

PROCUREMENT LAWYERS' ASSOCIATION

THE USE OF FRAMEWORK AGREEMENTS IN PUBLIC PROCUREMENT

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About this paper

The Procurement Lawyers' Association (PLA) is an organisation which exists to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA aims to represent, promote and strengthen procurement law expertise in a number of ways, including through in-depth discussion of procurement law issues.

A wide range of contracting authority requirements are subject to public procurement and economic operators bidding for public contracts operate in a variety of economic markets. Reflecting this and also the breadth of discretion available to contracting authorities in administrative law terms, there is a broad variation in the approaches taken by UK contracting authorities to the evaluation of bids in public procurements.

The PLA hopes this Paper clarifies some areas of legal uncertainty in relation to framework agreements and assists in the development of best practice in the use of framework agreements in public procurement, thereby promoting effective and fair competition for public contracts.

1 Scope of paper

- 1.1 This Paper considers “framework agreements” within the meaning of Directive 2004/18/EC (“the Public Sector Directive”), but does not consider framework agreements to which the Public Sector Directive does not apply in full, such as those relating to Annex IIB (Part B) services. This paper does not consider framework agreements established by utilities and subject to Directive 2004/17/EC, nor framework agreements the establishment of which are subject to the Defence and Security Procurement Directive 2009/81/EC.
- 1.2 References to the “Regulations” are to the Public Contracts Regulations 2006 (as amended), the domestic measures implementing the Public Sector Directive in England, Wales and Northern Ireland.
- 1.3 For the purposes of this paper the law is correctly stated as of 22 March 2012. This paper does not seek to address any of the changes to public procurement law currently proposed in the form of draft Directives¹.

¹ (i) Proposal for a Directive of the European Parliament and of the Council on public procurement (COM (2011) 896); (ii) Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services Sectors (COM (2011) 895); (iii) Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM (2011) 897).

2 Introduction: Framework agreements in context

Summary

The concept of a framework agreement is that it is, essentially, an arrangement which establishes the contractual terms which will apply to subsequent orders made for the goods, services or works covered by the framework over the period of time during which it is in force.

The inclusion of specific provisions in the Public Sector Directive covering framework agreements clarified the position in terms of the availability of framework agreements but also introduced restrictions and controls over their use and ambiguities about the legal rules.

- 2.1 In 2004 the Public Sector Directive introduced, for the first time, explicit provisions into European Union public procurement law covering the setting up and running of framework agreements by contracting authorities. The use of framework agreements was not, however, a new practice or concept within the European Union at that time. Prior to 2004 the Utilities Directive then in force² already provided for regulated utilities to use framework agreements. A variety of framework-type arrangements were already in use in a number of Member States (for example France, Sweden and the UK) where the view was taken that these were permissible within the existing provisions of the (then) public sector Directives³. In other Member States, however, there was little or no use of framework-type arrangements – probably due to a number of factors including a lack of specific regulation in the public sector Directives then in force.
- 2.2 The concept of a framework agreement is that it is, essentially, an arrangement which establishes the contractual terms which will apply to subsequent orders made for the goods, services or works covered by the framework over the period of time during which the framework is in force. Establishing a framework involves an initial call for tenders against set terms and conditions, the appointment of one or more suppliers⁴ on the basis of those tenders, and then the placing of periodic orders (commonly referred to as “calling off”). The mechanism is by no means unique to the European Union: similar agreements or arrangements include “indefinite

² Directive 93/38/EEC.

³ Directive 92/50/EEC (Services Directive), Directive 93/36/EEC (Supply Directive), and Directive 93/37/EEC (Works Directive).

⁴ The Regulations define “supplier”, “contractor” and “services provider” as, respectively, a person who offers on the market supplies, works or services. In this paper “supplier” denotes an economic operator appointed to a framework agreement, without distinction as to subject matter.

delivery/indefinite quantity" (IDIQ) in the United States, "supply arrangements" in Canada, "panel arrangements" in Australia and, more generally, "umbrella contracts". Similar arrangements exist elsewhere.

- 2.3 The historical context leading to the inclusion of the framework provisions in the Public Sector Directive is relevant in understanding the current state of the regulation of framework agreements. The Directive was the outcome of long-running consultations and negotiations which had formally commenced towards the end of 1996 when the European Commission published the Green Paper "Public Procurement in the European Union: Exploring the Way Forward"⁵. The Green Paper envisaged minimal changes to the Directives then in force, referring to the need to ensure legislative stability. There was no reference in the Green Paper to the possible introduction of provisions covering the establishment and operation of framework agreements.
- 2.4 The response to the consultation on the Green Paper proposals was that significant legal reform was required. In the Commission's follow-up Communication⁶ issued in 1998 it announced its intention to introduce a new legislative package. This was focussed on simplifying the legal rules and introducing new flexibilities to reflect practical developments in the market - such as the introduction of electronic procurement, the development of public-private partnerships and the inclusion of provisions on the establishment and operation of framework agreements.
- 2.5 In the context of the proposals relating to framework agreements the Commission referred in the Communication to its concerns that long-term contracts could pose a threat to competition, causing positions to become entrenched and certain firms to be shut out. It stated that it was:

"essential therefore that precise rules be laid down for the use of these procedures."
- 2.6 It emphasised the need for objective and transparent information to be published on framework contracts and was of the view that:

"(t)o ensure that these contracts are not walled off, lists should either be valid only for a limited period or be kept permanently open to new firms."
- 2.7 These comments indicate the Commission's thinking at that time, and provide pointers to the final position set out in the Public Sector Directive, such as the general limit of four years for the duration of a framework agreement and the "closed" nature of a framework agreement during its existence.

⁵ COM (1996) 583 final 27 November 1996.

⁶ Commission Communication COM (1998) 143 final, 3 November 1998.



- 2.8 The debate on the inclusion in the 1998 Communication (and subsequently in the draft Public Sector Directive) of proposals relating to framework agreements was, at least, prompted by the announcement by the Commission in December 1997⁷ of its intention to pursue infringement proceedings against the United Kingdom for breach of the public procurement rules. This case concerned the use of framework arrangements by the Northern Ireland Department of Environment for procuring architectural, engineering and other construction services. In announcing its decision, the Commission outlined the process used to establish the framework arrangement:

“Under this procedure, a tender notice is published in the EC Official Journal indicating a general category of services to be provided rather than giving details of a specific contract. Once a list of approved suppliers has been established by this procedure, entities may choose suppliers from the list without going through a new competitive procedure for each individual contract.”

- 2.9 The Commission’s view was that:

“The case raises an important question of principle, namely the use by contracting entities of such framework contract arrangements for the procurement of services, supplies and works... the use of such framework contracts is not authorised by the public procurement rules...”.

- 2.10 The Commission was therefore questioning the fundamental issue of whether framework agreements were permissible at all. Whilst the Northern Ireland case referred to above related to a framework arrangement which did little more than establish a list of pre-qualified suppliers, there was a clear risk at the time that the Commission would seek to prohibit the use of all framework agreements.

- 2.11 However, by July 2000 (when, due to Member State pressure, the Commission announced its intention to refer the case to the Court of Justice⁸), it had acknowledged that framework agreements could be used. In the press release relating to its announcement the Commission outlined its concerns in relation to the contested framework:

“ if the terms of a framework agreement are sufficiently specific as to detail the key elements of any individual contracts to be awarded subsequently, and if these are set out in binding form, when those individual contracts are awarded it is not necessary to follow the detailed procedural requirements

⁷ European Commission Press Release, Public Procurement: Infringement Proceedings Against the United Kingdom, Austria, Germany and Portugal, IP/97/1178, 19 December 1997.

⁸ European Commission Press Release, Public Procurement: Commission refers United Kingdom to Court IP/00/813, 13 July 2000.



of the Directives. However, where the key terms and conditions of individual contracts are vague, or simply not specified at all, they must be advertised in the Official Journal and follow the detailed procedural requirements of the public procurement Directives.

In this case, the Commission considers that the essential conditions of individual contracts were not specified in a binding manner in the framework agreement. Individual contracts awarded under the framework agreement should therefore have followed the detailed procedural requirements of the public procurement Directives."

- 2.12 This statement assists in explaining the inclusion of specific provisions in the Directive governing the award of contracts under a framework with and without further competition. Given the Commission's earlier concerns about framework agreements, the scope of Article 32 was surprisingly broad and catered for a much wider spectrum of framework agreements than might have been expected. The Commission moved from a position close to banning framework agreements to a situation which allowed single- and multi-supplier framework agreements, framework agreements which allowed subsequent mini-competitions, and those which operate on a "catalogue" sourcing model. Some proponents of framework agreements wanted the Commission to allow even greater dynamism in allowing for more "open" framework agreements and framework agreements with greater flexibility in the scope of the deliverables that can be provided under an awarded framework agreement.
- 2.13 It is questionable how far framework agreements in the UK have in practice succeeded in meeting the basic objective of simplifying the purchasing process for commodity items. In many instances, framework agreements have become a bureaucratic and costly stage in public sector contracting. One of the key initial objectives of the establishment of framework agreements was the aggregation of public sector demand with a consequent reduction in charges for public sector customers but this does not now seem to count amongst their primary functions. Notwithstanding the Commission's basic concerns, many UK framework agreements could be viewed as little more than lists of pre-qualified suppliers.
- 2.14 The inclusion of specific provisions in the Directive covering framework agreements clarified the position in terms of the availability of framework agreements but it also resulted in the introduction of restrictions and controls over their use which had not existed before and of ambiguities about the legal rules. So, for some Member States where framework agreements had been used prior to 2004 (including the UK), the new rules have arguably had the effect of reducing flexibilities, albeit probably to a lesser extent than had been expected.



3 Defining framework agreements and distinguishing them from public contracts

Summary

There is some confusion as to the precise coverage of the rules on framework agreements. This confusion results primarily from lack of clarity as to the use of the terms “framework agreements” and “framework contracts” and also whether or not framework contracts are a type of public contract.

A mere framework agreement sets out the terms which will apply if the parties conclude a contract, but does not itself constitute a public contract obliging either of them to do anything. The suggestion that a “framework contract” is the same as any other public contract seems to confuse the establishment of terms for the delivery of works, services or supplies with an obligation to provide, receive and pay for those works, services or supplies.

The term “binding” framework is used in the (very rare) instance where the contracting authority must use the framework agreement for any purchases it wishes to make of the works, services or supplies which form its subject-matter.

The large number of non-binding “buying club” framework agreements provides contracting authorities with a wide choice of potential suppliers. This means that contracting authorities are in a position to “shop around” for the supplier that offers the best deal.

From the provider’s perspective, a key concern is that they may incur potentially considerable costs in tendering for appointment to a framework agreement with no guarantee of work once appointed.

- 3.1 There is some confusion as to the precise coverage of the rules on framework agreements. This confusion results primarily from lack of clarity as to the use of the terms “framework agreements” and “framework contracts” and also whether or not framework contracts are a type of public contract. The European Commission’s Explanatory Note and, in the UK, the Guidance of the Office of Government Commerce (OGC) on this issue are, arguably, not particularly helpful and may be the cause of further confusion.
- 3.2 The confusion as to the precise coverage of the framework provisions is best illustrated by way of a practical example - the use of “term contracts” in the UK. Term contracts are contracts which are usually between a single contracting authority and a single economic operator where discrete items of work or services are generally initiated by “orders” placed under the contract in question. They are commonly used for responsive works in the housing and highways sector. For example, a term contract for housing maintenance works is entered into between the public sector housing

provider and the contractor for a fixed period of years. When a tenant requests a repair to their property an order is issued by the public sector housing provider to the contractor to cover that work.

