

Guidance on the use of framework agreements

1 Introduction

- 1.1 This guidance note sets out some of the key issues to consider when making purchases using an existing framework agreement in accordance with the Public Contracts Regulations 2006 (the “**2006 Regulations**”) or the Public Contracts Regulations 2015 (the “**2015 Regulations**”). It also takes into account government guidance on the use of framework agreements, including that issued on 27 May 2015 by the Crown Commercial Service in relation to the changes brought in by the 2015 Regulations. This note focuses on purchases using *existing* framework agreements, and the additional issues that a contracting authority will need to consider in the context of establishing a new framework agreement in the first instance are therefore outside of the scope of this note.

2 What is a framework agreement?

- 2.1 Framework agreements set out the general terms under which specific purchases (“**call offs**”) can be made under the agreement. The purpose of using a framework is to enable contracting authorities to award individual contracts without going through a full EU procurement process each time. This is because the 2006/2015 Regulations provide that, when awarding call offs under a framework agreement, there is no need to go through the full procedural processes set out in the 2006/2015 Regulations, provided that such processes were followed in the establishment of the framework agreement itself.
- 2.2 A framework agreement may be established with one provider (“**single provider frameworks**”) or with more than one (“**multiple provider frameworks**”). An example of a single provider framework would be where a framework agreement is established with a single supplier of pharmaceutical products with calls offs being made each time the particular products are required. An example of a multiple provider framework agreement would be where framework agreements are established with a panel of consultancy firms and work call offs are made from the different panel members over the life of the arrangements. Under the 2006 Regulations, the minimum number of suppliers for a multiple-provider framework is three, whereas under the 2015 Regulations, it is two.
- 2.3 A framework agreement may be used by one contracting authority or a number of different contracting authorities as long as this is provided for in the OJEU Notice issued for the purposes of establishing the framework agreement. For example, the 2006/2015 Regulations expressly recognise that a contracting authority may act as a “central purchasing body” in establishing framework agreements for use by one or more contracting authorities. Where the 2006/2015 Regulations have been followed by the central purchasing body in establishing the framework agreement, other contracting authorities can make call offs under the framework as long as they are mentioned (or fall within the category of authorities mentioned) in the relevant OJEU Notice. An example of frameworks open to a wide range of contracting authorities are those established by the Crown Commercial Service (click [here](#) for details).

3 Which Regulations apply?

- 3.1 The 2015 Regulations are not radically different from the 2006 Regulations in terms of their rules around the use of frameworks. That said, there are a few important divergences between the two, so the first task is to establish which set of regulations actually apply to the framework you are intending to use.
- 3.2 The 2015 Regulations came into force on **26 February 2015** and govern all procurements “commenced” on or after that date (“commenced”, broadly-speaking, here means “advertised”).
- 3.3 If the framework agreement was:
- 3.3.1 concluded before 26 February 2015; or
 - 3.3.2 commenced/advertised before 26 February 2015 but concluded after that date,
- then this framework, and contracts called off under it, are governed by the **2006 Regulations**.
- 3.4 If the framework agreement was advertised on or after 26 February 2015, it and any contracts called off under it will be governed by the **2015 Regulations**.

4 When should framework agreements be used?

- 4.1 Before making a call off under a framework agreement, a contracting authority should confirm that:
- 4.1.1 the particular goods, services or works required are available under the framework agreement (i.e. within the scope of the framework agreement as originally advertised in the OJEU); and
 - 4.1.2 it falls within the range of contracting authorities that can lawfully use the framework agreement (i.e. as mentioned in the OJEU Notice issued for the purposes of establishing the framework agreement).

Often framework agreements will have associated user notes or customer guidance to help potential customers with these issues.

- 4.2 If the goods, services or works required are within scope and the contracting authority can lawfully use the agreement, a call off under the framework agreement can potentially be made. However, as part of the final decision as to whether or not to use a particular framework agreement for a given requirement, a contracting authority will wish to consider a number of commercial issues including:
- 4.2.1 does the framework agreement offer the right supplier base to meet the particular requirement (e.g. taking into account the complexity and scale of the requirement and the relevant market) or could greater benefits be achieved by undertaking a full procurement that would be open to a wider range of suppliers from within the relevant market? For example, a contracting authority may decide that a full procurement, as opposed to a call off under the framework agreement, would be better if there have been a number of promising new entrants to the particular market since the framework was established;
 - 4.2.2 does the framework agreement offer the right level of choice in terms of the goods, services or works available? For example, new products may have entered the market since the

framework was established that a contracting authority may wish to consider. In these circumstances, a contracting authority may again decide that a full procurement would offer the best procurement route to ensure the required level of choice;

