

## Effective public sector frameworks

As both central and local government strive to put in place models that will secure greater procurement efficiencies and improved public services, it is timely to revisit the benefits (and pitfalls) of framework agreements.

Sometimes an overly restrictive interpretation of the procurement rules can constrain authorities unnecessarily, leading them to promote 'compliance' at the cost of 'delivery' against the requirements. In this article we consider some of the actual and perceived constraints on using framework agreements, some of the typical weaknesses observed (from the suppliers' perspective), and offer some suggestions for strengthening future frameworks.

They have their detractors of course but it seems clear that the Efficiency and Reform Group (ERG), at least, have accepted that if frameworks are properly designed and implemented they are best viewed as part of the solution rather than part of the problem.

Not all frameworks are the same, however, either in terms of their structure and effectiveness or indeed their objectives, and both the procurement legislation (ie Directive 2004/18/EC (the so-called 'classic directive') and the Public Contracts Regulations 2006 (as amended)) and the Commission Communications on Framework Agreements expressly recognise this by making provision for "agreements that establish all the terms" on the one hand and those that don't on the other.

The use of framework agreements has increased in recent years not just in the UK where they have long been in favour with procurement officers, but also in other Member States where the practice of letting frameworks has historically been less prevalent. Recent research<sup>2</sup> also demonstrates that Framework Agreements are cheaper to run over their lifetime. They also attract high numbers of bidders and so offer 'competitiveness'.

The procurement officer's overall objective, of course, is always to award (quickly and efficiently) a framework that will offer a quick, compliant route to the supply of goods or services without the need for Users to run their own full tendering exercise each time.

There have been many success stories. Buying Solutions<sup>3</sup> various frameworks, for example, have achieved much for their public sector customers, with demonstrable savings to the tax payer. In May 2010, the NAO also reported that an estimated 2500 OJEU tendering exercises could have been avoided if the UK bodies concerned had instead used one of the existing, compliant framework agreements.<sup>4</sup>

There is it seems, much for central purchasing bodies and other contracting authorities to play for in these times of economic constraint, and frameworks seem likely to remain a feature of the procurement landscape.

### Actual and Perceived Constraints on Frameworks

A number of common concerns or reservations about frameworks continue to be voiced, however, and may be influencing purchasing decisions either consciously or unconsciously.

The first is the assertion that any framework can only last for four years.

In fact what the rules say is that a framework agreement cannot be for longer than four years "except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement".<sup>5</sup>

The Commission's Explanatory Note observes that "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".

Many of the frameworks we see are for longer than four years, and where they have a clear, objectively justified rationale for that (and a robust audit trail for the decision), they remain reasonably safe from challenge.

But the Note also expresses the view that the four year limit also applies to any call-off contract awarded under the framework. This may be the default position, but if the framework itself is justifiably for more than four years (say five years) then arguably any call off contract may similarly be for up to five years, provided always that the award is not

<sup>1</sup>CC/2005/03. European Commission's 'Explanatory Note – Framework Agreements- Classic Directive'.

<sup>2</sup>Public Procurement in Europe Cost and Effectiveness - (PWC) a report for the European Commission.

<sup>3</sup>now the 'Government Procurement Service'

<sup>4</sup>NAO/Audit Commission Review of Collaborative procurement Across the Public Sector, May 2010.

<sup>5</sup>Regulation 19 (10) of the Public Contracts Regulations 2006 (as amended).

used “improperly” or managed in such a way as to ‘prevent, restrict or distort competition’. It is clear that a call-off contract can run beyond the expiry date of its framework agreement. So theoretically a call-off for one year could legitimately be awarded on the last day of a three year framework, if a one-year call-off is objectively required.

Another view sometimes expressed is that frameworks are only suitable for common commodities such as repeat office supplies or stationery. In fact, as experience in the UK and more widely has shown, frameworks can prove a highly successful contracting model for a vast range not just of supplies (straightforward and complex), but also services (including consultancy and professional services) and even public works. Provided the requirement is well understood and fully described in the tender process a framework can deliver a very lean procurement route and achieve significant savings especially when used as part of a collaborative approach amongst several contracting authorities.

Another constraint often referred to is that once the framework has been awarded it is not possible to admit additional contracting authorities as ‘users’. This is essentially correct; the rules state that frameworks may only be used between the contracting authorities and the economic operators originally party to the framework agreement”.<sup>6</sup>

It may be justifiable for a successor body to replace a named contracting authority as one of the parties, but additional authorities not originally named must not generally be permitted access to it.