3.3 Is this an arrangement which falls within the coverage of the framework provisions? Should it be advertised as a framework and, for example, be subject to the general limitation on the life of a framework of four years? Alternatively, is it a public contract not covered by the rules on framework agreements which can be awarded for a longer period without a general limitation?

3.4 This section goes on to explore the issues in more detail.

Defining and articulating the meaning of a “framework agreement”: the Public Sector Directive and the Regulations

3.5 A framework agreement is defined by the Public Sector Directive as follows:

“an agreement between one or more contracting authorities and one or more economic operators⁹, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.”

3.6 Regulation 2(1) of the Regulations defines a framework agreement as:

“an agreement or arrangement... which establishes the terms (in particular the terms as to price) under which an economic operator will enter into one or more contracts with the contracting authority in the period during which the framework agreement applies”.

3.7 This reproduces Article 1(5) of the Public Sector Directive with two minor variations:

- (a) the Directive states that “the purpose of” the framework agreement must be to “establish the terms” for the called-off contracts. The UK definition simply states that a framework agreement is an agreement that does “establish” them; and
- (b) the UK Regulations refer to “an agreement or arrangement” rather than just “an agreement” (in the Directive) – suggesting that the Regulations cover something less formal than “an agreement”. We do not consider the implications of this further in this paper.

⁹ Art. 1(5) - An agreement between a single contracting authority and a single supplier can be a “framework agreement” within this definition (a “single-vendor framework agreement”). Such an agreement will be a framework agreement if it does not oblige the authority to call work off from the supplier, but merely sets out the terms on which binding orders for work can be placed (even if the framework itself contains provisions which would bind the parties as a matter of English law, e.g. provisions ensuring confidentiality).



3.8 The definition contrasts with the definition of a public contract as:

(a) a public works contract, which is defined¹⁰ as:

"a contract for pecuniary interest ... for the carrying out of a work or works...";

(b) a public services contract, which is defined as:

"a contract for pecuniary interest ... under which a contracting authority engages a person to provide services"; or

(c) a public supply contract, which is defined as:

"a contract for pecuniary interest ... for the purchase of goods by a contracting authority ... or for the hire of goods by a contracting authority".

A mere framework agreement sets out the terms which will apply if the parties conclude a contract, but does not itself constitute a public contract obliging either of them to do anything.

Defining and articulating the meaning of a "framework agreement": the Commission's Explanatory Note

3.9 The Commission's Explanatory Note on framework agreements¹¹ distinguishes between:

(a) "framework contracts", which "establish all the terms" for the called off contracts; and

(b) "framework agreements", which do not "establish all the terms" as above.

3.10 The Commission's Explanatory Note suggests that the rules for framework agreements apply also to framework contracts. It goes on to state that:

"framework agreements that establish all the terms (framework contracts) are "traditional" public contracts and consequently their use was possible under the old Classic Directive."

¹⁰ The requirement for pecuniary interest (transposed into the Regulations as "consideration (whatever the nature of the consideration)" appears in the definition of "public contract" and accordingly applies to each of the definitions quoted here. The Court of Appeal in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011 concluded that "consideration" in the Regulations should be read as meaning "pecuniary interest".

¹¹ European Commission Explanatory Note "Framework Agreements - Classic Directive" (CC2005/03_rev/of 14.7.2005) found in the "Older Guidance" section of the "europa" website.



- 3.11 The distinction between a framework contract, whose terms do not need to be supplemented before a call-off can be made under it, and a framework agreement, under which those terms have to be supplemented at call-off, is found in Article 32, although in that Article both are described as “framework agreements”. However, the suggestion that a “framework contract” is the same as any other public contract seems to confuse the establishment of terms for the delivery of works, services or supplies with an obligation to provide, receive and pay for those works, services or supplies. This is explored further below.
- 3.12 It would be a matter of concern if the Explanatory Note meant that a public contract which obliges the contracting authority to take delivery of and pay for works, services or supplies can be a framework contract and therefore, in the language of the Public Sector Directive, a framework agreement. It would suggest that any contract under which delivery is deferred, or where the exact work, service or goods to be delivered are not clearly identified at the time of the contract, is a framework agreement, and hence subject to the particular constraints, such as a maximum duration of four years, which apply to framework agreements.

Defining and articulating the meaning of a “framework agreement”: analysis

- 3.13 The Public Sector Directive (and the Regulations) distinguish between:
- (a) a public contract – which imposes obligations on the parties to provide and to pay for the works, services or supplies the subject matter of the contract; and
 - (b) a framework agreement – which establishes the terms on which works, services or supplies are to be delivered at some point in the future, if the contracting authority decides to call them off under the framework agreement.
- 3.14 The key distinction in the language of the Public Sector Directive is that neither the contracting authority (or authorities) nor the provider(s) is obliged by the framework agreement to provide or to accept supplies, services or works unless and until the authority calls off a specific contract. By contrast, a public contract itself gives rise to obligations on both parties (albeit they may be conditional upon conditions precedent).
- 3.15 According to this analysis, there can never be a situation where a framework agreement is a public contract¹². The contract called off will be a public contract, even where it is necessary for terms from the framework agreement to be incorporated within it to make it effective.

¹² Regulation 47(1) provides that in Part 9 of the Regulations, “contract” means a public contract or a framework agreement (except in reg.470); however, that is a deeming provision for the purposes only of applications to the court.



Defining and articulating the meaning of a “framework agreement”: “Term” contracts

- 3.16 Given the above, those types of contracts which are commonly called “term contracts” present some difficulty. These are contracts, usually between a single contracting authority and a single economic operator, where discrete items of work or services are initiated by orders placed under the contract in question. The overall scope and nature of the works or services that may be required and the basis on which they are to be carried out is established when the contract is signed. The issue of a specific order determines which particular works or services are to be provided, when, and at which location.
- 3.17 Term contracts are commonly used for responsive work in the social housing and highways sectors. An order is issued whenever a tenant requests a repair to their property, or a hole in the road needs to be repaired. It is also possible to issue an order under a term contract in terms that require the contractor to “deal with all responsive repair requests that are made” over the period to which the order relates.
- 3.18 Term contracts are often concluded for a duration exceeding four years. The Regulations¹³ impose a maximum of four years on framework agreements except in exceptional circumstances. If, therefore, a term contract were classified as a framework agreement, a contracting authority could find itself in breach of public procurement law for having let such an agreement for a longer term.
- 3.19 Most of the industry standard-form term contracts include provisions to the effect that:
 - (a) the employer (contracting authority) does not guarantee that any particular volume of orders will be issued to the contractor; and
 - (b) any variation of the amount of work ordered from that anticipated does not lead to an entitlement for the contractor to claim extra costs.
- 3.20 The inclusion of such clauses could turn what would otherwise be a public contract into a framework agreement. If there is no obligation (explicit or implied) on the employer to place any orders under the contract, it is hard to escape the conclusion that such a contract is, indeed, a framework agreement.
- 3.21 Applying the above, the key question seems to be whether the term contract gives rise to an obligation (explicit or implied) on the supplier to provide specific works, services or supplies and on the contracting authority to receive and pay for them, or whether those obligations only arise when an order is placed. If the obligations arise when the term contract is concluded,

¹³ Regulation 19(10).



it is likely to be a public contract. If they do not arise unless and until an order is placed, it is likely to be a framework agreement.

The concept of “binding” and “non-binding” framework agreements: (i) “Non-binding” framework agreements

- 3.22 A framework agreement where there is no obligation on the contracting authority to use the framework agreement to procure the works, services or supplies for which it is set up is sometimes referred to as “non-binding”: the contracting authority can choose whether to use that framework agreement, another framework agreement or to carry out a separate procurement. Even so, such arrangements may contain binding obligations in relation to matters such as confidentiality, freedom of information and dispute resolution (although these can equally appear in the call-off contracts themselves).

The concept of “binding” and “non-binding” framework agreements: (ii) “Binding” framework agreements

- 3.23 The term “binding” framework is used in the (very rare) instance where the contracting authority must use the framework agreement for any purchases it wishes to make of the works, services or supplies which form its subject-matter. In other words, these arrangements are exclusive.

The concept of “binding” and “non-binding” framework agreements: (iii) Market impact of “non-binding” framework agreements

- 3.24 The large number of non-binding “buying club” framework agreements provides contracting authorities with a wide choice of potential suppliers. This means that contracting authorities are in a position to “shop around” for the supplier that offers the best deal.
- 3.25 Often this “shopping around” consists of nothing more than comparing the prices offered by suppliers for the same goods via different framework agreements. This is not generally viewed as a problem, save for the fact that the UK Government has identified a large amount to duplication in the numbers of framework agreements set up to offer the same, or similar, subject-matter.
- 3.26 The OGC Guidance discourages the running of mini-competitions under more than one framework agreement. This is perhaps unsurprising: unless, in such a situation, the multiple framework agreements apply identical award criteria for the purposes of calling off from them, it would not seem possible for the contracting authority to objectively justify the selection of a particular provider from a particular framework agreement.
- 3.27 From the provider’s perspective, a key concern is that they may incur potentially considerable costs in tendering for appointment to a framework agreement with no guarantee of work once appointed. If a contracting



authority acquires a reputation for setting up this kind of framework agreement, it may find that some suppliers choose not to tender.

- 3.28 Providers may instead prefer to bid for public contracts where there is some guaranteed minimum value and may offer better prices in return for appointment to such contracts. This situation may lead to a perception that framework agreements are in fact a more expensive way of purchasing, rather than a way of securing the savings they were set up to achieve. A rush towards many framework agreements, supported by Government encouragement, may turn into a flight from using them.



4 Valuation

Summary

The Public Sector Directive provides that the relevant value to be taken into account when determining whether a framework agreement falls above the relevant threshold level for the purposes of its procurement is "the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement".

If the framework only relates to one contracting authority and to a single requirement (for goods, services or works) then this calculation should be relatively straightforward. Difficulty may arise when more than one contracting authority is using the framework agreement and the requirements which may be procured through it are multiple.

In the context of framework agreements, what is important (having regard to contracting authorities' transparency obligations) is that the likely value of the contracts which might be awarded under the framework agreement is visible to economic operators who may be interested in expressing interest in tendering.

It adds transparency to state, to the extent possible, the likely ranges of contract values which may stem from the framework agreement.

General principle

- 4.1 The Public Sector Directive provides, at Article 9(9), that the relevant value to be taken into account when determining whether a framework agreement falls above the relevant threshold level for the purposes of its procurement is:

"the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement".
- 4.2 If the framework only relates to one contracting authority and to a single requirement (for goods, services or works) then this calculation should be relatively straightforward. Difficulty may arise when more than one contracting authority is using the framework agreement and the requirements which may be procured through it are multiple (this is discussed in the following section).
- 4.3 It is necessary to include within the estimated value "all the contracts envisaged for the total term of the framework agreement" to identify whether the framework agreement falls above the relevant threshold. There is no case-law suggesting that a non-exclusive framework agreement should be assessed any differently to an exclusive one: the scope of Article 9(9)

appears to require all the contracting authorities who are party to the framework to estimate their respective requirements for the particular supply over the term. In practice it is for the contracting authority carrying out the procurement on behalf of all of the contracting authorities who are party to the framework agreement to estimate the value of the respective requirements of those authorities.

Framework agreements set up by a “lead” contracting authority

- 4.4 If a contracting authority sets up a framework agreement for itself and intends to make it available for other contracting authorities then it should aggregate not only its own requirements but also all the requirements of the other users. Where the number of contracting authorities is very limited then this may be a relatively simple exercise for the “lead” contracting authority. However, where the framework agreement purports to be available for an extensive list of contracting authorities then there may be considerable uncertainty as to the accuracy of the aggregate value estimated. It may be inclined to overstate the likely demand by contracting authorities for a particular requirement, and where several overlapping framework agreements exist in the marketplace for the same or similar requirements then there may be a degree of double counting. In practice, some framework agreements will facilitate procurement in excess of the maximum estimated net value and some much less.

