

Guidance on Framework Agreements

1. Introduction

The purpose of this document is to provide guidance to public purchasers on the operation of framework agreements as provided for under current public procurement Directives and national regulations which implement those Directives. It outlines the procedures for establishing frameworks, types of frameworks (single supplier, multiple suppliers) and procedure for award of contracts based on frameworks. The guidance relates to framework arrangements being put in place by contracting authorities covered by Directive 2004/18/EC as implemented by SI 329 of 2006.

2. Framework agreements

2.1 Prior to the adoption of the current public procurement Directives, 2004/17/EC covering the utilities sector and 2004/18/EC covering the public sector, a provision for framework agreements existed only in the utilities sector. However, public sector contracting authorities in many Member States operated efficient framework type arrangements, based on competitive tendering, which represented good practice and achieved value for money. These typically were used to "draw down" commonly procured supplies or services as needs arose in a given period.

In the absence of a specific provision covering framework, there was uncertainty as to how some of these arrangements complied with the legal provisions of the public sector procurement Directives. This uncertainty is removed with the implementation of Directive 2004/18/EC.

New provisions

2.2 The new public sector Directive 2004/18/EC takes on board the definition of framework agreements as set out in Utilities Directives but introduces provisions designed to ensure that they are awarded in an open, transparent and competitive manner. Article 1(5) defines a framework agreement 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.'* In effect, framework agreements are agreements with suppliers or service providers which set out terms and conditions under which specific purchases can be made during the term of the agreement. Article 32 of Directive 2004/18/EC sets out the conditions and procedures under which agreements must be set up and contracts based on the agreements awarded¹.

¹ Regulations 33, 34 and 35 of SI No. 329 of 2006 implement Article 32 of Directive 2004/18/EC. These regulations are set out in an appendix to this guidance.

3. Advantages of frameworks

3.1 The advantages of frameworks arise from the

- flexibility they bring to the public procurement function. They provide a transparent and competitive mechanism whereby contracting authorities can place contracts with suppliers in the framework without having to carry out onerous tendering procedures for individual requirements that are covered by the framework
- reduced administrative cost of tendering either within or across contracting authorities
- potential to develop competition on price and or quality and ensure better service
- potential to encourage competition, in particular where there are limited numbers of suppliers, with resulting cost benefit and improved service to contracting authorities.

However these advantages can only be achieved where public purchasers have an understanding of the market in which they are operating, and how competitive pressures work in that market, to enable them establish the appropriate conditions for the framework to operate.

3.2 The contracting authority also needs to be in a position to manage the framework - in particular if the framework is for technical, complex or high value goods or services or operates across a number of authorities. In such cases, the needs of the suppliers and the relevant purchasers need to be met, e.g. in regard to customer complaints, supplier complaints, monitoring of the framework so that it is operated in accordance with the terms set down and is delivering required outcomes. Such frameworks may need dedicated contract management. Smaller frameworks within contracting authorities can generally be managed internally.

3.3 Frameworks may not always be a suitable purchasing/procurement strategy and contracting authorities need to assess whether or not they are suitable for the acquisition of particular goods or services. For example, a framework arrangement might not be the most suitable for long term service contracts that typically might run longer than the duration of a framework agreement (normal maximum 4 years, see 7.1).

3.4 In general, where framework agreements are put in place, they should provide an economic and efficient means of purchasing and supply. Their use should be generally advantageous and more beneficial to authorities than carrying out standard tendering procedure for individual requirements. It would be expected, therefore, that they would be generally used by the participating authority or authorities for works,

supplies or services which are the subject of a framework agreement. However, purchasing outside the framework is not precluded where, for instance, an authority believes that the terms of the framework do not fit a particular requirement or that more advantageous terms can be obtained outside the framework.

Some key features of frameworks agreements:

- *can be placed by an individual contracting authority, a group of contracting authorities or a central purchasing authority*
- *can be with a single supplier or multiple suppliers*
- *if with multiple suppliers, the minimum number must be three (provided there are at least this number of qualified candidates)*
- *"mini — competitions " may be held between participants as needs arise*
- *the maximum duration is four years (unless in exceptional circumstances justified by the subject of the framework)*
- *the terms and criteria for awarding contracts must be published at outset and not substantially changed*

4. Contracting authorities and scope for use of frameworks

4.1 Framework agreements can be set up by

- individual contracting authorities
- a contracting authority acting on behalf of a number of other contracting authorities
- a central purchasing authority acting on behalf of a sector or group of contracting authorities

When a framework is being established on behalf of a group of contracting authorities or a central purchasing authority, the authorities which are party to it must be made clear. This can be done either by listing the authorities in the notice or framework documentation or describing them in a way that makes the scope and range of the framework clear to market operators. For instance it would probably be acceptable to describe a framework as applying to "all central Government Departments and Offices" or "all Local Authorities in the province of XXX" in the published notice, and for greater clarity, listing the relevant authorities in the framework documentation. On the other hand, for example, describing a framework as "open to all public bodies" would not be sufficiently clear and transparent.