4.2.3 is pricing under the framework agreement still considered competitive? For example, a framework agreement could have been established at a time when relevant market prices were high. In the event that prices have since fallen, the framework agreement may not represent best value for money even allowing for any savings in procurement costs that could be realised by using such a framework agreement; and

4.2.4 are the terms and conditions that apply to call offs under framework agreement considered acceptable? For example, a contracting authority may have a particularly complex requirement in relation to certain services and the terms applying to call offs under the relevant framework envisage relatively straightforward requirements. As the terms and conditions must not be the subject of further substantive negotiation, as set out below, a contracting authority may decide that it needs to conduct a full procurement on the basis of a more appropriate set of terms and conditions.

5 General considerations for call off contacts under a framework agreement

5.1 A call off contract under a framework agreement will be a contract between the relevant supplier and the contracting authority making the call off. As set out above, the award of a call off contract under a framework agreement does not have to follow the full procedural steps for competitive supplier selection under the 2006/2015 Regulations provided that these were complied with when establishing the framework agreement. However, there are still some rules that apply as follows:

5.1.1 a contracting authority must not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition. It must also comply with the general EU treaty principles of non-discrimination, proportionality, transparency and equal treatment. For example, when undertaking any call offs under a multiple provider framework agreement it is important that the process is transparent to all relevant suppliers and that everyone is treated equally;

5.1.2 the length of call off contracts under a framework agreement is not specifically limited by either the 2006 or 2015 Regulations. The “old” EU Directive, the source of the 2006 Regulations, was silent on this issue, although it has been addressed since that directive came into force through Commission guidance, which stated that call off contracts should not last more than four years (although of course this could mean that the call off contract could extend beyond the life of the framework agreement itself);

5.1.3 the “new” EU Directive, the source of the 2015 Regulations, expressly states at Recital 62 that that, *“while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer. In particular, it should be allowed to set the length of individual contracts based on a framework agreement taking account of factors such as the time needed for their performance, where maintenance of equipment with an expected useful life of more than four years is included or where extensive training of staff to perform the contract is needed”*; and

- 5.1.4 Recital 62 also expressly acknowledges that, in some (albeit exceptional) cases, a call off contract may need to extend for longer than four years. It says this: *“there might be exceptional cases in which the length of the framework agreements themselves should be allowed to be longer than four years. 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.”*

Depending on whether the agreement is a single provider framework or a multiple provider framework, further considerations will apply as set out below.

6 Call offs under single provider framework agreements

- 6.1 Where a framework is concluded with only one provider, call offs under the framework should be awarded on the basis of the terms laid down in the agreement, as refined or supplemented to reflect particular circumstances for the individual call off. This does not mean that basic terms can be renegotiated or the specification used for setting up the framework can be substantively changed. [Older government guidance](#) cites terms dealing with particular delivery timescales as an example of a term supplementing other terms in a framework agreement but which was not agreed at the time.

7 Call offs under multiple provider framework agreements

- 7.1 Where a framework is a multiple provider framework, the contracting authority has two options when awarding call off contracts. Where the terms of the framework are sufficiently precise to cover the particular call off, the contract may be awarded without re-opening competition (i.e. a **“direct call off”**). Where the terms laid down in the framework are not precise enough or complete for the particular call off, a further competition (i.e. a **“mini competition”**) should be held with all those suppliers within the frameworks capable of meeting the particular need. In addition, if the framework is regulated by the 2015 Regulations there is a third option of calling off a contract via a combination of both direct award and mini-competition routes. Further considerations relating to making direct call offs and holding mini competitions are set out in the next three sections of this note.

8 Making a direct call off under a multiple provider framework agreement

- 8.1 As set out above, where the terms of the framework are sufficiently precise to cover the particular call off, a direct call off may be made. The 2006/2015 Regulations do not specify how this should be done, but helpfully the same general principles will apply regardless of which set of regulations apply. As such we can take a steer from older government guidance given under the 2006 Regulations together with the guidance on frameworks under the 2015 Regulations, as follows:

- 8.1.1 The [guidance dated May 2015](#) in respect of the 2015 Regulations says *“If the framework agreement sets out all the terms governing the provision of the works, services and/or supplies concerned and all the objective conditions that are required to make a decision for award of the specific contract, then awarding the contract without re-opening competition amongst the parties to the framework agreement is possible. In this instance, the choice of provider must be based on the objective criteria laid out in the procurement documentation.”*

8.1.2 We can also have regard to [older government guidance](#) issued under the 2006 Regulations, which points out that reference to “the terms of the framework agreement” is not just a reference to the call off terms and conditions, but should be taken to include information contained within the framework agreement relating to the award of contracts without further competition.