Incorrect estimation of value

- 4.5 From the perspective of compliance with the Public Sector Directive, it is suggested that over-estimation of overall value is not necessarily problematic, since it will mean that the framework agreement is advertised. The result of a gross under-estimation of likely value might in the extreme case lead to an unlawful failure to advertise a framework agreement. A more complex question is whether legal risks arise if the contract value of the framework is significantly over- or under-estimated, but where it is nevertheless advertised?
- 4.6 It is submitted that if economic operators, who might otherwise have expressed interest in appointment to the framework agreement, might be deterred from doing so because of the inaccuracy of the estimate, that will amount to a breach of the obligations of transparency and equal treatment. The European Ombudsman, in relation to the use of specific CPV¹⁴ codes, expressed the view¹⁵ that economic operators have a legitimate interest in

¹⁴ The Common Procurement Vocabulary, whose use is mandated by Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 as amended.

¹⁵ Decision of the European Ombudsman closing his inquiry into complaint 333/2009/(BEH)KM against the European Aviation Safety Agency (EASA):
<http://www.ombudsman.europa.eu/cases/decision.faces/en/5362/html.bookmark>



the use of specific CPV codes to enable them to identify whether a "call for a tender could be of interest to them". By extension, it might be argued that an economic operator also has a legitimate interest in a statement as to contract value being reasonably accurate, as it enables it to identify whether the call for tenders might be of interest.

- 4.7 In the context of framework agreements, what is important (from the perspective of the fulfilment by contracting authorities of their transparency obligations) is that the likely value of the contracts which might be awarded under the framework agreement is visible to economic operators who may be interested in expressing interest in tendering. Inaccurate contract values may have a negative effect: an economic operator might be put off by sheer size, and small and medium sized enterprises may be discouraged. Alternatively, a call for tenders which under-estimates value may, even if advertised, deter cross-border interest, contrary to the central policy of the procurement legislation. Both outcomes are undesirable in the light of the Community's general policy objectives. It therefore adds transparency to state, to the extent possible, the likely ranges of contract values which may stem from the framework agreement.



5 Framework agreements divided into lots

Summary

In the UK, framework agreements are routinely divided into “lots”. A contracting authority may specify whether a bidder is permitted to tender for one lot only, or for one or more lots, or must tender for all lots.

For the purposes of estimating the value of framework agreements divided into lots, contracting authorities are required to aggregate all contracts which could be entered into under the framework agreement.

Where framework agreements only exceed threshold because of an aggregation of different requirements, the question arises whether the requirements would have a cross-border interest in the absence of such aggregation.

Generally

- 5.1 In the UK, framework agreements are routinely divided into “lots”. A lot is a package or category of works, goods or services, for which economic operators may bid separately, without necessarily having to bid to provide the entirety of the works, goods or services which form the subject-matter of the framework agreement. Alternatively, framework agreements may be divided into lots by reference to geography. A contracting authority may specify whether a bidder is permitted to tender for one lot only, or for one or more lots, or must tender for all lots.
- 5.2 By way of example, a framework agreement for the supply of medical consumables might be divided into lots as follows:
 - (a) Lot 1 – bandages;
 - (b) Lot 2 – syringes;
 - (c) Lot 3 – all supplies (including, inter alia, bandages and syringes).
- 5.3 In this situation, a supplier of syringes and other consumables (but not of bandages) would bid for lot 2, but not lot 1. It might also bid for lot 3, but only if (were it to be awarded lot 3) there would either be no requirement for it to supply bandages or, if there were such a requirement, the supplier could otherwise source bandages through its supply chain.
- 5.4 At pre-qualification, the contracting authority might require proof of a higher degree of economic and financial standing and/or different levels of technical or professional ability, where multiple lots are to be tendered for. However, in respect of the award decision, the exclusion of a bidder for a

particular lot (on the basis that it had won another lot) would not be in accordance with Article 53 of the Public Sector Directive.

Aggregation of lots

- 5.5 For the purposes of estimating the value of framework agreements divided into lots, contracting authorities are required to aggregate all contracts which could be entered into under the framework agreement.
- 5.6 The requirement for aggregation across lots will lead to more framework agreements exceeding threshold than would otherwise be the case. However, where these framework agreements only exceed threshold because of an aggregation of different requirements, the question arises whether the requirements would have a cross-border interest in the absence of such aggregation.
- 5.7 If all the lots are capable of being fulfilled by the same supplier then the aggregated value gives a clear representation of the value of the contract to a potential bidder. However, if the lots themselves are diverse enough for it to be necessary to involve different providers to meet the combined requirements, then aggregation does not appear to send an accurate signal to the market of the possible value of the contract to individual providers. In such circumstances, it may be questionable whether cross-border interest would exist. However, in such circumstances, it would be within the gift of the contracting authority not to procure such diverse requirements under the same framework, but instead use smaller framework agreements for single requirements.



6 Setting up and participating in framework agreements

Summary

A framework agreement can be set up by one or more contracting authorities for their own use or a central purchasing body for the use of other contracting authorities.

In either case, an agent may be employed to carry out the processes of advertisement, selection and award. In that event, liability for legal compliance remains with the contracting authority or authorities.

Where a framework agreement is set up by contracting authority acting as a central purchasing body, that framework agreement can safely be used by other contracting authorities who are adequately identified at the time the central purchasing body places the contract notice and have consented to the central purchasing body doing so on their behalf.

Where a group of contracting authorities has collectively decided to set up a framework agreement, the allocation of liability is the most important matter for them to address as between themselves. It seems that the most effective way for them to do so would be to set up a “framework users’ agreement” or “access agreement” in order to apportion liability between themselves in an appropriate way.

The Public Sector Directive’s definition of a framework agreement is “an agreement between one or more contracting authorities and one or more economic operators...”. Therefore, any entity which is not a contracting authority cannot validly establish a framework agreement intended for use by contracting authorities. If it were to do so, then economic operators would be deprived of a remedy where the procurement (by the non-contracting authority) was carried out unlawfully.

- 6.1 This section examines the question of who is able to set up a compliant framework agreement, and examines the situation where framework agreements are set up for use by contracting authorities, but by entities which are not contracting authorities.

Setting up framework agreements: the starting premise

- 6.2 As a matter of law, a framework agreement can be set up by:
- (a) one or more contracting authorities for their own use; or
 - (b) a central purchasing body for the use of other contracting authorities.

6.3 In either case, an agent may be employed to carry out the processes of advertisement, selection and award. In that event, liability for legal compliance remains with the contracting authority or authorities.

6.4 A central purchasing body is defined by the Public Sector Directive as follows:

“a contracting authority which:

- acquires supplies and/or services intended for contracting authorities, or
- awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.”

6.5 A central purchasing body is defined by the Regulations as follows:

“a contracting authority which–

- (a) acquires goods or services intended for one or more contracting authorities;
- (b) awards public contracts intended for one or more contracting authorities; or
- (c) concludes framework agreements for work, works, goods or services intended for one or more contracting authorities”.

Setting up framework agreements: contracting authority acting as a central purchasing body

6.6 On the basis of the above definitions, it can be concluded that where a framework agreement is set up by a contracting authority acting as a central purchasing body, that framework agreement can safely be used by other contracting authorities who are adequately identified at the time the central purchasing body places the contract notice and have consented to the central purchasing body doing so on their behalf.

6.7 If a framework agreement is set up for use by other contracting authorities who, are neither specifically named in the contract notice nor are adequately identified by grouping (whether or not they exist at the date of the contract notice), this would raise difficulties due to the fact that any contracting authority wishing to rely on a contract notice must be adequately identified (if not by name, at least by class of user). It is suggested, however, that statutory successors to contracting authorities which are either named or are adequately identified in the contract notice would be able to use the framework agreement set up under it.

6.8 Where a group of contracting authorities has collectively decided to set up a framework agreement, the allocation of liability is the most important matter for them to address as between themselves. It seems that the most



effective way for them to do so would be to set up a “framework users’ agreement” or “access agreement” in order to apportion liability between themselves in an appropriate way. This might take account of which of them had carried out the bulk of the work in setting up the framework, and may contain suitable warranties or indemnities. Such an agreement would cover all potential areas where liability could accrue, including transparency issues arising from the way in which the scope and the duration of the framework are described in the contract notice.

Setting up framework agreements: arrangements set up by private-sector bodies

- 6.9 It will be recalled that the Public Sector Directive’s definition of a framework agreement is “an agreement between one or more contracting authorities and one or more economic operators...”. Therefore, any entity which is not a contracting authority cannot validly establish a framework agreement intended for use by contracting authorities. If it were to do so, then economic operators would be deprived of a remedy where the procurement (by the non-contracting authority) was carried out unlawfully.

The Office of Government Commerce’s Procurement Policy Note, July 2010

- 6.10 In the UK, the Office of Government Commerce (OGC) issued a Procurement Policy Note (PPN) in July 2010 on the use of framework agreements set up by entities who are not contracting authorities. In summary, the PPN’s position is that the use of framework agreements set up by entities who are not contracting authorities should be avoided by them¹⁶.
- 6.11 The thrust of the message conveyed by the PPN is that an organisation which is not a contracting authority could not set up a compliant framework agreement on its own¹⁷, and that it is unlikely that an organisation can legitimately promote a contracting arrangement as a framework agreement, which contracting authorities can use, if:
- (a) the organisation is not a contracting authority or acting demonstrably on the instructions of a contracting authority as the authority’s agent;
 - (b) the terms of any relationship of agency between it and a contracting authority are inconsistent with the requirements of the public procurement rules; or

¹⁶ At para. 1.

¹⁷ Ibid., para. 11.



- (c) the arrangement was set up at the organisation's initiative, as part of its general business activities/interests with contracting authority participation secured subsequently¹⁸.
- 6.12 The PPN goes as far as to state that even where a "framework agreement" set up by a non-contracting authority has been subject to full advertisement in the Official Journal, the award of specific contracts under that agreement could amount to an illegal direct award.¹⁹ Even though this may seem counter-intuitive, it is consistent with the premise that if an arrangement purporting to be a framework agreement is not established by a contracting authority (whether for itself or for the benefit of other contracting authorities), the arrangement in question cannot satisfy the Public Sector Directive's definition of a framework agreement.
- 6.13 However, where a framework agreement is established by a central purchasing body or by an organisation acting as agent for a central purchasing body, the position is different. A central purchasing body can validly set up a framework agreement because it is itself a contracting authority.

¹⁸ Ibid., para. 12.

¹⁹ Ibid., para. 14.



7 Duration of framework agreements

Summary

A framework agreement may not endure for more than four years “except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement.” This four-year rule exists to ensure that EU public procurement markets are opened up periodically to competition.

Where any kind of justification for a longer period than four years is relied on, the grounds for doing so would be expected to appear in the contract notice.

The Public Sector Directive and the Regulations do not stipulate any maximum duration for contracts awarded pursuant to a framework agreement, raising the question of whether the setting up of a framework agreement of a duration longer than four years can ever be justified.

Where the view is taken that exceptional circumstances justify a framework agreement of a longer duration than four years, provision may be made that individual contracts called off pursuant to it will co-determine with the end of the framework agreement.

Framework agreements for a longer duration than four years may have the potential to prevent, restrict or distort competition, see section 12.