4.2 Extending the use of a framework to contracting authorities not included at the outset is specifically precluded. The same rule applies as regards suppliers or services providers. Only those pre-qualified and admitted at the outset may participate in the

framework: it is not open to authorities to admit new entrants during the course of the agreement.

4.3 Where central or multi - authority frameworks are put in place it is important that all parties to them are familiar with the terms and conditions. It is necessary to ensure that authorities participating observe the provisions of the framework: here again the necessity for appropriate management is stressed.

5. Establishing a framework

5.1 The process of establishing a framework agreement includes many of the features involved in conducting a standard tendering procedure. When a contracting authority considers that a framework arrangement is appropriate for its needs, and the estimated value of the total contracts to be awarded exceeds the relevant thresholds, it must follow the advertising and procedural rules set out in the EU Directives².

The EU Directives provide that participants in a framework agreement can be selected using the standard open, restricted, competitive dialogue or negotiated procedures (however, use of the latter two procedures would be rare; the appropriate exceptional conditions set out in Articles 29 and 30 of Directive 2004/18/EC must exist. In practice, therefore most frameworks would be established using the open or restricted procedure). Framework agreements can be put in place with a single supplier or with multiple suppliers.

5.2 Frameworks are advertised using the standard OJEU contract notice. When publishing, the contracting authority must indicate

- (i) that the intention is to establish a framework
- (ii) whether the framework is single supplier or multi - supplier and if the latter the, number of suppliers it intends to include
- (iii) the duration of the framework and
- (iv) an estimate of the total value of purchases expected to be made for the duration of the framework
- (v) procedure being used (open , restricted etc.).

Procedures involving single and multiple - supplier frameworks

5.3 In some instances a conventional tendering process (specifying a need, inviting tenders, evaluating tenders and awarding contracts to the best tenderer in accordance with the award criteria) may be suitable for establishing a single supplier or multi - supplier framework.

(i) Single supplier: This would involve publishing a tender notice (as outlined at 5.2) indicating the intention to set up a single supplier framework, inviting tenders and

² Given the nature of frameworks (involving aggregation or requirements, fulfilling requirements over a period etc.) this would relate to the majority of agreements. It is entirely possible, of course, to establish frameworks for small requirements, in total not exceeding the relevant Directive thresholds, based on flexible procedures set out in national guidelines for awarding sub - threshold contracts.

awarding all contracts under the framework to the most suitable tenderer selected on the basis of the published award criteria. The terms and criteria for award of contracts would be precisely formulated and published in the contract notice or tender documentation. The contracting authority may draw down requirements in accordance with the agreed terms as needs arise for the duration of the framework. Under this arrangement there is no scope to supplement or amend the initial tender. The price, delivery times, and other terms are likely to be settled but some terms, such as the quantity, may not. The price need not be fixed in absolute terms; it may be possible to set it by reference, for example, to a price index provided the mechanism chosen makes it possible to price specific orders in an objective and transparent manner.

(ii) Multi - supplier: Under the same procedure, a multiple - supplier framework could be put in place by publishing this intention in the tender notice. The notice would indicate the relevant number of participants to be selected on the basis of the award criteria (price or most economically advantageous, possibly based on order of merit) at the end of a full tendering procedure. In setting up multiple supplier frameworks, a minimum of three participants must be included (provided, of course, that there is at least this number of qualified tenderers). These selected tenderers would be used for further requirements for the works, supplies or services which were the subject of the tendering process. The terms for awarding further contracts under the framework would have to be set out in the tender notice or tender documentation, e.g. possible use of mini-competition (see 5.5), award criteria for mini - competition, rotation etc.

Alternative type of multi - supplier arrangement

5.4 The following outlines a more flexible, less rigid alternative which would, perhaps, more commonly arise in the context of establishing a framework. A central purchasing authority or a contracting authority may wish to set up a framework to be used by a group of authorities under an open procedure³. There may not be a requirement to be fulfilled immediately on the basis of a tendering procedure. In the circumstances, the authority may invite tenders and select a number of candidates (minimum of three) on the basis of published criteria, including economic or other award criteria. For example, in addition to information on tenderers' capacity and expertise, it may request interested parties to submit information on pricing of the relevant goods or services, delivery schedules etc. and include these as criteria for admission to the framework.

