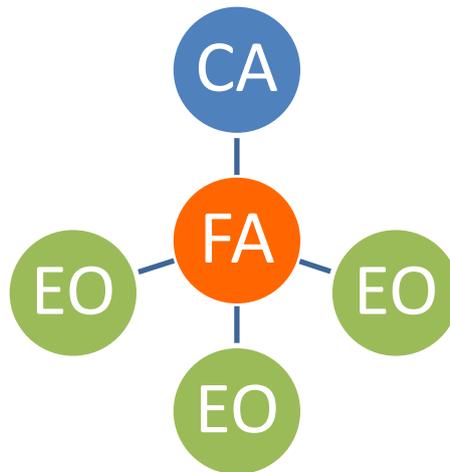
Single-supplier framework agreement (FA) between one contracting authority (CA) and one economic operator (EO)



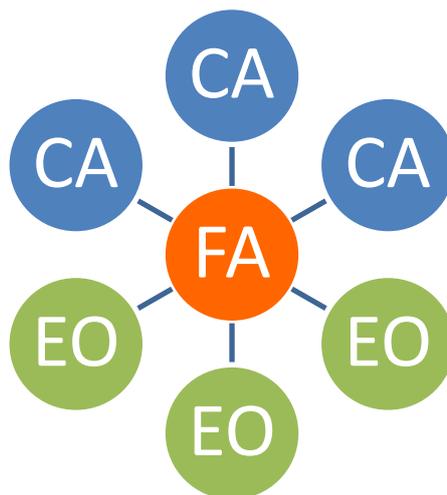
Single-supplier framework agreement (FA) between several contracting authorities (CA) and one economic operator (EO)



Multi-supplier framework agreement (FA) between one contracting authority (CA) and several economic operators (EO)



Multiple-supplier framework agreement (FA) between several contracting authorities (CA) and several economic operators (EO)



Is there a limitation on the number of economic operators participating in a framework agreement? Where the framework agreement will be set up with several economic operators, the envisaged number or maximum number must then be indicated in the *OJEU* Contract Notice. No statutory maximum number of economic operators is defined by the Directive. In practical terms it makes sense to limit the number of participants so that, for example, there are not too many participants in a mini-competition.

The economic operators that are party to the framework agreement remain fixed for the duration of the framework. New economic operators may not join the framework once it has been established.

Can frameworks be used for all procurement procedures? Frameworks may not be suitable for all types of purchasing, and contracting authorities need to be certain that a framework will provide an economic and efficient means of purchasing. The most appropriate use of frameworks is where a contracting authority has a repeated requirement for works, services or supplies, but where the exact quantities required are unknown.

Contracting authorities must be in a position to manage a framework agreement, as the needs of both the contracting authority or authorities and the provider(s) must be met, and the

operation of the framework agreement must be closely monitored. Care must also be taken to ensure that frameworks are not set up in such a way as to distort competition and that they are not improperly used.

When does a framework agreement need to be advertised in the OJEU? A framework agreement is advertised by publishing a Contract Notice in the *OJEU* if the estimated value 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.

When estimating the value of the framework, the maximum estimated value of all of the contracts envisaged for the total term of the framework agreement must be included. The total value excludes value-added tax. Once the framework agreement has been established, there is no further requirement to advertise each time a contract is awarded under the framework agreement.

What procedure is used for procuring a framework agreement? Any one of the main competitive procedures may be used for procuring a framework agreement, although the open procedure and the restricted procedure are the most commonly used procedures.

It should be noted that a framework agreement is not a list of selected economic operators that are qualified to provide the works, services or supplies covered by the agreement. To join the framework, economic operators are obliged to have tenders that have been both qualified and submitted for evaluation by the contracting authorities, and it is those tenders that will provide the basis for future awards under the framework agreement.

Is there a time limitation on the life of a framework agreement? In general, the life of a framework agreement may not exceed four years. It may only exceed four years in exceptional circumstances that are duly justified, in particular by the subject matter of the framework agreement.

How are contracts awarded under the framework agreement?

Agreement with one economic operator: Where the framework agreement is with one economic operator, the contracts are awarded according to the terms laid down in the framework agreement. The contracting authority may request the economic operator to supplement its tender if necessary, but no substantial amendments may be made to the terms laid down in the framework agreement.