The four-year rule

- 7.1 The legislation provides that a framework agreement may not endure for more than four years “except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement.” The four-year rule exists to ensure that public procurement markets within the EU are opened up periodically to competition, thereby avoiding the locking up of markets for excessive periods. There may, however, be countervailing economic reasons why, in particular situations, it may be appropriate for the duration of a framework agreement to exceed four years.
- 7.2 However, the nature of the subject-matter of certain framework agreements may mean that the desired outcomes of the framework agreement (for example, savings through aggregation of purchaser demand) will only be achievable if the framework agreement subsists for a longer term than four years.
- 7.3 One example of this may be the situation where the subject-matter of the contract requires much upfront investment to be made by the appointed supplier, and where it may take a substantial period before any kind of return on that investment (for both supplier and customer) is to be felt. There is conceivably a danger that, if suppliers are in some circumstances only prepared to invest for a longer term, they may be disinclined to bid as

innovatively as might have been the case had the advertised framework agreement been longer.

- 7.4 Where any kind of justification for a longer period than four years is relied on, the grounds for doing so would be expected to appear in the contract notice.
- 7.5 However, the Public Sector Directive and the Regulations do not stipulate any maximum duration for contracts awarded pursuant to a framework agreement. This raises the question of whether the setting up of a framework agreement of a duration longer than four years can ever be justified. If a longer duration is required for the purposes of investment, might suppliers be prepared to make the desired investment if they can see that individual call-off contracts will run for a longer duration? It is conceivable that in some circumstances they would.
- 7.6 Where the view is taken that exceptional circumstances justify a framework agreement of a longer duration than four years, an acceptable alternative may be for the framework itself to be of a longer duration, but for provision to be made that individual contracts called off pursuant to it will co-determine with the end of the framework agreement. Structuring the arrangement in such a way would provide certainty to the successful bidder that it could invest and innovate, whilst also knowing that (short of the contracting authorities terminating early) it could go ahead and make the required investment and, in doing so, achieve the savings sought by the contracting authorities.
- 7.7 There may well be circumstances where a longer duration than four years is justified, and would constitute exceptional circumstances permitting a longer arrangement. Where this is so, contracting authorities are likely to set out the justification for the longer duration in the contract notice such that any likely challenge can be detected and drawn out at the earliest possible stage.
- 7.8 It is noted elsewhere²⁰ that framework agreements for a longer duration than four years may have the potential to prevent, restrict or distort competition. The same possibility cannot be discounted even in the case of framework agreements of four years or less – such arrangements may, on occasion, have a foreclosing effect on the relevant markets, for example by reason of the numbers of customers who may have recourse to them. This situation may arise, in particular, where (whether by obligation or effect) those customers will have recourse to the framework on an exclusive basis. It may conceivably prevent, restrict or distort competition if customers using a framework were required to purchase all of their requirements for a particular class of goods or services via the framework, and the longer the

²⁰ For an analysis of the “improper use” rule, see section 12, post.



duration of the framework in question (and the wider the span of customers using it), the greater the foreclosing effect could be.

What constitutes exceptional circumstances?

- 7.9 It has been suggested above that the need for a certain level of investment in a framework agreement by a particular supplier (or suppliers) before expected levels of savings can be realised may be capable of amounting to “exceptional circumstances duly justified, in particular by the subject of the framework agreement”, justifying the award of a framework agreement for a period in excess of four years²¹. That is perhaps a straightforward example: if the framework agreement is not set up for a longer period, it may not achieve its *raison d’être* of generating the savings which may be sought by its users.
- 7.10 Elsewhere, there may be more likelihood of such savings being achieved if the framework agreement is re-exposed to competition on a more regular basis: the individual circumstances of each framework agreement will be key to determining the position.
- 7.11 There is no doubt that any decision on the part of contracting authorities to rely on the existence of exceptional circumstances as justification for a duration in excess of four years would be closely scrutinised, so caution is needed wherever there is an intention to do so.

²¹ Investment and depreciation are the sole examples cited in the Commission’s Explanatory Note (CC/2005/03) as circumstances where a longer duration may be justified.



8 Duration of contracts awarded under framework agreements

Summary

No particular period is stipulated by the Public Sector Directive as being the maximum permitted for call-off contracts entered into pursuant to framework agreements.

The Commission's Explanatory Note states that the rules are the same as for the framework itself: the maximum duration of a call-off contract is four years, but call-off contracts may continue to be awarded right up to the end of the framework and so continue in force beyond the life of the framework itself.

However, the position is not clear cut. To enter into a long call-off contract so as to extend the reach of the framework and avoid the need to conduct a fresh procurement when one was properly due would be unlawful if it amounted to using the framework agreement so as to prevent, restrict or distort competition.

Clearly, the longer the proposed call-off duration in excess of four years, the higher the hurdle ought to be in terms of justification.

- 8.1 No particular period is stipulated by the Public Sector Directive as being the maximum permitted for call-off contracts entered into pursuant to framework agreements. It is widely accepted in the UK (though the position differs in some other Member States) that call-off contracts may continue beyond the end of the framework agreement to which they relate, and the Commission's Explanatory Note seems to confirm this²². But on the issue of the permissible maximum duration of individual call-off contracts, there are differing views. The Commission's Explanatory Note states that the rules are the same as for the framework itself: the maximum duration of a call-off contract is four years, but call-off contracts may continue to be awarded right up to the end of the framework and so continue in force beyond the life of the framework itself. For these propositions the Commission quotes in support Articles 32(3) and 32(4) of the Public Sector Directive (see also Regulations 19(5)(a), 19(7)(a) and 19(8)) which state that call-off contracts must be awarded:

"within the limits of the terms laid down" in the framework agreement, "by application of the terms of the framework agreement" or by reopening competition on the basis of the "same... terms".

- 8.2 It is unclear whether the expression "within the limits of the terms laid down" is intended to refer to the duration of the framework agreement, or the ambit of its terms, or both (since duration is one of the terms).

²²

At paragraph 2.1.

- 8.3 The Commission's Guidance does not appear to take into account the fact that an individual call-off is likely in most cases to have less potential to distort competition by market foreclosure than the framework itself. In that light, the imposition of a four year duration on call-off contracts appears arbitrary. A better starting point for determining call-off duration might be Article 32(2), paragraph 5, of the Public Sector Directive (Regulation 19(12)), which provides that:-

"Contracting authorities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."

- 8.4 This provision suggests that, rather than being set at a fixed number of years, maximum call-off duration should (consistently with the Guidance published in 2008 by the OGC) be assessed on a case by case basis, by reference to subject matter, value and wider market conditions.
- 8.5 However, the position is not clear cut. To enter into a long call-off contract simply as a means of extending the reach of the framework in order to avoid the need to conduct a fresh procurement when one was properly due would be likely to be unlawful, on the basis that such behaviour would amount to using the framework agreement so as to prevent, restrict or distort competition. On the other hand, call-off contracts under certain framework agreements could by their nature be of varying lengths and the need for a long call-off towards the end of the framework may be entirely legitimate. In any event, it might in those circumstances be very difficult for an economic operator to establish a breach of the rule against preventing, restricting or distorting competition.
- 8.6 Whatever the merits of those arguments, and in light of the Commission's Explanatory Note, a UK Court would probably take Article 32(2) paragraph 4 of the Public Sector Directive as its starting point in assessing maximum call-off duration, but may be more inclined than in the case of the overarching framework to find a longer duration justified because:-
- (a) the market-distorting potential of an individual call-off contract is less marked than that of the framework itself. If the framework expires after four years, is replaced and fresh call-off contracts are let under the replacement framework, the fact that one or more individual call-off contracts remains in place under the old framework may have de minimis market impact (depending on, among other things, wider market conditions).
 - (b) the examples quoted in the Commission and OGC Guidance of circumstances where a longer framework may be justified (e.g. where upfront costs can only be recouped over a longer timeframe) seem more suited to individual call-off contracts than to the over-arching framework (whether the framework is four years or fourteen, if suppliers have no guarantee of any business they are unlikely to invest until they are awarded business under specific call-off contracts).



- 8.7 Clearly, the longer the proposed call-off duration in excess of four years, the higher the hurdle ought to be in terms of justification.
- 8.8 There is no express obligation to state the likely duration of call-off contracts in the contract notice advertising the framework agreement. However, where the contracting authority clearly envisages from the outset that call-off contracts in excess of four years' duration are likely to be placed it will be advisable for reasons of transparency) to include a statement to this effect in the contract notice (ideally with an indication of the range of possible durations) and to provide for this also in the drafting of the framework agreement. This will strengthen the case that the subsequent call-off contracts are made within the terms of the framework. In addition, contracting authorities should have a clear audit trail documenting the justifications for putting in place call-off contracts for longer than four years.



9 Who can call off contracts under a framework agreement

At what stage must the terms of the call-off contract be finalised?

Summary

In order to call-off a contract from a framework agreement a contracting authority must be an original party to the framework agreement. As a minimum "original party" means that the contracting authority must have been either: named in the contract notice; named in a document referenced in the contract notice; or be an identifiable member of a class of contracting authority named in the contract notice or a document referenced in the notice. There is no consensus as to whether "original party" also means that the contracting authority must have decided prior to the conclusion of the framework agreement that it wished to be eligible to use it.

Calling off under a framework gives rise to two principal issues: which framework supplier should get this particular call-off, and on what terms?

With single supplier frameworks the choice of supplier has by definition already been made and it is likely that most of the terms of the subsequent call-off contracts should have been settled during the competition to identify the single supplier and whilst the process is still competitive.

With multi-supplier frameworks contracting authorities may choose to establish at the outset of the framework a mechanism that will identify which of the framework suppliers will be awarded any particular call-off and in this case the terms of the call-off should also largely be settled at the outset (each call-off being analogous to a single supplier situation).

Alternatively, the contracting authority may identify the chosen supplier and finalise the terms of the call-off contract, to a greater or lesser extent, by mini competition.

- 9.1 Neither the Directive nor the Regulations explicitly address how contracting authorities must identify the users of a framework agreement. Both the EU Commission and OGC have produced guidance on this.
- 9.2 Article 32(2) of the Public Sector Directive states:

“Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between contracting authorities and the economic operators originally party to the framework agreement.”
- 9.3 The Commission’s Explanatory Note states as follows:

"The last part of the second subparagraph of Article 32(2) lays down that framework agreements can only be used "between the contracting authorities and the economic operators originally party to the framework agreement. When a framework agreement is to be used by several contracting authorities, therefore, these contracting authorities must be identified explicitly¹⁴ in the contract notice, either by naming them directly in the notice itself or through reference to other documents (e.g. the specifications or a list available from one of the contracting authorities¹⁵, etc.).

In other words, framework agreements constitute a closed system which no-one else can enter, either as a purchaser or a supplier."

- 9.4 The reference to contracting authorities being identified "explicitly" is further glossed in footnote 14 of the Commission's Explanatory Note, which reads:

"For example, in the case of a framework agreement concluded by a central purchasing body acting as an intermediary rather than as a "wholesale dealer", it would not therefore be sufficient to indicate that the agreement can be used by "contracting authorities" established in the Member State in question. In fact, such an indication might not render it possible to identify the entities that are parties to the agreement due to the difficulties that may arise in determining whether an entity does or does not meet the definition of a body governed by public law. On the other hand, a description permitting immediate identification of the contracting authorities concerned – for example "the municipalities of x province or of y region" – renders it possible to verify that the provision of Article 32(2), second indent has been observed."