All the terms will not be precisely specified at the time of establishing the framework. There is now a provision whereby sub competitions or "mini - competitions" may be used

³ It would also be possible to set up this type of multi - supplier agreement using the restricted procedure. Use of the restricted procedure in the conventional manner would involve a two stage process, firstly pre-qualification on the basis of the normal Directive pre-qualification criteria followed by a request for information on pricing or other award criteria and admission to the framework on the basis of the two stage process. This latter two stage approach may be appropriate in certain cases (e.g. for the award of services contracts to make the process more manageable) but for establishing many frameworks the one stage open procedure may be more suitable.

to determine the most competitive supplier for a particular requirement among framework participants.

Mini competitions under multi - supplier frameworks

5.5 Under this new provision, participants will have been selected on the basis of the rules for admission to the framework as set out at 5.4. [or 5.3 (ii) if participants are chosen on the basis of a full tendering procedure]. The criteria for the award of subsequent contracts will also have been set out. (See section 6 on award criteria). Precise specifications or prices will not be established. As requirements arise, an authority would contact in writing the participants in the framework which it considers are capable of performing the contract and invite them to submit competitive bids. (This need not necessarily include all the participants to the framework. There may be instances, for example, where the framework covers a range of supplies, some of which may not be supplied by all participants. It should be borne in mind, also, that not all participants will necessarily compete for every requirement; for example, they may already be operating at full capacity. The numbers admitted in the first instance should allow for this and be sufficient to ensure adequate competition in the operation of the framework).

5.6 An appropriate timeframe must be allowed for the submission of bids for the mini - competition. This timeframe is not prescribed but it must be reasonable and have regard to the complexity and time required to prepare a bid for submission. The bids received are then evaluated and contracts awarded on the basis of award criteria indicated under the rules of the framework. It is also permissible to use an electronic auction, conducted under the provisions of Article 54 of Directive 2004/18/EC and the corresponding national implementation measures, among the competing participants to determine the most economically advantageous offer⁴.

The following is a practical example of a framework which would involve a mini — competition to award supply contracts. Suppliers of a range of personal computers (desktops, laptops etc.) would be invited to tender to supply a contracting authority, or authorities, for a specified period. Participants would be selected on the basis of capacity to supply and appropriate award criteria such as indicative pricing, delivery times etc. The terms of the agreement need not specify quantity, precise technical specifications or price of items which are the subject of the supply framework. As requirements arise, an authority would contact the parties to the framework that are in a position to supply and invite them to submit competitive bids which would form the basis of the mini - competition. These would be evaluated on the basis of the rules and criteria, more precisely formulated where necessary, as set out in the terms of the framework. The contract would be awarded to the participant who submitted the most economic or lowest priced bid in accordance with the rules and criteria set out.

⁴ An electronic auction requires careful preparation. Price, and possibly other criteria which can be represented numerically, will be the basis for award of contract.

6. Award criteria

The basis for admission to the framework and award of contracts must be set out in the published notice or in the documentation being supplied to candidates. The criteria under which tenders will be evaluated and contracts awarded must be indicated.

It is important to note that substantive changes or modifications in award criteria are not permitted during the operation of the framework. This needs to be borne in mind in particular when holding mini-competitions for the award of contracts. In such cases it would seem reasonable that, at the outset, that criteria weighting would be indicated within an indicative range. In inviting bids in the context of holding a mini- competition for particular requirements, it would seem appropriate that the criteria and weightings would be more precisely formulated having regard to the requirement concerned. It is conceivable that some of the stated criteria would attract less weighting in one case than another. For example, timeframe for supply or delivery of a service might be important in the performance of one contract but less relevant in other cases.

The following is a practical example of a framework which would involve a mini — competition to award service contracts. Public authorities may be required to implement a public sector wide or a sectoral policy initiative. Some authorities may require specialist advice on this. A central authority promoting implementation could select a number of suitably qualified specialists for inclusion in a framework. Authorities requiring advice would choose from those included on the framework and engage services based on tenders submitted in a mini — competition and evaluated under the criteria and terms set out in the framework agreement.

7. Duration of frameworks

7.1 The duration of framework agreements is limited to a maximum of four years. However, there is provision to establish frameworks for longer than this in exceptional circumstances where this can be justified by the subject of the framework contracts. An example which has been quoted relates to a situation where in order to supply or fulfil a contract, a level of capital investment is required on the part of a contractor. If the appropriate return on this investment cannot be achieved within a normal maximum four year period, a longer term framework may be justified.

7.2 The relevant Article in the procurement Directives does not contain any provisions on the duration of contracts entered into during the course of the framework. This may be a particular consideration coming toward the end of the framework's duration. While there is nothing explicit in the rules, it would most likely be seen as an abuse of the system to place a contract of a duration that extends substantially beyond the published termination date of a framework that is due to expire. Unless there were particular circumstances justifying it, this would probably be seen as restrictive and contrary to the principles of market openness and competition.