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

- **direct award:** by applying the terms laid down in the framework agreement without re-opening competition, the contract is awarded directly to a particular economic operator;
- **re-opening of competition:** by organising an additional competition, all suitably qualified economic operators in the framework are invited to participate (a “mini-competition”).

Contracting authorities also have the option of awarding contracts under a framework agreement by using both of the above methods: partly by direct award and partly by re-opening competition.

When setting up a multi-provider framework, contracting authorities should indicate how contracts are to be awarded, and the framework agreement should include provisions covering the manner of awarding the contract. Where the contracting authority sets up a framework agreement with the option of using both methods for the award, it must then set out in the

framework agreement the objective criteria that it will use to decide on which method to use in a particular case.

In all cases, 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.

For further information, see SIGMA Procurement Brief 19, *Framework Agreements*.

Electronic auctions

The Directive contains a number of provisions that encourage electronic procurement, including the use of electronic auctions (e-auctions).

The e-auction is a method of inviting revised final tenders following the conduct of a full tender process. It involves an online electronic system that is used by economic operators to submit new prices and/or other revisions to elements of their tenders for a particular contract in real time and in direct competition with other economic operators.

Contracting authorities can only use e-auctions for procurement where the specifications can be established with sufficient precision. They are not permitted to use e-auctions for certain service contracts and works contracts that have as their subject-matter intellectual performance, such as the design of works. The reason for this provision is that only the elements suitable for automatic evaluation by electronic means, *without any intervention or appreciation by the contracting authority*, may be the object of an e-auction. The elements that are subject to automatic evaluation must be quantifiable so that they can be expressed in figures or percentages.

There are other types of purchases for which an e-auction is not a suitable method, such as contracts where more complex needs must be tailored for a particular project.

The contracting authority needs to think carefully about the appropriate use of e-auctions. For example, a contract for the supply of paper where the type and quality of paper can be easily specified and where there is a good level of competition in the market would be suitable for an e-auction. A contract for complex medical equipment, where a number of products are available, all with slightly different specifications, and where there are service-delivery issues, is unlikely to be suitable for an e-auction.

At what stage in the tender process does an electronic auction take place? The e-auction is the final stage of an open, restricted or competitive dialogue tender process, after receipt of the initial tenders.

An e-auction may also be used as a mini-competition under a framework agreement and under a dynamic purchasing system.

In all cases, in order to organise an e-auction, the contracting authority must indicate in the original Contract Notice that it intends to use this procurement tool.

The contracting authority receives initial tenders from all participating economic operators and makes a full evaluation of tenders before proceeding with an e-auction. That evaluation must be conducted in accordance with the pre-set award criterion or criteria and the weightings.

What factors can the contracting authority assess at the e-auction?

An e-auction can be based on:

- the submission of new prices revised downwards, where the contract is awarded on the basis of price only; or
- prices and/or new values of the features indicated in the procurement documents, where the contract is awarded on the basis of the best price/quality ratio.

Are there rules relating to the conduct of an e-auction? Detailed rules relating to the conduct of e-auctions are set out in the Directive. Important requirements to bear in mind are:

- The procurement documents must include at least the following details:
 - the features, the values of which will be the subject of the e-auction, provided that such features are quantifiable and can be expressed in figures or percentages;
 - any limits on the values that may be submitted, as they result from the specifications relating to the subject of the contract;
 - information that will be made available to tenderers in the course of the e-auction and, where appropriate, when it will be made available to them;
 - relevant information concerning the e-auction process;
 - the conditions under which the tenderers will be able to bid and, in particular, the minimum differences that will, where appropriate, be required when bidding;
 - relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.
- All economic operators that submitted admissible bids must be invited simultaneously to participate in the e-auction as from the specified date and time, using the connections in accordance with the instructions set out in the invitation.
- The invitation to participate in the e-auction must contain the outcome of the full evaluation of the relevant tenderer's own tender, but not about the tenders of other tenderers.
- The invitation shall also state the mathematical formula to be used in the e-auction to determine the automatic re-rankings.
- The e-auction may take place in a number of successive phases. The auction shall not start sooner than two working days after the date on which the invitations were sent.
- Throughout each phase of the e-auction, the contracting authority is required to instantaneously communicate to all tenderers the information that is at least sufficient to enable them to ascertain their relative ranking at any moment. Where previously indicated, the contracting authority may communicate other information concerning other prices or values submitted. It may also at any time announce the number of participants in that phase of the auction.
- The identities of the tenderers must not be disclosed during any phase of an e-auction.