- 9.5 The expression "explicitly" in this context is not intended to refer only to identification by name. It is capable of including identification of contracting authorities:
- (a) by name;
 - (b) by reference to another document, e.g. a list of named contracting authorities; or
 - (c) in the case of central purchasing bodies, by reference to a description of the class of contracting authorities expressed to be eligible to use the framework agreement to make purchases.
- 9.6 Alternative (c) leaves open the question whether the eligible authorities are limited to those which existed at the time the contract notice was published, or whether subsequently-created contracting authorities which happen to fit the description are also eligible. Logic might suggest the latter, since the likelihood is that the overall market will remain broadly the same (e.g. where a local authority is split into two new authorities, it is perhaps unlikely that the economic size or characteristics of the relevant market will



be significantly altered). This is the position as stated in the OGC Action Note of September 2010 at paragraphs 16-18.

- 9.7 This interpretation leaves unanswered one question: whether contracting authorities wishing to use the framework agreement to make purchases must have expressly consented to being identified as contracting authorities, prior to the issue of the contract notice.
- 9.8 The question has not been tested in litigation (although at least one defendant has been prepared to plead the point in proceedings which subsequently settled). Neither the Commission's Explanatory Note nor the OGC's PPN discuss this point explicitly.
- 9.9 In summary, the Directive (in its English and French versions) refers to framework agreements as being available for use by the contracting authorities and economic operators "originally party to the framework agreement"²³. The Directive could equally have provided "the economic operators appointed to the framework agreement and the contracting authorities identified in the relevant notice in the Official Journal", or words to that effect²⁴.
- 9.10 It is submitted that the better way to understand the requirement "to be an original party to the framework agreement" is to interpret it in the light of the overriding Treaty obligations (whilst also bearing in mind the overall purpose of framework agreements) - that is, the identification of authorities eligible to use a framework agreement must be sufficiently comprehensive and exact to be transparent in the *Telaustria*²⁵ sense: in other words, it must be sufficient to open the relevant market to competition and enable the impartiality of processes to be reviewed. This dovetails with the requirement to provide a maximum estimated value for call-off contracts for all contracting authorities party to the framework agreement envisaged for the total term of the agreement.
- 9.11 From the perspective of risk management, it is submitted (in the light of this tension) that what actually exists is a "spectrum" of attachment – the more removed a contracting authority is from the procurement process which led

²³ In the French version: "Ces procédures ne sont applicables qu'entre les pouvoirs adjudicateurs et les opérateurs économiques originellement parties à l'accord-cadre." (emphasis added).

²⁴ Perhaps the best resolution of the apparent conflict between the language of the Directive and the interpretation of the Commission's Explanatory Note is to say that, since the framework agreement itself will generally not be a contract but an act preliminary to the award of one or more contracts, it is in any event not capable of having "parties" in the contractual sense and the word is therefore to be understood as meaning "those entities which will become parties to any contracts awarded pursuant to the framework agreement". However, this cannot be applied to an arrangement which would otherwise be a framework agreement but for the fact that it has contractual force (for example, one which obliges the contracting authorities to make a minimum value of purchases).

²⁵ Case C-324/98 *Telaustria Verlags GmbH, Telefonadress GmbH v Telekom Austria AG*, formerly Post & Telekom Austria.



to the setting up of the framework agreement, the greater the risk assumed by that contracting authority in then using it.

How does one call off a contract under a framework agreement?

9.12 The provisions of the Public Sector Directive (described below) – which on their face appear to allow a large degree of latitude as to the stage at which call-off terms and conditions are fixed should probably be construed with reference to the underlying "mischiefs" that the Commission sought to address by regulating framework agreements in the Public Sector Directive, namely:

- (a) the informal, discretionary choice of supplier at call-off stage; and
- (b) significant, non-transparent negotiation between the contracting authority and the chosen call-off supplier.

9.13 To the extent that the terms of the subsequent call-off contracts have been settled at the outset of the framework agreement, these terms cannot be materially changed²⁶ at call-off stage. This applies both to single supplier framework agreements and to multi supplier framework agreements (including call-offs that require a mini-competition amongst all the capable framework participants before contract award):

"When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3 [single supplier framework agreements]."²⁷

9.14 However, Commission and OGC Guidance clearly allows at least some call-off terms and conditions to be left outstanding at the outset, in order to be finalised only at call-off stage (including for single supplier framework agreements²⁸), although the extent of this is not clear.

Single-supplier framework agreements

9.15 In the case of single-supplier framework, Article 32(3) of the Public Sector Directive states:

"Contracting authorities may consult the operator party to the framework agreement in writing requesting it to supplement its tender as necessary."²⁹

²⁶ Any proposed amendments therefore are lawful only to the extent that they fall short of being 'material' changes under the Presetext tests²⁶ (C-454/06, Presetext Nachrichtenagentur GmbH v Republik Österreich).

²⁷ Article 32(2) paragraph 3.

²⁸ See paragraph 2(2) of the Commission's Explanatory Note.

²⁹ Article 32(3), paragraph 2.



- 9.16 Neither the Commission's Explanatory note nor the OGC's Guidance suggests how much of the call-off contract needs to be settled at the time of the competition to find the single supplier and how much can be left to be dealt with at call-off stage by means of the supplier "supplementing" its tender. However, the scope of this ability to "supplement" terms should be construed within the context of the overriding Treaty obligations. It is submitted that this supplementing process was not envisaged to be extensive and the intention was that all major terms of principle were to be settled at the outset, with only minor, call-off-specific, points (such as quantities, the scope or specification of particular "packages" of services or works, or delivery times in the case of supply of goods), left to be determined at the later stage.³⁰

Multi-supplier framework agreements

- 9.17 In the case of multi-supplier framework agreements the Public Sector Directive gives two alternatives for the award of particular call-off contracts. This may be done:
- (a) by application of the terms laid down in the framework agreement without reopening the competition; or
 - (b) by competition amongst all capable framework suppliers "on the basis of the same and, if necessary, more precisely formulated terms and where appropriate other terms referred to in the specifications of the framework agreement". However this option is limited to instances "where not all the terms are laid down in the framework agreement."
- 9.18 These two options appear to be exhaustive and indeed legislation of some Member States prohibits the combining of both options in one framework. They are also on the face of it, mutually exclusive. Either the framework agreement prescribes all the terms of the subsequent call-off contracts and the formula for identifying how suppliers will be allocated to particular call-off contracts (in which case the first option must be used and a mini competition is not available) or the framework leaves at least some terms of the call-off contracts unsettled (e.g. price) and provides that contracts will be finalised, and the successful supplier will be chosen, by mini competition.
- 9.19 That said, the Directive does not seem to prohibit both approaches from being deployed in a framework. However, any framework agreement that gave the contracting authority the discretion to choose between the two approaches at the time of the call-off would need to set out clearly the call offs in relation to which it does "establish all the terms" and those in relation to which it does not "establish" all of them.

³⁰ This is consistent with the definition of a framework agreement as "an agreement the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price" (emphasis added): Article 1(5).



Multi-supplier framework agreements without a mini-competition

- 9.20 Where a contracting authority concludes a framework agreement with more than one economic operator, as mentioned above, one option is for a specific contract to be awarded by application of the terms laid down in the framework agreement without re-opening competition. As the OGC Guidance provides:

"4.5 Where the terms laid down in the framework agreements are sufficiently precise to cover the particular requirements, the authority can award the call-off without reopening competition. The Regulations do not specify how this should be done and the following section sets out some points that contracting authorities may find it useful to consider.

"4.6 The reference in the Regulations to the terms laid down in the framework agreement is not just a reference to the call-off terms and conditions, but also to the information contained in the framework which explains matters such as:

- i the circumstances in which the contracting authority envisages making a direct award without further competition;
- i how the contracting authority would select the supplier to which an award is made, for example by adopting an initial ranking of the suppliers on the basis of the award criteria used at the time that the framework was established;
- i how the contracting authority would select a subsequent supplier if the first supplier selected was unable to provide the requirement. For example, framework agreements might be concluded with five suppliers for the delivery of individual photocopiers, fax machines and printers, separately priced, and for delivery within set timescales. If the authority simply wants to call-off some photocopiers it would go to the supplier offering the most economically advantageous offer, using the original award criteria, for that item alone without reopening the competition. If that supplier for any reason could not supply the items required at that time, the authority would go to the supplier offering the next most economically advantageous offer, and so on."

- 9.21 The Commission's Explanatory Note provides, at paragraph 3.2:

"As regards contracts based on this type of framework agreement (i.e. multiple framework agreements that establish all the terms (multiple framework contracts) the Directive limits itself to specifying, in Article 32(4), second paragraph, first indent, that they are awarded "by application of the terms laid down in the framework agreement without reopening competition. The choice between the different economic operators for the execution of a specific order is, on the other hand, not specifically regulated by the Directive. Consequently, this choice may be made simply



by complying with the basic principles, cf. Article 2.³¹ One way of doing this is the "cascade" method, i.e. firstly contacting the economic operator whose tender for the award of a framework agreement establishing all the terms (framework contract) was considered the best and turning to the second one where the first one is not capable of or interested in providing the goods, services or works in question."

- 9.22 Footnote 24 to paragraph 3.2 of the Commission's Explanatory Note further elaborates as follows:

"A decision as to which economic operator a specific order is to be placed with may also be made according to other criteria, provided that they are objective, transparent and non-discriminatory. Thus, let us imagine a large institution which, having photocopiers of different makes, has concluded framework agreements establishing all the terms for the maintenance and repair of this equipment with a series of economic operators so as to ensure the presence of at least one specialist for each make of photocopier in its machine pool. For the award of the framework agreements, the contracting authority has used award criteria such as price, speed of intervention, range of makes that can be catered for, etc. It is clear that an order to service e.g. a Rank Xerox machine may then be given to the specialist for this make even if the tender for Canons has been ranked first."

- 9.23 Various methods of direct award of call-off contracts are commonly deployed. These include:

- (a) "cascade" (where the winner takes all until it cannot, or does not wish to, provide under further call-off contracts);
- (b) "cab rank" or rotation between suppliers;
- (c) percentage allocation; or
- (d) random selection.

- 9.24 The cascade method is the method cited by both the Commission and the OGC. However, the legitimacy of these other methods of call-off has not yet been tested. Any method is likely to be upheld, provided the criteria are objective, transparent, non-discriminatory and, potentially, identify the most economically advantageous tender for the particular contract being called off. Whether or not the criteria are required to seek to identify the most economically advantageous tender will depend on whether the general requirement to award contracts on the basis of most economically advantageous tender is applied to direct awards under framework

³¹ Article 2 of the Public Sector Directive provides: "Contracting Authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way".



agreements. This has not yet been established by case law, although this interpretation is consistent with general principles of public procurement law.

- 9.25 It is also clear that the criteria for appointment to the framework agreement do not need to be the same as the criteria for award of the call-off contract, provided that the respective criteria are clearly communicated.

Multi-supplier framework agreements with a mini-competition

- 9.26 Where all of the call-off terms and conditions have not been agreed at the outset and there is no pre-determined formula that will identify a particular framework supplier for the contract that has arisen, the plugging of the gaps (and the identification of the chosen supplier) must be done by mini-competition involving all capable suppliers. Again, there must be no material changes to any terms that were agreed at the outset: this is consistent with the Pressetext³² ruling.
- 9.27 Neither the Public Sector Directive, nor the Regulations nor any guidance, indicates how much of the call-off contract has to be settled at the outset as part of the competition leading to the establishment of the framework agreement and how much can be left to be determined as part of the mini-competition. It is thought that the framework agreement must specify the terms of future call-off contracts sufficiently clearly so as to enable economic operators contemplating submitting tenders both to understand the nature of the opportunity and to review the impartiality of the process³³. Call-off terms which were too vague or high-level to satisfy that requirement would contravene the overriding requirement of transparency.
- 9.28 In practice, contracting authorities will usually seek to settle a fairly complete template call-off contract as part of the initial competition for a place on the framework. The detail that a contracting authority is most likely to want to leave outstanding is price. Whether, or to what extent, this is lawful is a grey area on which there is little consensus. Clearly the actual prices for call-off contracts are highly unlikely to be fixed at the outset: it is intrinsic to the nature of a framework agreement that the Contracting Authority does not know in advance precisely the quantities or scope of its requirements. The question therefore is how the price of call-off contracts will be determined and how much latitude is available for competitive bidding of prices in mini-competitions. On one view (referred to below as "Proposition 1") the framework agreement must itself set out a mechanism (such as schedules of prices for time and materials or indices to which specified discounts and margins will be applied) by which the price of each

³² Case C-454/06, Pressetext Nachrichtenagentur GmbH v Republik Österreich.