8. Impact on SMEs

Estimating the value and establishing frameworks for works, supply and service contracts will generally involve aggregation of requirements for a period of time and will, possibly, extend to a number of contracting authorities or sectors. Consideration should be given to how proposed arrangements will impact on small and medium sized enterprises (SMEs). While total demand may be aggregated, requirements will generally be drawn down in small lots, in many cases following mini - competitions. In selecting participants, authorities should ensure that where smaller enterprises can meet requirements or compete for particular lots, the terms of the framework facilitate their inclusion. There will be instances where flexibility and ability to respond speedily to requirements will place such enterprises in a particularly favourable position to participate and compete effectively.

The following sets out an example of a framework that could facilitate small or medium sized enterprises. A contracting authority or sector with responsibility for providing a national service may require works, supplies or services to be provided nationally. Rather than put one national framework in place, invitations could be invited from parties who would participate in a framework for requirements to be met on a local or regional basis. Interested small or medium enterprises could qualify for inclusion and successfully compete for contracts.

9. Contract award notices

The obligation to publish a contract award notice applies in the case of framework agreements where the total value of contracts to be awarded exceeds the relevant EU thresholds. The standard Contract Award Notice is used for publication. However, the requirement to publish relates only to the framework agreement at the time it is established, not to individual contracts or draw-down of requirements or awards based on mini - competitions undertaken under the agreement.

10. Remedies and standstill period

Framework agreements covered by the public procurement Directives and the contracts awarded under them are subject to the provisions of the Remedies Directives. However, in regard to the need to observe a "standstill period" between the time a decision is taken and the time a contract is put in place, the "standstill" need not apply to contracts placed on the basis of mini-competitions under a framework agreement. Recent revisions to the Remedies Directive provide that the "standstill period" need only apply to decisions on admission of candidates or tenderers to the framework at the stage when the initial agreement is being put in place.

Regulations from SI 329 of 2006 covering Framework Agreements

Contracting party may enter into framework agreements

33. (1) A contracting authority may enter into a framework agreement as provided by this Regulation.

(2) In entering into a framework agreement, a contracting authority shall follow the rules of procedure prescribed by these Regulations for all phases up to the award of contracts based on the agreement. The parties to the framework agreement are to be determined by applying the award criteria set in accordance with Regulation 66.

(3) A contracting authority that proposes to award a contract by means of a framework agreement shall award the contract in accordance with the procedures specified in Regulations 34 and 35. Those procedures are applicable only between the contracting authority and the economic operators that were originally parties to the agreement.

(4) In awarding a contract on the basis of a framework agreement, the parties may not make substantial amendments to the terms specified in the agreement, in particular in the case referred to in Regulation 34.

(5) The duration of a framework agreement may exceed 4 years only in an exceptional case that is justified by factors such as the subject matter of the contract.

(6) A contracting authority may not use framework agreements in such a way as to prevent, restrict or distort competition.

Framework agreement entered into with a single economic operator

34. (1) A contracting authority may award a contract on the basis of a framework agreement with a single economic operator within the limits of the terms specified in the agreement.

(2) In deciding whether to award such a contract to a single economic operator, the contracting authority may in writing request the operator to supplement its tender to such extent as it requires. The contracting authority may decide not to award the contract on the ground that the operator has failed to comply with such a request to that authority's satisfaction.

Framework agreement entered into with several economic operators

35. (1) A contracting authority may enter into a framework agreement with several economic operators, but in that case the number of economic operators must be not less than 3, unless there is—

- (a) an insufficient number of economic operators to satisfy the relevant selection criteria, or
- (b) an insufficient number of admissible tenders that satisfy the relevant award criteria.

(2) A contracting authority may award a contract based on a framework agreement entered into with several economic operators either—

- (a) by applying the terms specified in the agreement without reopening competition, or
- (b) if not all the terms are specified in the agreement, when the parties are again in competition on the basis of the same terms (which may, if necessary, be more precisely formulated), and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the appropriate procedure.

(3) For the purposes of paragraph (2)(b), the appropriate procedure is as follows:

- (a) for each contract to be awarded, the contracting authority shall consult in writing the economic operators that appear to the authority to be capable of performing the contract;
- (b) the contracting authority shall fix a time limit that is sufficiently long to allow tenders for the contract to be submitted and, in particular, shall take into account factors such as the complexity of the subject matter of the contract and the time needed to submit tenders;
- (c) economic operators must submit their tenders in writing;
- (d) the contracting authority shall keep the content of the tenders confidential until the deadline for receiving tenders has expired;
- (e) the contracting authority shall award the contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.