How does the contracting authority close the e-auction and award the contract?

The contracting authority determines how to close the e-auction process. It can close the auction as follows:

- at the date and time specified in advance in the invitation to participate in the auction;
- when it receives no more new prices or new values (that meet the requirements concerning minimum differences) within a pre-specified time limit. The time specified as being required between the receipt of the last new price or new value and the close of the auction must be stated in the invitation to participate in the auction;
- when the number of phases in the auction, as specified in the invitation to participate in the auction, has been completed. Where phases are to be completed following a lapse of time between the receipt of the last new price and/or new value and the close of the auction, then the timetable must be stated in the invitation to participate in the auction.

The contract is awarded following the close of the e-auction and on the basis of the results of that auction.

See also SIGMA Procurement Brief 17, *e-Procurement*.

Dynamic purchasing systems

A dynamic purchasing system (DPS) is a completely electronic system that can be used for repeated standardised purchases. All communications in the context of a DPS are to be made only by electronic means. Therefore, to set up a DPS, the contracting authority must have an internet-based system that economic operators can join at any time.

Where the total estimated value of purchases under a DPS exceeds the relevant thresholds, the Directive then applies to the setting-up and operation of that system.

The contracting authority must follow the rules of the restricted procedure, using a selection process that will operate for the DPS set-up but will also allow new suppliers to join the system during its entire period of validity.

Interested economic operators submit requests to participate in the DPS. No indicative tenders have to be submitted during this phase. All of the candidates satisfying the selection criteria are to be admitted to the system, and there is no limitation on the number of admitted candidates.

The contracting authority must inform the economic operator concerned at the earliest possible opportunity as to whether or not it has been admitted to the DPS.

At any time during the period of validity of the system, the contracting authority is free to require economic operators to submit a renewed and updated self-declaration on the fulfilment of criteria for qualitative selection, within an adequate time limit.

Any economic operator that has submitted a request to participate and met the selection criteria is allowed to take part in procurement procedures carried out through the DPS during its period of validity.

Each contract that a contracting authority wishes to award under a DPS must be the subject of a separate invitation to tender. The contracting authority awards the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the call for competition.

What sorts of purchases are suitable for a DPS? The definition of a DPS makes it clear that it is intended only for “commonly used purchases” and refers to those purchases as being “generally available on the market”. These systems are generally only suitable for commodity-type purchasing where there is an active market in standard items.

How is a DPS set up and how does it operate? The contracting authority starts the process by publishing a call for competition for the establishment of the system in the required format.

The contracting authority must include in the specifications at least the following details:

- nature and estimated quantities of the purchases envisaged;
- necessary information concerning the electronic purchasing system;
- electronic equipment used, technical connections and specifications.

The contracting authority must also indicate any division into categories of products, works or services and the characteristics defining them.

The contracting authority must offer unrestricted, direct and full access to the specifications and to any additional documents, and it must indicate in the Contract Notice the internet address where these documents can be found. This requirement of access to the specifications and additional documents applies from the date of publication of the Contract Notice and for the duration of the DPS.

Interested economic operators then submit requests to participate in the system. The minimum time limit for receipt of the first requests to participate must be 30 days from the date of the call for competition. No further time limits for the receipt of requests to participate apply once the invitation to tender has been sent for the first specific procurement under the DPS.

All of the candidates satisfying the selection criteria are to be admitted to the system, and the contracting authority shall not limit the number of candidates to be admitted to the system.

Operation of the system: Unlike framework agreements, where the membership is fixed once the framework has been set up, under a DPS new economic operators may apply to join the system at any time, and throughout the entire DPS validity period.

New suppliers can request to participate in the DPS under the same conditions as the original entrants.

The contracting authority must finalise its assessment of such requests in accordance with the selection criteria within 10 working days following their receipt. That deadline may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

A contracting authority is not permitted to request the payment of any charges by economic operators that are joining the system. All documents must be made available free of charge, and no charges may be made for administrative costs or any other costs.