³³ See Case C-324/98 Telaustria Verlags GmbH, Telefonadress GmbH v Telekom Austria AG, formerly Post & Telekom Austria.



call-off can be fixed as it arises. This leaves no room for competitive bidding of price at call-off stage.

- 9.29 At the other extreme it is argued that price need not feature prominently in the competition to identify the framework participants, so long as the price for any particular call-off is established by competition amongst the framework suppliers at the relevant time and a process whereby this will be done (e.g. mini-competition) is set out in the framework agreement. This is referred to below as "Proposition 2". Naturally many views lie somewhere between the two extremes.

- 9.30 Briefly, the various arguments may be summarised as follows:

Proposition 1: pricing mechanisms must be defined in the framework agreement

- 9.31 The argument goes that framework agreements are in effect a derogation from the general legal regime governing public procurement because, for the duration of the framework, they carve out a closed market. The default four-year limit on duration reflects the need to limit the derogation to what is required for its legitimate purpose. It follows that there must be a robust – and complete – competition for gaining a place on the framework, which should extend to determining the mechanism by which the price for call-off contracts will be fixed. Failing to test price at the outset, or setting prices that may be changed when a particular call-off arises, is inconsistent with Regulation 19(2), which requires a Contracting Authority to run the competition for establishing a framework in accordance with the standard procedures and expressly requires the choice of successful suppliers to be made:-

"by applying award criteria set in accordance with Regulation 30".

- 9.32 Regulation 30(1) stipulates that selection must be on the basis of "lowest price" or "most economically advantageous tender" ("MEAT"). Regulation 30(2) sets out a non-exhaustive list of criteria which may be used to determine MEAT. The list includes "price".
- 9.33 Lowest price cannot be established unless mechanisms for determining price form part of the terms of the framework agreement. As regards the "most economically advantageous" basis of assessment it is implicit in the use of the term "economically" that price must be taken into account as part of any MEAT analysis. The Regulations could have provided that contracting authorities were at liberty to choose the "most advantageous offer" leaving them free to select bids which promoted local employment, or local purchasing of materials, without regard to economic competitiveness. Instead, the inclusion of the word "economically" is a manifestation of the discipline imposed by the legislation which requires Member States to award contracts to the most competitive offers without discrimination or inequality of treatment.



- 9.34 Furthermore, leaving price open to be bid at mini-competition stage contravenes the general Treaty principles. It means that the impartiality of the procurement process cannot be reviewed, since it cannot be ascertained whether framework suppliers have actually been appointed on the basis of objective factors (which necessarily include value for money) or on the basis of other, potentially discriminatory, criteria. Finally, leaving price at large, to be bid in mini-competitions, opens the way to collusion between framework suppliers, who might agree to force prices up over the lifetime of the framework agreement.
- 9.35 Thus, Regulation 19(2), when read against the backdrop of the general Treaty principles, means that the competition for a place on the framework must entail the determination of prices for subsequent call-off contracts, or at least of a pricing mechanism that will fix a definitive price at the relevant time. Leaving prices to be bid at call-off stage would open the way to discrimination and unequal treatment which would be difficult to review in the absence of any requirement to publish a contract award notice at the award of any particular call-off contract.
- 9.36 It is true that the Commission's Explanatory Note (paragraph 2.2) suggests that:
- "the Directive does not require certain aspects to be established at the beginning: as regards the price in particular, it should be emphasised that this aspect does not need to be established in the framework agreement itself."
- 9.37 This appears inconsistent with the definition of a framework agreement in the Public Sector Directive, and should, it is suggested, be interpreted as acknowledging that the actual price of particular call-off contracts cannot be anticipated, for the reasons set out above. To the extent that it could be interpreted to mean that on appointment to the framework agreement the contracting authority can simply ignore price, it is difficult to see how it can be correct.
- 9.38 This analysis suggests that mini-competitions are most likely to be useful in circumstances where the pricing terms fixed at the outset cannot be applied to a particular call-off contract without further input from the suppliers. For example, a framework agreement for the provision of IT hardware might define pricing terms as follows:
- "hardware prices will be the supplier's originally tendered prices subject to annual adjustment, up or down, to mirror movements in the Retail Prices Index, subject to a discount of 10% with a further 2.5% discount when orders over a rolling 12 month period exceed £x".
- 9.39 In such a case, if the contracting authority simply wishes to purchase hardware, it can establish each supplier's price at the relevant time by application of the formula. There is no requirement (or room for) any competition between suppliers at this time. This approach may be less



appropriate where prices (for example, of raw materials like flour or fuel) tend to be subject to severe fluctuation.

- 9.40 In reality, however, mini-competitions will often entail more complex assessments. To extend the example, one might postulate a framework agreement where the contracting authority has appointed a number of suppliers to provide desktop and laptop computers, network infrastructure and software, and helpdesk and maintenance services, at prices which are fixed for the duration of the framework. An example would be where the contracting authority wishes to equip a new office and holds a mini-competition under which the framework suppliers are asked to propose how the IT should be provided. The suppliers' solutions may vary widely, both in terms of the technical solution and the price: one might offer a low-priced but inflexible solution based on desktops and hard-wired networking only, while another might offer a more expensive but more flexible solution using laptops and wireless connectivity. It would be up to the contracting authority to assess which offered the most economically advantageous solution, in the light of its requirements.
- 9.41 Another example might be a mini-competition for professional services, where suppliers have fixed their hourly rates as part of the competition for a place on the framework but are unable to give a price for any particular project until further details are known about it. Here, once the details of a project have been finalised by the contracting authority and disclosed to the suppliers, the suppliers will be able to propose different ways of staffing the particular scope of work and make their own estimates of the time required to carry it out, and a mini competition will be used to elicit a specific price for that project from each supplier which uses the predetermined hourly rates but will yield different prices.

Proposition 2: prices must be fixed competitively but this may be done at call-off stage

- 9.42 The contrary proposition holds that price should certainly be established by some competitive process but that need not necessarily be undertaken, or undertaken definitively, at the time of establishing the framework.
- 9.43 If price for any particular call-off is established by means of a mini-competition amongst the framework suppliers at the relevant time it is true that other suppliers outside the framework may be prejudiced by being unable, at that time, to offer a yet more competitive price. But the essence of a framework agreement is the establishment of a closed class of suppliers amongst whom business may be awarded (within limits) flexibly. That is made clear in Recital (11) of the Public Sector Directive:

"The reopening of competition [in framework agreements] should comply with certain rules the aim of which is to guarantee the required flexibility and to guarantee respect for the general principles, in particular the principle of equal treatment."



- 9.44 The Recital makes it clear that once the framework agreement has been established (which must be done in conformity with one of the regulated procedures and the requirement of transparency and equal treatment imposed by Article 2 (Regulation 4(3)), the contracting authority is entitled to benefit from a measure of flexibility. The general Treaty principles still apply, but they apply as between the members of the framework agreement. Hence, competition on price should be permitted as part of mini-competitions, provided that it does not contravene those principles – that is, provided that the criteria for assessing price are transparent, objective and equally applied. In effect, the framework agreement creates, for its duration, a closed market within which the competitive disciplines of public procurement apply, but only as between suppliers on the framework agreement.
- 9.45 That was, at least in part, why it was considered necessary to impose the default four-year limit on the duration of a framework agreement, after which a wider class of suppliers would again be entitled to compete for the contracting authority's custom. If price, or a definitive pricing mechanism, for all call-off contracts had to be fixed at the outset of a framework, the framework would be little different from an immediate one-off contract. Since the Public Sector Directive and the Regulations place no express limit on the duration of these, why was a limit considered necessary for a framework? It must be instead because the contracting authority was intended to have greater flexibility than in the case of a one-off contract to determine particular supply terms and conditions, including price, during the life of the framework.
- 9.46 Whilst it is true that Regulation 19(2) requires that places on the framework be awarded on the basis of lowest price or MEAT, the list in Regulation 30(2) of permitted MEAT criteria is universally accepted to be an exemplar³⁴ and neither "price", nor any of the other listed criteria, are indicated as being mandatory. It seems unlikely that a contracting authority could comply with Regulation 19(2) if price were wholly ignored at the framework appointment stage. However, the demands of transparency and equal treatment will be satisfied, in respect of the competition for places on the framework, if potential tenderers are able clearly to ascertain how prices for call-off contracts will be fixed at a relevant future date. Once the framework has been established, those demands will be met provided that a transparent and fair means of assessing price is applied within the limited market created by the framework agreement.
- 9.47 As noted above, the Commission's Explanatory Note states expressly that call-off contract prices need not be fixed at the outset and it does not appear that the Commission has changed its position on this since the Commission's Explanatory Note was issued. This stance is underlined by

³⁴ This is explicitly supported by the wording of the corresponding Article in the Public Sector Directive (Article 53(1)(a)) which places the words "for example" in front of the list.



Article 54(2) of the Public Sector Directive (Regulation 21(2)) which provides contracting authorities with the option of establishing the price for any particular call-off by means of an e-auction. If prices, or a definitive price calculation mechanism, had to be fixed at the outset of the framework this provision would be a dead letter.

Custom and practice

- 9.48 Whilst the strict legal position remains so uncertain, contracting authorities in practice adopt a variety of approaches to price in the initial framework competition including:-
- (a) price not featuring at all in the initial competition. It follows from the foregoing that this may well not be lawful and it is certainly questionable from a commercial point of view since it may produce framework suppliers with excellent quality, but totally unaffordable, products!
 - (b) prices being fixed for an initial period, e.g. 12 months, as part of the framework competition, thereafter to be determined by mini competition.
 - (c) prices that suppliers bid to gain a place on the framework being treated as maximum prices, but with the possibility of quoting lower prices in subsequent mini competitions.
 - (d) suppliers competing to gain a place on the framework on the basis of fixed prices for an "example" or "reference" project, from which future call-off prices are then derived. Here, the extent to which suppliers have the ability to modify their initial prices is crucial. From a commercial perspective, unless this is tightly controlled it is potentially open to the same objections as the first approach.
- 9.49 Each of these approaches may – or may not – be lawful and definitive judicial consideration of the extent to which prices must be fixed at the outset of a multi supplier framework is sorely needed. In the meantime, the more cautious a contracting authority is, the more it will wish to pin down its suppliers on price at the outset of the framework and so limit their room for manoeuvre in subsequent call-off competitions.



10 Can eligibility criteria be re-considered in the lifetime of the framework agreement?

Summary

A framework agreement can contain contractual terms allowing for the exclusion of a supplier from the framework agreement should it no longer meet certain stated criteria.

However, care must be taken at mini-competition stage not to blur the distinction between selection criteria and award criteria.

- 10.1 Article 32(4)(a) of the Public Sector Directive provides, in the case of call-off contracts to be awarded by mini-competition, that the contracting authority must:

"consult in writing the economic operators capable of performing the contract."