8.1.3 This guidance suggests that consideration, therefore, needs to be given to what the particular framework agreement says about when a call off may be made without further competition, how such award might be made (e.g. is there a ranking system based on the award criteria used at the point the framework agreement was established) and how a subsequent supplier should be selected when the first placed supplier cannot for whatever reasons fulfil the requirement. Such information may be contained in user guidance notes accompanying the framework agreement.

8.1.4 If the particular framework agreement does not address the issues set out at paragraph 8.1.3 above, a reasonable approach, as reflected in previous government guidance, is for contracting authority to award the call off to the provider who is considered to provide the most economically advantageous offer based on the award criteria used at the time the framework was established. Where that provider is not capable or interested in providing the goods, services or works in question, the contracting authority should turn to the next best provider and so on.

8.2 This option of making a direct call off under the framework agreement is most likely to be relevant for commodity products and services. For example, if the framework agreement relates to basic office supplies (pens, paper, paper clips and other consumables), it is likely that call offs should be capable of being made without any need to refine or supplement the terms of the framework agreement. Direct call offs could, therefore, be made the basis of the award criteria used at the time the framework was established. On this basis, supplier A may offer best value for money for pens and supplier B may offer best value for money for paper clips. Therefore, if a contracting authority had a requirement for pens it would make a direct call off from supplier A. If it had a requirement for paper clips it would make a direct call off from supplier B.

9 Holding a mini competition under a multiple supplier framework agreement

9.1 As set out above, where the terms laid down in the framework agreement are not precise or complete enough for the particular call off, a mini competition should be held with all those suppliers within the framework arrangements capable of meeting the particular need. Again, this does not mean that basic terms can be renegotiated or that the specification used in setting up the framework can be substantively changed. However, basic terms can be refined or supplemented to reflect particular circumstances that apply to the call off where these were not and could not be provided for when the framework agreement was established. The 2006/2015 Regulations do not specify how a mini-competition should be run, but helpfully the same general principles will apply regardless of which set of regulations apply. As such, we can take a steer both from older government guidance given under the 2006 Regulations together with the [guidance on frameworks under the 2015 Regulations](#), as follows.

9.2 The 2015 Regulations guidance does not go into detail on the types of refinements to the basic terms which are permissible via a mini-competition. However, [older government guidance](#) issued under the 2006

Regulations gave the following examples of the types of supplementary terms or refinements that are permissible:

- 9.2.1 “particular delivery timescales”;
- 9.2.2 “particular invoicing arrangements and payment profiles”;
- 9.2.3 “additional security needs”;
- 9.2.4 “incidental charges”;
- 9.2.5 “particular associated services, e.g. installation, maintenance and training”;
- 9.2.6 “particular mixes of rates and quality”;
- 9.2.7 “where the terms include a price mechanism”; or
- 9.2.8 “individual special terms (e.g. specific to the particular products/services that will be provided to meet a particular requirement under the framework)”.

9.3 General rules governing any mini competition are:

- 9.3.1 All framework providers capable of performing the contract must be consulted in writing and invited to submit a written tender for each contract to be awarded. This does not mean that every supplier under the framework agreement must be invited to submit a tender. For example, under a framework agreement for different products and services the requirement would only be to invite those suppliers who have committed to providing the particular goods or services required at the point the framework was established. Framework agreements are often split into sub categories of works, goods or services for this reason (i.e. to make it easier to identify which suppliers are capable of providing which works, goods or services).
- 9.3.2 A reasonable and proportionate time limit for return of tenders must be set which takes into account the complexity of the call off and the time needed for different suppliers to submit their tenders.
- 9.3.3 If the 2006 Regulations apply, each tender must be kept confidential until the deadline for receipt of tenders has passed. However, if the 2015 Regulations apply, the contracting authority may not even open the tender until the bid deadline has passed.
- 9.3.4 The call off must be awarded on the basis of the best tender according to the award criteria that were set when the framework was established. However, the weightings of the award criteria may be varied to reflect the importance of the particular criteria to the requirement to which the proposed call off relates provided that this is notified to the suppliers as part of the tender request.
- 9.3.5 There is no scope at the mini competition stage to select on the basis of general financial and economic standing or technical ability, as these issues should have been addressed as part of the process to establish the framework agreement. However, this does not mean that financial due diligence should not be undertaken if considered appropriate to check that particular suppliers remain financially stable (e.g. obtaining a report on a supplier’s financial standing

from an appropriate agency), as long as this does not form part of any selection process. For example, if it was determined that a number of suppliers on the framework presented a financial risk in relation to a particular size of contract, this would be relevant to the commercial considerations as to whether or not to use the framework agreement, as referred to at paragraph 4.2 of this guidance note.

