Framework Agreements
OGC Guidance on Framework Agreements in the new procurement Regulations

January 2006
OGC Guidance on Framework Agreements

Framework Agreements in the new Public Contracts Regulations

Contents
1. Introduction
2. What is a framework agreement?
3. Why has there been a problem?
4. Setting up a framework agreement
5. Call-offs
6. Examples of framework agreements
   Figure 1: Framework agreements
   Figure 2: Call-off Stage
   Article 32: Framework agreements
1. **Introduction**

The new public sector procurement Directive, which replaces the existing Directives covering public procurement of services, supplies and works, includes a provision (Article 32) on framework agreements for the first time. The UK Regulations, which implement this new Directive, will cover this provision in Regulation 19. The Regulations will come into force on 31 January 2006. This note offers guidance to practitioners on the implications of the new provision on framework agreements. As the new provision is simply making explicit what is already considered to be permissible under the existing EU rules, procurers do not have to await implementation of the new Directive before making use of this guidance note. It can be used now.

2. **What is a framework agreement?**

2.1 The new Directive defines a framework agreement as an agreement with suppliers, 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 quantity. In other words, a framework agreement is a general term for agreements with providers which set out terms and conditions under which specific purchases (call-offs) can be made throughout the term of the agreement. The framework agreement may, itself, be a contract to which the EU procurement rules apply. This would be the case where the agreement places an obligation, in writing, to purchase goods, works or services for pecuniary interest (or consideration in UK legal terminology). For this type of agreement, there is no particular problem under the EU rules, as it can be treated in the same way as any other contract.

2.2 However, the term is normally used to cover agreements which are not, themselves, covered by the definition of a contract to which the EU rules apply (though they may create certain contractually binding obligations). Such agreements set out the terms and conditions for subsequent call-offs but place no obligations, in themselves, on the procurers to buy anything. With this approach, contracts are formed, in EU Directive terms, only when goods, works and services are called off under the agreement. The benefit of this kind of agreement is that, because authorities are not tied to the agreements, they are free to use the frameworks when they provide value for money, but to go elsewhere if they do not.

2.3 It is this form of agreement, where the framework itself cannot be readily classifiable as a contract for the purposes of the current Directives, which has caused much difficulty in relation to the application of the EU procurement rules, and which is addressed explicitly in the new provision and covered in this note. But it should be stressed that the contractual status of a framework agreement should not cause undue concern; the key is that a means of awarding contracts under framework agreements is provided for without the need to re-advertise and re-apply the selection and award criteria from the outset.

3. **Why has there been a problem?**

3.1 The UK has always taken the view that the only sensible approach to such framework agreements is to treat them as if they are contracts in their own right for the purposes of the application of the EU rules. As such, the practice has been to advertise the framework itself, in the OJEU, and follow the EU rules for selection and award of the framework. This provides transparency for the whole requirement across the Community and it removes the need to advertise and apply the award procedures to each call-off under the agreement, on the basis that the framework establishes the fundamental terms on which subsequent contracts will be awarded.

3.2 The European Commission has, during recent years, expressed some concerns about this approach. The main concern has been that, in making call-offs under a framework agreement,
there should be no scope for substantive amendments, through negotiation, to the terms established by the framework agreement itself.

3.3 Discussions with the Commission on complaints involving Northern Ireland framework agreements and the GCat and S-Cat electronic catalogues, however, have led to a better understanding within the Community of how these agreements can fit with the EU rules. The new provision meets the UK's need for greater clarity in this area compatible with current practice.

4. Setting up a framework agreement

4.1 It will be important to consider whether a framework agreement, as defined above, is the right approach for the particular goods, works or services to be purchased. This will be a value for money judgement for the contracting authority or authorities concerned, taking account of the kinds of purchases involved and the ability to specify such purchases with sufficient precision upfront. In particular the framework should be capable of establishing a pricing mechanism. However, this does not mean actual prices should always be fixed, but rather that there should be a mechanism that will be applied to pricing particular requirements during the period of the framework. It should also be possible to establish the scope and types of goods and/or services that will need to be called-off. There should not be any objection to upgrading the product, service or works required so long as it remains within the scope of the original specification.

4.2 In using framework agreements, contracting authorities will need to ensure that their obligations on issues such as sustainability, TUPE and Code of Practice on Workforce Matters are being met. The use of framework agreements does not remove the need to address these issues, where relevant, in awarding a contract at the call-off stage.