- 10.2 The OGC Guidance seems to favour the narrow interpretation of "capable" and indicates that the concept of capability was not intended to allow any form of PQQ-style short-listing:

"It should be noted that there is no scope, at this stage, to run a selection procedure based on technical ability, financial standing etc. This will have been carried out before the framework itself had been awarded and should not be repeated at the further competition stage. The decision about which suppliers should be consulted must be based on the kinds of supplies or services required and on which suppliers can supply them, based on their offers at the time the framework itself was awarded."³⁵

- 10.3 As part of the PQQ process, the contracting authority may have asked bidders to confirm that their supplies or services met certain objective standards (for example, legal requirements such as health and safety). Insofar as these objective standards have changed in content then it is suggested that a contracting authority may require the supplier to meet the revised standard as to not meet these standards would render the supplier "incapable" of providing the goods or services (as it does not meet the objective standard).
- 10.4 During the life of the framework the economic and financial standing and/or technical or professional ability of the supplier may change – it may not be the same calibre of organisation that pre-qualified and was awarded a place on the framework. It seems relatively uncontentious that a contracting authority may incorporate into the drafting of the framework agreement a right to reject a supplier (permanently) from the framework should certain

³⁵

OGC Guidance, paragraph 4.11.

events occur (insolvency, poor performance etc), or should it no longer meet certain stated criteria.

- 10.5 A further question arises as to whether a contracting authority may introduce additional questions or requirements at call-off stage that relate to technical ability and/or financial standing, i.e. selection criteria. OGC Guidance suggests that this would be unlawful.
- 10.6 The contrary view holds that admission to the framework is merely an intermediate step in an on-going award procedure which commences with the framework OJEU advert and does not end until a supplier has been (in each case) awarded a call-off contract. This approach may be convenient for the contracting authority as it would enable an authority to maintain a supplier on the framework but simply not select him for a particular call-off competition if he fails certain short-listing-type requirements for that particular call-off. This, however, does blur the distinction between selection criteria and award criteria, as articulated by the ECJ in Lianakis³⁶ and accordingly, it is not at all clear that this can be done; if it can, then this would appear to render framework agreements little more than groupings of pre-qualified candidates.

³⁶ Case C-532/06, Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis and Others.



11 The “improper use” rule

Summary

The Public Sector Directive and the Regulations provide that contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

It appears that the “improper use” rule is intended to have a more significant function than merely acting as a general catch-all. It is intended to import into the rules on framework agreements the specific significance of the principle of non-restriction of competition to procurement law.

There are competition issues associated with overly large framework agreements and the foreclosing effect they may have on a particular market. Where there is pressure on users to avail themselves of such framework agreements on an exclusive basis it is difficult to envisage how this would not at least have the potential to prevent, restrict or distort competition.

Consortium bidding might be relevant to framework agreements where consortia are formed to apply for admission to the framework agreement, and where they are formed by framework economic operators to bid in a mini-competition.

Although Regulation 28 does not refer to framework agreements, it is unlikely that the intention behind this omission is to preclude consortia from bidding for admission to a framework agreement. By extension, there seems no reason why suppliers on a framework agreement should not have the ability to form consortia for the purposes of bidding in specific mini-competitions.

- 11.1 The Public Sector Directive³⁷ and the Regulations³⁸ provide that contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. This “improper use” rule is mirrored in relation to electronic auctions and dynamic purchasing systems.
- 11.2 The “improper use” rule probably imposes some substantive limits on matters such as the range of products and services covered and potentially the range of user entities for some types of framework. However, neither the Public Sector Directive nor the Regulations make specific provision as to what is meant by it, or at what “mischief” it is directed.
- 11.3 Section 2.1 (third paragraph) of the Commission's Explanatory Note provides as follows:

³⁷ At Article 32(2), paragraph 5 thereof.

³⁸ Regulation 19(12) thereof.

"The duration of framework agreements is limited to four years, which is also the case for the contracts based on framework agreements. However, framework agreements may have a longer duration in "exceptional cases duly justified, in particular by the subject of the framework agreement". Thus, for example, a longer duration could be justified in order to ensure effective competition for the contract in question if its performance required investment with a depreciation period of more than four years. This is because the development of effective competition in the public procurement sector is one of the objectives of the Directives dealing with this area, as recalled by established case law and the second recital of the Classic Directive. Moreover it should be noted that the public procurement directives do not operate in a legal vacuum – both community and national competition rules apply to them."

- 11.4 Footnote 17, which relates to the above paragraph, refers to the Sintesi case³⁹ and states that, in the case of framework agreements:

"this objective is moreover more or less stated in the fifth sub paragraph of Article 32(2)."

- 11.5 The fifth sub-paragraph of Article 32(2) is the "improper use" provision.

- 11.6 The Sintesi case is concerned with the principle of non-restriction of competition, as applicable to public procurement. In it, the Court ruled as unlawful a national rule which, for the purposes of awarding public works contracts following open or restricted procedures, imposed a general and abstract requirement that the contracting authorities used only the criterion of lowest price. The Court stated (at paragraph 35), referring also to earlier case law, that the purpose of the former Public Works Directive was to develop effective competition in the field of public contracts. It referred (at paragraph 36) to that principle being expressly stated in Article 22(2) of that Directive which provides that where a contract is awarded under the restricted procedure, the number of candidates invited to tender is in any event sufficient to ensure genuine competition. At paragraph 37, the Court stated:

"In order to meet the objective of developing effective competition, the Directive seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria...".

- 11.7 In addition, the Court has stated as follows:

- (a) In case C27/98 Fracasso: "Second, it should be observed that, according to the tenth recital in the preamble to Directive 93/37, the aim of that directive is to ensure the development of effective competition in the

³⁹ Case C-247/02, Sintesi SpA.



award of public works contracts...[27] in that connection, as the Commission has rightly pointed out, Article 22(2) of Directive 93/37 expressly pursues that objective in providing that, where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender must in any event be sufficient to ensure genuine competition."

- (b) In cases C285/99 and 286/99 *Lombardini and Mantovani*: "The Directive nevertheless aims, as is clear from its preamble and second and tenth recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (*Ordine degli Architetti*, paragraph 52). [35] The primary aim of the Directive is thus to open up public works contracts to competition. It is exposure to Community competition in accordance with the procedures provided for by the Directive which avoids the risk of the public authorities indulging in favouritism."
 - (c) In case C-470/99 *Universale-Bau*: "The Directive nevertheless aims, as is clear from its preamble and second and tenth recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (see, among others, *Lombardini and Mantovani*, cited above, paragraph 34). [90] As the Court has already stated..., in order to meet that aim, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts (case 31/87 *Beentjes* [1988] ECR 4635 paragraph 21)."
- 11.8 All of the Court's statements cited above, together with the "improper use" rule in the context of framework agreements, relate to the same basic principle of non-restriction of competition.
- 11.9 Various types of behaviour have been referred to in this paper which could violate the "improper use" rule. To distil them here, they are:
- (a) entering into a long call-off contract simply as a means of extending the reach of the framework in order to avoid the need to conduct a fresh procurement when one was properly due⁴⁰;
 - (b) introducing call-off terms which are too vague or high-level to satisfy the requirement to specify the terms of future call-off contracts sufficiently clearly so as to enable economic operators contemplating submitting tenders are able both to understand the nature of the opportunity and to review the impartiality of the process⁴¹. The law established in *Presetext* and

⁴⁰ See paragraph 8.8 above.

⁴¹ See paragraph 9.12 above.



Telaustria is therefore also a relevant consideration in delineating the “improper use” rule.

- 11.10 It therefore appears that the “improper use” rule is intended to have a more significant function than merely acting as a general catch-all. It is intended to import into the rules on framework agreements the specific significance of the principle of non-restriction of competition to procurement law. It is noteworthy that under general principles of competition law a unilateral obligation not to prevent, restrict or distort competition only falls on dominant companies (either suppliers or purchasers). Also, under competition law there have been few cases where dominant purchasers have been found to have abused a dominant market position. For non-dominant companies under competition law, obligations not to prevent restrict or distort competition only fall on bilateral arrangements between businesses. Accordingly, the obligation on a contracting authority not to use a framework agreement “improperly or in such a way as to prevent, restrict or distort competition” comparatively appears to be quite onerous but is consistent with the general principles of the Public Sector Directive.
- 11.11 The “improper use” rule may create a practical tension in the sense that a framework agreement whose success depends on its extent, or duration, may offend against the rule. There may be situations where the more contracting authorities use the framework, the greater the savings possible. Against this laudable objective, the situation may arise where the contract notice expresses the framework agreement to be capable of use by contracting authorities who have neither agreed to their name being mentioned in the contract notice, nor had anything to do with the procurement⁴². However, it may be completely impractical (or indeed impossible) to define all of the potential users with sufficient transparency, whether by name or closed class. A line has to be drawn somewhere, but doing so may have the effect of limiting the ultimate attractiveness of the whole proposition to a potential supplier. There is scope for the view that the application of the principle of transparency to the identification of contracting authorities in the contract notice can end up curbing the potential usage of a framework in circumstances where greater usage might well have resulted in greater savings for all of its users. At the same time, a framework agreement with a large multitude of contracting authorities able to use it may have the effect of preventing smaller suppliers from being able to compete for it.
- 11.12 There are, of course, competition issues associated with overly large framework agreements and the foreclosing effect they may have on a particular market – especially where there is pressure felt by users to avail themselves of such framework agreements on an exclusive basis - whether or not that is provided for expressly. It is difficult to envisage how this would not at least have the potential to prevent, restrict or distort competition.

⁴² Note however that this is probably unlawful - see paragraphs 6.6 to 6.8 above.



Participation by economic operators: consortium bidding

11.13 There seem to be two circumstances in which consortium bidding might be relevant to framework agreements:

- (a) where consortia are formed to apply for admission to the framework agreement; and
- (b) where consortia are formed between economic operators on the framework agreement to bid in a mini-competition.

11.14 The only reference to consortia in the Regulations is in Regulation 28, which provides as follows:

“(1) In this regulation a “consortium” means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a public contract.

(2) Subject to paragraph (3), a contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of economic operators to be invited to tender for or to negotiate a public contract or to be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract or being admitted to a dynamic purchasing system.

(3) Where a contracting authority awards a public contract to a consortium it may, if it is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations references to an economic operator where the economic operator is a consortium includes a reference to each person who is a member of that consortium.”

11.15 Regulation 28 does not refer to framework agreements. However, it is unlikely that the intention behind this omission is to preclude consortia from bidding for admission to a framework agreement. There is no ostensible reason why contracting authorities should not be free to stipulate that consortia bidding for inclusion on framework agreements must form a legal entity before being admitted. By extension, there seems no reason why suppliers on a framework agreement should not have the ability to form consortia for the purposes of bidding in specific mini-competitions. Regulation 28 does not, however, include specific reference to this possibility.



Participation by economic operators: subcontracting

- 11.16 Some framework agreements appoint a single supplier on the basis of a generic description of the type of works, or, more usually, of the type of services or supplies to be provided under it. The supplier then simply subcontracts that supply to whichever ultimate supplier the contracting authority wishes. The actual framework supplier charges a percentage on top of the amount charged by the subcontractor in return for their being the main contractor to the contracting authority. It is unlikely that such an arrangement would be regarded as compliant since:
- i identifying the works, services or supplies in only generic terms, or allowing the contracting authority to specify particular favoured products, is unlikely to meet the requirement of transparency;
 - i there will be no genuine competition in relation to the actual purchase price at either framework set-up or call-off stage; allowing suppliers to compete on the basis solely of a percentage mark-up would seem to breach the requirements set out in the Henry Brothers⁴³ case;
 - i if the identity of the ultimate supplier is significant, then case law⁴⁴ suggests that that supplier should have been procured through the initial framework agreement procurement; and
 - i this may well be regarded as "improper use" of a framework agreement.