- 9.4 As well as the above general rules governing mini competitions, particular framework agreements may contain specific rules and processes that have been agreed with the suppliers as part of the establishment of the framework agreement. Where this is the case, such requirements should also be followed to the extent that they do not conflict with the general legal requirements set out above.
- 9.5 Contracting authorities should note, where a mini-competition is held, that this can bring into the play the possibility of a disgruntled bidder bringing a claim for a “declaration of ineffectiveness”. We discuss this in more detail below.

10 Combination of direct award and mini-competition (available under the 2015 Regulations only)

10.1 This new possible route is available under the 2015 Regulations. It can be used provided that:

- 10.1.1 the procurement documents state that this route may be used;
- 10.1.2 the framework sets out all the necessary terms governing provision of the work/supply/service being procured;
- 10.1.3 objective criteria are set out in the procurement documents for the framework agreement and are applied to determine whether a particular call off is directly awarded or goes on to a mini-competition; and
- 10.1.4 the procurement documents specify which terms may be subject to the re-opening of competition. The guidance gives this example: “*For example, a direct award could be for those suppliers allocated to provide goods to a specific region and the accompanying objective criteria for selecting to re-open competition could be:*
- (i) *the contract exceeds a set financial threshold;*
 - (ii) *the quantity of products required is over a certain level; or*
 - (iii) *the contract has particularly complex requirements”.*

11 Is a “standstill period” required?

11.1 The requirement in the 2006/2015 Regulations for a standstill period between the decision to award a particular contract and formal conclusion of the contract (i.e. to allow bidders time to receive information relating to the contract award decision and to challenge the decision if appropriate) does not apply to call offs under a framework agreement. Call off contracts under a framework agreement can, therefore, be concluded as soon as the award decision has been made. That said, it can be advisable to hold a standstill period in relation to a call off contract, for the reasons discussed in paragraph 12 immediately below.

12 Call offs and potential claims for a “declaration of ineffectiveness”

- 12.1 In three limited circumstances, set out at Regulation 47K of the 2006 Regulations and mirrored at Regulation 99 of the 2015 Regulations, it is possible for a challenger to apply to court for a “declaration of ineffectiveness” in relation to a public contract. If the court decides that the claimant is correct that one of the grounds for a declaration is met, it may declare the call off contract “ineffective”, prospectively from the date of the declaration. This means that all performance of the contract must cease from that date. The court would also order the contracting authority to pay a fine, and may also order it to pay compensation to the claimant.
- 12.2 The third ground for a declaration of ineffectiveness is particularly relevant to framework agreements and call off contracts. Essentially, it is available if the requirements in relation to the holding of a mini-competition (see above) have been breached.
- 12.3 However, Regulations 47K and 99 include a mechanism through which, when awarding a call off contract via a mini competition, contracting authorities can attempt to protect themselves from the risk of a claim for a declaration of ineffectiveness (provided that the contracting authority believes the call off is in accordance with the 2006/2015 Regulations). This mechanism involves the contracting authority voluntarily sending the participants award decision notices and holding a standstill period (even though these are not mandatory for the award of call offs). As long as no challenge emerges during the standstill period, the effect of these voluntary steps is to prevent a supplier from being able to claim for the remedy of ineffectiveness on the grounds that the mini-competition rules were not properly followed.
- 12.4 There are two other grounds in the amended Regulations under which a supplier can make a claim for ineffectiveness. These do not specifically relate to frameworks.
- 12.5 The 2006/2015 Regulations make it clear that call off contracts will not themselves automatically be subject to a declaration of ineffectiveness merely because the parent framework agreement is declared ineffective by the court. Suppliers must bring a claim for ineffectiveness against a call off contract separately.

13 Contract Award Notices and Contracts Finder

- 13.1 Under both the 2006 and 2015 Regulations, there is no obligation to publish a formal contract award notice in the OJEU when calling off a contract under a framework agreement.
- 13.2 However, if the framework agreement is regulated by the 2015 Regulations, there is a requirement under Regulation 108 to publish certain information to Contracts Finder within a reasonable time:
 - 13.2.1 the name of the contractor;
 - 13.2.2 the date on which the call off contract was entered into; and
 - 13.2.3 the value of the call off contract.

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