4.3 If the framework approach is chosen, it will be necessary to advertise the framework itself in the OJEU, if its estimated maximum value over its lifetime exceeds the relevant EU threshold and the procurements in question are not covered by one of the exclusions set out in the Directives. If the framework itself is not advertised in OJEU, in cases where the procurements are subject to the EU rules, an OJEU notice may be required for individual call-offs. The need to do this will depend on the size of the call-offs and on whether the aggregation rules apply. It is far better, therefore, to advertise the framework itself, so that there is no need to consider the need for advertising as each call-off comes up.

4.4 Contracting authorities which act as central buying organisations may set up and advertise framework agreements on behalf of other contracting authorities. Where the EU rules have been followed by such central buying organisations, other contracting authorities may use the framework agreements as required so long as they have been covered in the OJEU notice (see the second indent of paragraph 4.5 below). The new provision explicitly recognises that contracting authorities may purchase through central purchasing bodies.

4.5 Under the proposed new Directive the OJEU notice must:

- make it clear that a framework agreement is being awarded;

- include the contracting authorities entitled to call-off under the terms of the framework agreement. The authorities can be individually named, or a generic description may be used – eg Government Departments, health authorities, all contracting authorities in a particular region etc. When generic descriptions are used, it is advisable to include, in the notice, a reference to where details of the authorities covered can be obtained. Although the individual circumstances will need to be considered, it is worth seeking to construct the framework so that it can have the maximum take-up across the public sector. However, if the framework is only relevant to, say, certain central Government Departments, that should be made clear;
- state the length of the framework agreement. Under the new provision, once implemented in January 2006, it will be a maximum of four years “except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement”. It is understood that a longer duration could be justified in order to ensure effective competition in the award of the framework agreement because four years would not be sufficient to provide a return on investment. It is worth considering, in any event, whether a framework agreement is necessarily the best vehicle for a longer term project;

- include the estimated total value of the goods, works or services for which call-offs are to be placed and, so far as is possible, the value and frequency of the call-offs to be awarded under the agreement. This is necessary in order for providers to be able to gauge the likely values involved and to provide a figure for the framework overall which, as with other contracts, should not normally be exceeded without a new competition taking place.

4.6 Article 19 of the new procurement Directive, as implemented by Regulation 7 of the new procurement Regulations, enables contracting authorities to reserve the right to participate in a public contract to supported employment factories and businesses. The ability to reserve contracts in this way will apply to framework agreements as well as to contracts generally. The OJEU notice, for the award of the framework agreement, will need to make it clear that it is reserved for sheltered workshops (the term used for supported factories and businesses in the EU Directive itself) under Article 19 of the Directive. Guidance on Article 19 is to be issued by the OGC and DWP.

4.7 Once the OJEU notice has been despatched, the authorities setting up the framework agreements should follow the rules for all phases of the procurement process covered by the Directives. This will include the use of the open or restricted procedures or, where the conditions for their use are met, the negotiated or competitive dialogue procedures, and adherence to the rules on specifications, selection of candidates and award. The new Directive does not explicitly prohibit the possibility of concluding framework agreements under the new competitive dialogue procedure. However, it is difficult to imagine cases where the conditions governing the use of a competitive dialogue would be satisfied and the use of a framework agreement would be practicable. At the award stage, the providers to be included in the framework agreements should be chosen by applying the award criteria, to establish the most economically advantageous tender or tenders, in the normal way.

4.8 Framework agreements can be concluded with a single provider or with several providers, for the same goods, works or services. In the latter case, there must be at least three providers, provided that there are sufficient candidates satisfying the selection criteria and which have submitted compliant bids meeting the award criteria. The agreement will establish the terms which will apply under the framework, including delivery timescales and daily or hourly rates. Figure 1 (at end of document) sets out the questions which need to be asked in order to establish how a framework agreement should be treated.

4.9 Contracting authorities awarding framework agreements will need to apply the new mandatory standstill (Alcatel) rules. The standstill period should apply to the award of the framework itself and not to contracts, or call-offs, awarded under the framework. For the detail on these rules, please see the separate advice on Alcatel on the OGC website.