⁴³ Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland [2008] NICA 59.

⁴⁴ Case C-91/08, Wall AG.



12 Remedies for breach of the rules on framework agreements

Summary

Regulation 47 provides that, for the purposes of Part 9 of the Regulations (Applications to the Court), a "contract" is defined as meaning either a public contract or a framework agreement.

The exception to this is Regulation 470, which is concerned with the implications of a declaration of ineffectiveness for contracts based on a framework agreement, but entered into before any declaration of ineffectiveness was made in respect of the framework agreement itself.

There is currently considerable uncertainty concerning the potential application of Regulation 470.

A specific call-off contract will not automatically be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement which gave rise to that contract.

A claim for ineffectiveness of a specific contract may follow some time after an action to seek a declaration of ineffectiveness of a framework agreement.

As regards the grounds available for challenging a call-off contract made under a framework, considering the terms of Regulation 19, a challenge could arise in a number of ways.

There would seem to be no reason in principle why a challenge could not be based wholly or in part upon alleged breach of another Regulation, perhaps most obviously of the general equal treatment, non-discrimination and transparency duties set out in Regulation 4(3).

The process used to establish a framework agreement can be challenged in the same way as a challenge to any other public contract.

Automatic suspension: it is not possible to come to a generalised view as to whether it will be more or less appropriate to lift the suspension with regard to framework agreements than any other contract. The decision will turn on the facts of the particular case.

Status of a framework agreement as a "contract" for the purpose of remedies

- 12.1 The judgment of the High Court of Northern Ireland in *McLaughlin and Harvey Limited v Department for Finance and Personnel*⁴⁵ concluded that a framework agreement remained vulnerable to being set aside notwithstanding that the framework agreement had been entered into. The

⁴⁵ *McLaughlin & Harvey Ltd v Department of Finance & Personnel* [2008] NIQB 122.

reason for this was essentially that a framework agreement was not to be regarded as a contract for the purposes of then Regulation 47(9), which provided that the Court had no power to order any remedy other than damages if the contract in relation to which the breach occurred had been entered into. This decision was followed shortly afterwards in *Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland*⁴⁶.

- 12.2 However, the position changed when the Regulations were amended by the Public Contracts (Amendment) Regulations 2009 with effect from 20 December 2009. Regulation 47 now provides that, for the purposes of Part 9 of the Regulations (Applications to the Court), a “contract” is defined as meaning either a public contract or a framework agreement. The exception to this is Regulation 47O, which is concerned with the implications of a declaration of ineffectiveness for contracts based on a framework agreement, but entered into before any declaration of ineffectiveness was made in respect of the framework agreement itself.
- 12.3 There is currently considerable uncertainty concerning the potential application of Regulation 47O, in part owing to the virtual absence of cases to date concerning the ineffectiveness remedy generally, but in part due to distinct issues concerned with the application of the ineffectiveness remedy in relation to contracts awarded under framework agreements. The discussion of issues below is intended as illustrative rather than comprehensive.
- 12.4 First, it is clear that a specific call-off contract will not automatically be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement which gave rise to that contract (Regulation 47O(2)). However, it is unclear whether the fact of framework agreement ineffectiveness will influence the willingness of the courts to render ineffective a specific contract based on that ineffective framework agreement and, if so, what significance shall be afforded to that factor.
- 12.5 It would also appear possible for a claim for ineffectiveness of a specific contract to follow some time after an action to seek a declaration of ineffectiveness of a framework agreement (it is clear from Regulation 47O(4)(b) that such claims need not be made at the same time). In this regard the time limits in Regulation 47E apply. The 30-day limit applies to specific contracts only if the contracting authority has informed the economic operator of the conclusion of the contract and provided a summary of the relevant reasons. The adequacy of this summary of reasons is to be judged against the standard set out in Regulation 32(9) which may not always be met by contracting authorities using framework agreements - with the result that it may often be the longer, six-month time limit, which applies.

⁴⁶ *Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland* (No 3) [2008] NIQB 153.



- 12.6 If a court is satisfied that the grounds for ineffectiveness apply to any public contract, Regulation 47L provides that it must not make a declaration of ineffectiveness if satisfied that reasons relating to a general interest require that the effects of the contract should be maintained. There have been no cases to date where a court has addressed this issue so considerable uncertainty remains as to how these powers will be exercised. By virtue of Regulation 47O(5), Regulation 47L applies also where an economic operator seeks a declaration of ineffectiveness in respect of a specific contract. The uncertainty and concerns regarding the application of the provision to public contracts generally apply *mutatis mutandis* to specific contracts under framework agreements.
- 12.7 Regulation 47J addresses available remedies in the situation where a contract has been entered into. It makes clear that the relevant remedies in this situation are:
- (a) ineffectiveness (if grounds for ineffectiveness apply);
 - (b) ineffectiveness-related penalties as provided for by Regulation 47N; and
 - (c) an award of damages to an economic operator which has suffered loss or damage as a consequence of the breach.
- 12.8 Sub-paragraph (2)(d) of Regulation 47 makes clear that a Court must not order any other remedies. The position has therefore changed since the adoption in the Regulations of the possibility allowed for by the Public Sector Directive. This view is confirmed by the Northern Ireland Court of Appeal in its recent judgment on the Henry Brothers⁴⁷ appeal. In upholding the original judgment, the Court referred to the fact that there is (as at 2011) a clear power under the Public Sector Directive, for Member States to limit remedies following the establishment of a framework, but that there is no obligation to do so.

Grounds for challenge

- 12.9 Regulation 19 provides that contracting authorities establishing framework agreements shall use one of the procedures set out in Regulations 15-18 to do so. As discussed above, a framework agreement is regarded as a contract for the purposes of Regulation 47. When establishing a framework agreement, a contracting authority is obliged to comply with relevant parts of the Regulations. That obligation is a duty to economic operators. The effect of these provisions is that the process used to establish a framework agreement can be challenged in the same way as a challenge to any other public contract.

⁴⁷ [2011] NICA 59.



- 12.10 A distinct issue arises as regards the grounds available for challenging a call-off contract made under a framework. Considering the terms of Regulation 19, it is clear that such a challenge could arise in a number of ways:
- (a) in a single supplier framework, if a specific contract is awarded other than within the limits of the terms laid down in the framework (Regulation 19(5)(a));
 - (b) in a single supplier framework, if the supplementing of a tender by the supplier envisaged by Regulation 19(5)(b) exceeds what is permissible;
 - (c) in a multi-supplier framework, if a specific contract is awarded without re-opening competition, but the terms applied to that specific contract are not those laid down in the framework agreement;
 - (d) in a multi-supplier framework, if all the terms of the proposed contract are laid down in the framework agreement, but competition is nonetheless reopened e.g. a mini-competition is held simply to improve the price of supplies or services already priced under the framework⁴⁸;
 - (e) in a multi-supplier framework, if the contracting authority does not invite all the suppliers which are capable of performing the proposed contract;
 - (f) in a multi-supplier framework, if a specific contract is to be awarded following a mini-competition, but the provisions of Regulation 19(8) and Regulation 19(9) are not complied with.
- 12.11 Of particular interest are the available grounds for challenging a call-off on the basis of the procedure set out in Regulation 19(7)(b) as it is in these situations where economic operators party to the framework submit tenders for the contracting authority to evaluate; inherently involving the risks of error involved in any assessment of bids. It is clear that such a challenge, as referred to above could be grounded in a breach of Regulation 19(8) or 19(9) or on the basis of an alleged breach of the prohibition in Regulation 19(12) against using framework agreements improperly or in such a way as to prevent, restrict or distort competition.
- 12.12 However, there would seem to be no reason in principle why a challenge could not be based wholly or in part upon alleged breach of another Regulation, perhaps most obviously of the general equal treatment, non-discrimination and transparency duties set out in Regulation 4(3) as well as the general Treaty principles of proportionality and good administration.

⁴⁸ There is arguably an inconsistency between Regulation 19(7), which permits the re-opening of competition where not all the terms of the proposed contract are laid down, and Regulation 19(8) which permits the re-opening of competition on the basis of the "same or, if necessary, more precisely formulated terms, and where appropriate other terms..." (emphasis added). The Public Sector Directive is the same, save that for "or" the wording is "and". The key point is that in all cases the re-opening of competition is permissible where some terms of the proposed contract are lacking, and where the "same terms" are the basis of the competition.



Such a challenge could arise on transparency grounds on the basis of non-disclosure of award criteria in a mini-competition. However, other possibilities exist – for example, in more precisely formulating the terms of a contract to be awarded through mini-competition a contracting authority could use an impermissible technical specification breaching Regulation 9.

Differences between challenges to call-off contracts and other public contracts

- 12.13 It is doubtful whether the use of the word "voluntarily" in Regulation 47K(7)(b) means that, where a contracting authority chooses to comply with Regulation 32(1) to (2A) the obligations are any less onerous because they have chosen voluntarily to avoid the risk of a declaration of ineffectiveness on the narrow third ground for ineffectiveness under Regulation 47K(6), where there has been a breach of the Regulation 19(7)(b) procedure in Regulation 19(8) and 19(9). Interestingly, the equivalent Regulation in the Public Contracts (Scotland) Regulations 2006 (as amended) - Regulation 47(B)(9) – omits the word "voluntarily". This, it is suggested, supports this viewpoint.

The automatic suspension

- 12.14 Once a challenge has been brought, the effect of Regulation 47G is the same with regard to framework agreements as to any other public contract; the contracting authority is required to refrain from entering into the contract. An interesting question then arises as to how the courts are likely to treat framework agreements if the contracting authority seeks an interim order under Regulation 47H to have the suspensive requirement of Regulation 47G lifted. Our view is that it is not possible to come to a generalised view as to whether it will be more or less appropriate to lift the suspension with regard to framework agreements than any other contract. The decision will turn on the facts of the particular case.
- 12.15 Nevertheless, case-law in recent years does provide some insight into the factors that the courts are likely to take into account when considering whether to allow a framework agreement to be entered into. It is now clear that the courts in the UK will use the American Cyanamid approach in procurement cases when considering whether to lift the automatic suspension – thus:
- (a) is there a serious issue to be tried? If so,
 - (b) would an award of damages be an adequate remedy? If not,
 - (c) does the balance of convenience favour the maintaining of the suspension, or its lifting?
- 12.16 This means that framework case-law prior to the introduction of automatic suspension remains relevant as indicative of the likely factors that judges will take into account and can be considered alongside more recent jurisprudence.



- 12.17 Wider public interest considerations and adverse effects upon the interests of third parties have been taken into account; the general public interest in having framework arrangements in place which allow cost savings was cited as a relevant factor by in *European Dynamics SA v HM Treasury*⁴⁹ in a decision to lift an injunction obtained two weeks previously. In *Exel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust*,⁵⁰ Mr Justice Akenhead, in deciding to lift the automatic suspension, was swayed by a clear risk that the arrangements in question might fall apart through subscribers to a purchasing consortium withdrawing and remaining users being left with substantial costs.
- 12.18 Framework agreements also sometimes pose particular difficulties with regard to the assessment of financial loss and whether damages would be an adequate remedy. In *Exel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust*, the judge was of the view that damages could, with expert input, be assessed. In *Henry Brothers (Magherafelt) Limited v Department of Education for Northern Ireland*⁵¹, interim relief was refused notwithstanding that the calculation of damages was unlikely to be straightforward (albeit not impossible).

⁴⁹ *European Dynamics SA v HM Treasury* [2009] EWHC 3419 (TCC).

⁵⁰ *Exel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC).

⁵¹ [2007] NIQB 116.