Awarding a contract: For each procurement procedure carried out under the DPS the contracting authority invites all admitted economic operators to submit a tender. Where the system has been divided into categories of works, products or services, the contracting authority invites only those participants that have been admitted to the category corresponding to the specific procurement concerned to submit a tender.

The contracting authority awards the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the call for competition.

Electronic catalogues

Electronic catalogues (e-catalogues) represent a new electronic purchasing tool that could help to increase competition and streamline public purchasing, particularly in terms of savings in time and money.

What are e-catalogues?

In simple words, an e-catalogue is a digital version of a supplier's catalogue. In the case of public procurement, certain general rules must be taken into consideration to ensure that the use of an e-catalogue complies with the principles of equal treatment, non-discrimination and transparency. These general rules are as follows:

- The use of an e-catalogue for the presentation of tenders does not entail the possibility for economic operators to transmit their own general catalogues.
- Economic operators must adapt their general catalogues in view of the specific procurement procedure. This adaptation ensures that the catalogue that is transmitted in response to a given procurement procedure observes the format established by the contracting authority and contains only those products, works or services that correspond to the requirements of the contracting authority.

Consequently, e-catalogues are provided in a format for the presentation and organisation of information in a manner that (1) is common to all of the participating bidders, and (2) lends itself to electronic treatment.

A typical example of an e-catalogue is a spreadsheet containing information about a specific product, such as its description, product manufacturer, product codes, pricing, units of measure, delivery time, images (if applicable) as well as any other relevant information, in accordance with the requirements of the contracting authority.

When and how may e-catalogues be used? The contracting authority may require tenders to be presented in the format of an e-catalogue or may include an e-catalogue in all procurement procedures where the use of electronic means of communication is required.

Where e-catalogues are required in a procurement process, contracting authorities must indicate this requirement in the Contract Notice and provide all of the necessary information on the format, electronic equipment used, technical connection arrangements and specifications for the catalogue.

E-catalogues shall be established by the economic operators with a view to participating in a given procurement procedure, in accordance with the technical specifications and format established by the contracting authority. Tenders presented in the form of an e-catalogue may be accompanied by other documents that complete the tender.

E-catalogues may be "combined" with other procurement tools and techniques, such as a framework agreement or a DPS.

Where a multi-provider framework agreement has been set up using e-catalogues, the contracting authority may provide that the mini-competition processes for call-offs are to take place on the basis of updated catalogues. In that event, the contracting authority may use one of the following two methods:

- invite tenderers to re-submit their e-catalogues, adapted to the requirements of the contract in question; or
- notify tenderers that it intends to extract from the e-catalogues that have already been submitted the information needed to constitute tenders that are adapted to the requirements of the contract in question.

However, the contracting authority is bound to give to tenderers the opportunity to refuse such a collection of information and to give to the winner, prior to the award of the contract, the opportunity to either confirm that the tender thus constituted did not contain any material errors or, on the other hand, to contest the constituted tender.

Contracting authorities are also encouraged to use a combination of a DPS and e-catalogues for the purchase of commodity items by requiring that tenders for a specific contract be presented in the format of an e-catalogue.

Utilities

The Utilities Directive³ includes provisions on the use of the following procurement tools:

Framework agreements: The provisions for utilities are less detailed and less proscribed than those provided in the Directive. For more details, see SIGMA Public Procurement Brief 19, *Framework Agreements*.

Electronic auctions: The provisions for utilities are similar to those provided in the Directive.

Dynamic Purchasing Systems: The provisions are similar to those in the Directive.

Qualification systems: Contracting entities may also set up and operate qualification systems. Qualification systems are unique to the Utilities Directive.

A qualification system is a flexible system in which economic operators interested in contracting with the contracting entity may apply to be registered as potential providers. The contracting entity then registers some or all of those economic operators in the system. The registered economic operators form a pool from which the contracting entity may draw those operators that are invited to bid or negotiate contracts.

³ Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

Further Information

Publications

SIGMA (2015), *Public Procurement Training Manual* – Module C4, OECD Publishing, Paris,
<http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

Public Procurement Briefs

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2016), *E-Procurement*, Brief 17, OECD Publishing, Paris

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