5. **Call-offs**

5.1 When awarding call-offs (individual contracts), under framework agreements, authorities do not have to go through the full procedural steps in the EU Directives again so long as the rules were followed appropriately in the setting up of the framework agreements themselves. However, the relevant EU Treaty provisions and Treaty-based principles, including non-discrimination, still apply at this stage, and authorities need to be careful to ensure that nothing is done which is discriminatory, improper or which distorts competition. See Figure 2 (at end of document).
5.2 The length of call-offs, under a framework agreement, is not specifically limited by the Directives. For example, call-offs for consultancy services might be for three, six or twelve months or longer. It may be the case, as a result, that individual call-offs extend beyond the four-year term of the framework itself. However, this should not be done in order to circumvent the EU rules. For example, it would be difficult to justify a 12 month call-off, right near the end of the life of the framework itself, where the normal pattern for the goods or services in question had been for such call-offs to last for just one month at a time. The length of call-offs, as with other contracts, should be appropriate to the purchases in question and should reflect value for money considerations.

5.3 Where a framework agreement is concluded with just one provider, call-offs under the agreement should be awarded on the basis of the terms laid down in the agreement, refined or supplemented by other terms in the framework agreement but not agreed at that time (see paragraph 5.6 for examples of how terms may be supplemented). It is the same principle as that applying to a normal contract, except that, with a framework agreement, there will be an interval between the awarding of the framework itself and the calling-off of the goods, works or services under it. There can be no substantive change to the specification or the terms and conditions agreed at the time that the framework is awarded.

5.4 Where frameworks, for the same goods, works or services, are awarded to several providers, there are two possible options for awarding call-offs under the framework.

**Option one: apply the terms of the framework agreement**

5.5 Where the terms laid down in the framework agreements are sufficiently precise to cover the particular call-off, the authority awards the call-off without reopening competition. The Directive does not specify how this should be done. However, in order to ensure value for money, the authority should award the call-off to the provider who is considered to provide the most economically advantageous (vfm) offer based on the award criteria used at the time that the framework was established. Where that provider is not capable or interested in providing the goods, services or works in question, the authority should turn to the next best provider. For example, frameworks might be concluded with five providers 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 provider offering the most economically advantageous offer, using the original award criteria, for that item alone without reopening the competition. If that provider for any reason could not supply the items required at that time, the authority would go to the provider offering the next most economically advantageous offer, and so on.

**Option two: hold a mini-competition**

5.6 Second, where the terms laid down in the framework agreements are not precise enough or complete for the particular call-off, a further or mini competition should be held with all those suppliers within the frameworks capable of meeting the particular need. This does not mean that basic terms can be renegotiated, or that the specification used in setting up the framework can be substantively changed. Substantive modifications to the terms set out in the framework agreement itself are not permitted. It is more a matter of supplementing or refining the basic terms to reflect particular circumstances for the individual call-off. Examples of such terms are:

- particular delivery timescales;
- particular invoicing arrangements and payment profiles;
- additional security needs;
- incidental charges;
- particular associated services, eg installation, maintenance and training;
- particular mixes of quality systems and rates;
- particular mixes of rates and quality;
- where the terms include a price mechanism;
- individual special terms (e.g. specific to the particular products/services that will be provided to meet a particular requirement under the framework).

5.7 Where a mini-competition is held for a particular call-off, the contracting authority should consult in writing (invite to tender) the providers within the framework which are capable of meeting the particular need. This does not necessarily mean that every provider in the framework must be included. A framework may cover a number of different supplies or services, and there is no obligation to consult those providers which had not agreed, in awarding the framework, to provide the particular supplies or services which are the subject of the call-off. Indeed, the framework may be divided into categories, each covering different supplies or services. In that case, the authority only need consult providers in the categories which cover the goods or services required.

5.8 However, 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 on who should be consulted should be made on the basis of the kinds of supplies or services required and which providers can supply them, based on their offers at the time the framework agreement itself was awarded.

5.9 Contracting authorities should state the subject matter for the call-off for which tenders are being requested, and also a time limit which is sufficient to enable the selected providers to submit their bids for the particular call-off. This time limit should take account of the complexity of the call-off and the time needed for the different tenderers to submit their bids. In addition, where the authority has decided to make use of the option to hold an electronic auction for the mini competition, it must abide by the rules covering e-auctions as set out in the Directive and Regulations. Tenders should be submitted in writing, and they should remain confidential until the time limit has expired. The contracting authority should award the call-off to the provider which has submitted the most economically advantageous tender on the basis of the award criteria set out in the framework itself focusing on the particular requirement. New award criteria should not be added, but weighting may need to vary to reflect the particular requirement.

