

## Guidance on the use of framework agreements December 2009

### 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, as amended (“**Regulations**”) and related OGC Guidance. 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 framework agreement in the first instance are therefore outside of the scope of this note.
- 1.2 The law stated is the English legal position as at **14 December 2009**, and takes into account the amendments to be introduced by the Public Contracts (Amendment) Regulations 2009, amending the Regulations to reflect the new EC Remedies Directive. Section 10 of this note deals with the position of framework agreements to which these new rules apply.

### 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 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 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.

- 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 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 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 Buying Solutions (see [buyingsolutions.gov.uk](http://buyingsolutions.gov.uk))

### **3 When should framework agreements be used?**

- 3.1 Before making a call off under a framework agreement, a contracting authority should confirm that:

3.1.1 The particular goods, services or works required are available under the framework agreement (ie within the scope of the framework agreement as originally advertised in the OJEU); and

3.1.2 It falls within the range of contracting authorities that can lawfully use the framework agreement (ie 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.

- 3.2 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:

3.2.1 Does the framework agreement offer the right supplier base to meet the particular requirement (eg 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.

3.2.2 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.

- 3.2.3 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.
- 3.2.4 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.

#### **4 General considerations for call off contracts under a framework agreement**

- 4.1 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 Regulations provided that the Regulations were complied with when establishing the framework agreement. However, there are still some rules that apply as follows:
- 4.1.1 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.
- 4.1.2 The length of call off contracts under a framework agreement is not specifically limited by the Regulations. However, the Commission issued guidance stating its view is that call off contracts should not last more than four years. OGC guidance recognises that this may mean that individual call offs extend beyond the four year term of the framework itself. OGC guidance also states the general principle that “the length of call offs, as with other contracts, should be appropriate to the purchases in question and should reflect value for money considerations.”

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

## **5 Call offs under single provider framework agreements**

- 5.1 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. The OGC 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.

## **6 Call offs under multiple provider framework agreements**

- 6.1 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 (ie 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 (ie a “**mini competition**”) should be held with all those suppliers within the frameworks capable of meeting the particular need. Further considerations relating to making direct call offs and holding mini competitions are set out in the next two sections of this note.

## **7 Making a direct call off under a multiple provider framework agreement**

- 7.1 As set out above at Section 6 of this guidance note, where the terms of the framework are sufficiently precise to cover the particular call off, a direct call off may be made. The Regulations do not specify how this should be done. However, the following points should be considered:

7.1.1 Recent OGC guidance 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.

7.1.2 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 (eg 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.

- 7.1.3 If the particular framework agreement does not address the issues set out at paragraph 7.1.2 above, a reasonable approach, as reflected in previous OGC guidance, is for contracting authorities 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.
- 7.2 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 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.

## **8 Holding a mini competition under a multiple supplier framework agreement**

- 8.1 As set out above at Section 6 of this guidance note, where the terms laid down in the framework agreement are not precise enough or complete 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 the 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. OGC gives the following examples of the types of supplementary terms or refinements that are permissible:
- 8.1.1 “particular delivery timescales”;
  - 8.1.2 “particular invoicing arrangements and payment profiles”;
  - 8.1.3 “additional security needs”;
  - 8.1.4 “incidental charges”;
  - 8.1.5 “particular associated services, eg installation, maintenance and training”;
  - 8.1.6 “particular mixes of rates and quality”;
  - 8.1.7 “where the terms include a price mechanism”; or

8.1.8 “individual special terms (eg specific to the particular products/services that will be provided to meet a particular requirement under the framework)”.

8.2 General rules governing any mini competition are:

8.2.1 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 (ie to make it easier to identify which suppliers are capable of providing which works, goods or services).

8.2.2 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.

8.2.3 Each tender must be kept confidential until the deadline for receipt of tenders has passed.

8.2.4 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.

8.2.5 There is no scope at the mini competition stage to select on 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 (eg 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 3.2 of this guidance note.

- 8.3 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.
- 8.4 Contracting authorities should note the impact on mini competitions of the amendments made to the Regulations to implement the new EC Remedies Directive. Please see paragraph 10 below for details.

## **9 Is a “standstill period” required?**

- 9.1 The requirement in the Regulations for a standstill period between the decision to award a particular contract and formal conclusion of the contract (ie 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 contract. Call off contracts under a framework agreement can, therefore, be concluded as soon as the award decision has been made. However, contracting authorities should bear in mind the impact of the amendments made to the Regulations to implement the new EC Remedies Directive. Please see the next paragraph for details.

## **10 The impact of the amended Regulations on framework agreements and call off contracts**

- 10.1 The amended version of the Regulations will apply to a framework agreement if the process for the procurement of the framework agreement is “commenced” on or after 20 December 2009. Broadly speaking, the procurement of a framework (or indeed any other public contract) is “commenced” at the point when it is first advertised in the Official Journal of the European Union, or the contracting authority otherwise seeks expressions of interest from potential providers.
- 10.2 The amended Regulations will apply to specific call off contracts only if they apply to the parent framework agreement itself.
- 10.3 If the framework is caught by the amended Regulations, then the new rules, including rules concerning the content of award decision notices, the length of the standstill period and the availability of the “ineffectiveness” remedy in certain cases, will apply to the framework agreement.
- 10.4 However, the new feature which affects framework agreements and call off contracts specifically is the availability of the “ineffectiveness” remedy in situations where a contracting authority has awarded a call off contract without respecting the requirements of the legislation in relation to mini competitions (as discussed above at paragraphs 8.2.1 to 8.2.4).
- 10.5 If the court is satisfied that these requirements have been breached, 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.

- 10.6 However, by using the mechanism set out at Regulation 47K(7) 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 where the contracting authority believes the call off is in accordance with the Regulations. This mechanism involves the contracting authority voluntarily sending the participants award decision notices in accordance with Regulation 32 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.
- 10.7 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.
- 10.8 The amended 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.

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