6. **Examples of framework agreements**

Frameworks for supplies, services and works are allowed under the new provision. Examples of each type are as follows (but it is important to read the detailed approaches set out in paragraphs 8-20 of this note):

- **supplies from a single provider**: a framework agreement is required for desks by one authority and is awarded, following OJEU and selection, on the “most economically advantageous” basis to a single supplier. The authority calls-off its requirements for desks, during the period of the framework, on the basis of the terms agreed when the framework was set up;

- **supplies from several providers**: a framework agreement is required to cover a number of authorities’ paper needs over four years. Following the OJEU notice and the selection process, based on financial and economic standing and technical capacity, bids are evaluated on the “most economically advantageous” basis for entry into the framework. A number of suppliers are included in the framework to supply a variety of paper types – plain, lined, recycled, coloured etc – over the four-year period. The authority goes to the supplier within the framework whose offer is the “most economically advantageous”, based
on the original award criteria, for each call-off required throughout the four years. As the terms do not need to be refined or supplemented in this case, the authority has no need to use the mini-competition option;

- **consultancy services**: a framework agreement is required for a range of consultancy services. An OJEU notice is issued and candidates for the framework are selected on the basis of financial and economic standing and technical capacity – including track record and ability. Bids are then evaluated on the “most economically advantageous” basis, including quality systems and fee rates. A number of companies are included in the framework, covering the range of consultancy services required. Hourly rates for different grades of staff form part of the agreed terms. When there is a need to call-off specific services, within the framework, the contracting authority holds a mini competition with all providers capable of meeting that need for the category of services required in order to establish which company provides the “most economically advantageous” (vfm) offer for the particular mix of grades/rates required;

- **minor works**: a framework is awarded to several contractors on a UK-wide basis, following OJEU, selection and award on the “most economically advantageous” basis. The contractors provide a range of services within categories, such as building, plumbing and electrical services. Hourly rates, call out charges and levels of quality are set under the framework agreement. When a call-off is required, the authority goes to the contractor providing the “most economically advantageous” offer, on the basis of the original award criteria, for the particular need. There is no need for a mini-competition in this case, as the terms do not need to be refined. An alternative approach might be to award a framework to a single contractor for each region; and

- **major works 1**: a framework is needed for units to be constructed as part of a major works programme. Following an OJEU notice and a selection process, based on financial and economic standing and technical capacity, a framework is awarded to a small number of prime contractors for units to be constructed as necessary throughout the period of the agreement. The kinds of units in question might include prison cells, categories of hospital beds (eg acute, accident and emergency etc) garages etc, where there is a standard size, design or requirement. The awards are made on the basis of the particular mix of quality/unitary prices to meet the need. At the call-off stage, a mini-competition is held and bids are invited from all contractors capable of meeting the requirement for the specific units, with the call-off awarded to the contractor providing the “most economically advantageous” bid for the units required.

- **major works 2**: a framework is required for the construction of standard building units or office space in various locations over a four-year period. Following OJEU and the selection process, based on financial and economic standing and technical capacity, a framework is awarded to a number of prime contractors on “the most economically advantageous tender” basis. Each of the prime contractors has the skills and supply chains necessary to undertake the different aspects of the construction work during the period of the framework. A decision is made, at each call-off, as to whether a mini-competition is needed – based on whether the terms need to be refined. If a mini-competition is necessary, bids are invited from all prime contractors capable of meeting the particular need. Call-offs under the framework, which may be awarded any time up to the end of the agreement itself, can continue beyond the period of the agreement until the work is completed.

OGC
January 2006
Framework Agreements are agreements with one or more suppliers which set out terms and conditions for subsequent procurements.

Does the agreement include a commitment by the procurer to buy something?

- **NO**
  - This is a framework agreement, for which contracts subject to the EC rules are formed only when call-offs are made under the framework.

- **YES**
  - This is a framework contract and should be treated as any other contract under the EC rules (see para 2 of text).

Is the framework agreement, over its lifetime, estimated to fall below the relevant EC threshold? Or is otherwise not covered by the full rules?

- **NO**
  - Apply the EC rules to advertising and awarding the framework itself as if it were a contract to purchase something. Apply the specific provisions of Article 32 to the call-offs under the framework.

- **YES**
  - Only the EC Treaty provisions and Treaty-based principles, including non apply, together with the value for money policy.
Call-off stage

Is there only one framework supplier?  

- NO
  
  Where there are several suppliers in the framework, are the terms agreed in setting up the framework precise enough for the best supplier to be identified for the particular need?

  - NO
    
    Hold a mini competition between those suppliers in the framework capable of meeting the particular need using the original terms supplemented or refined as necessary.

  - YES
    
    Award the call-off to the supplier who can provide the goods, works, or services using the refined terms on the most economically advantageous basis.

- YES

Call-off the relevant supplies, works or services using the terms agreed when the framework was set up.