### Typical weaknesses encountered and some solutions to them

Quite often, an otherwise well designed framework will prove to be out of reach of other public bodies simply because they were not aware of the proposal to award it and do not fall within the OJEU description of the participating organisations. A multi-user framework (ie one awarded by a central purchasing body) will often achieve the greatest efficiencies but only if the potential user group is clearly identified at the outset of the procurement exercise. The time taken to identify all the potential users, by local and regional advertising, discussion between managers and possibly the careful use of PINs is generally well worth the investment since it will ensure that the framework will attract a larger number of users thereby benefitting from economies of scale and better pricing competition.

The effort spent on designing a framework divided into categories or ‘lots’ can also prove rewarding too since this structure allows additional flexibility in terms of the range of services/supplies that may be purchased under it. If the category is well-understood and managed, the different size and characteristics of the various suppliers can be catered

for, making it easier for niche or small and medium sized enterprises (SMEs) to break into the market for example. It is essential to get the design of the lots right from the outset since they will form a central role in meeting your customers’ requirements and will have a crucial part to play in the call-off mechanism. Engaging early on with the various stakeholders will therefore yield great returns for the success of the framework.

If there is to be mini-competitions it is essential that the framework agreement makes it clear how this will operate. How will you identify the providers who are capable of meeting the specific call-off requirement? It may be that the answer is in the design of the lots and that all the providers in the relevant lot will be invited to tender, but this can be problematic if the lot has a large number of providers on it. Providers can find they are invited to numerous, repeat mini-competitions; where the high number of competitors makes the exercise unattractive. Designing the lots and call off mechanism with this difficulty in mind can remove the problem and make call-offs slicker and easier exercises for all involved.

A mini-competition, just like the process at the framework award stage is only successful if the specific requirements for the task are thoroughly analysed by the public body<sup>7</sup> and clearly communicated to the bidders. The providers’ general capabilities are already known. So at the call-off stage the authority has the additional luxury of being able to state with more precision what it is they are looking for. Is the delivery method critical? Is it essential to have specialist knowledge in a ‘sub-category’? Will the provider need to make staff available on site or not? Some are excellent at ‘partnering’ with the client, others less so. Particular delivery timescales may be important.

Providers can vary enormously in quality of service and their approach to delivery. At call-off there is the opportunity to focus on what really matters to the public body concerned, the ‘user’.

Rarely can the framework itself predict all the specific requirements of Users but with more detailed specifications the mini-competition can prove a flexible tool.

Finally, there may not be a need for a mini-competition at all. The framework may in fact enable the user to take the ‘catalogue’ approach to the purchase. Sometimes users overlook this mechanism, perhaps because of an overcautious approach or perhaps because they simply haven’t been told how to use it.

### Costs and returns

Providers will have expended huge resources just to win a place on the framework. That represents a real cost to the UK economy. When they do get onto it it must surely make economic sense for all of them to come away feeling that

<sup>6</sup>Article 32(2) of the Directive.

<sup>7</sup>Remembering that it is not permitted to apply selection criteria (financial standing; general technical or professional capability) at this stage as this was undertaken at the framework award stage.

it was worth the effort, that they would do it again and that the public sector is after all a reliable customer. Without that return on investment for providers it becomes harder for the public sector to attract the range of providers it needs to meet its requirements and to ensure effective competition. Without effective competition the tax payer loses out.

It is possible to devise compliant mechanisms which ensure an even or predictable (and transparent) distribution of work across a multi-supplier framework. The OGC Guidance<sup>9</sup> suggests one model which involves adopting an initial ranking of the providers on the basis of the award criteria used at the time that the framework was established. The OGC Guidance goes on to consider a range of issues that might well form part of a requirement for a mini-competition such as the need for 'special security considerations' and the need for 'a particular mix of rates and quality'. Other mechanisms are possible, but they must all be made clear in the framework documentation itself and should not be left entirely to the call-off stage.

### Some Conclusions

Clearly, not all frameworks are the same. Those for 'services' and works often require more sophisticated designs than those for straightforward supplies, since they cover a wider range of variable scenarios.

Overall, though, both providers and purchasers benefit from well-designed and thought out frameworks that are tailored to their user-requirements.

Users welcome clear instructions on how to purchase from the framework. Providers similarly need to know exactly how the model is intended to operate. If the number of mini-competitions can be reduced that is a benefit too; because 'catalogue' purchasing is quicker and easier to use. But the ability to use a catalogue approach relies on a high level of upfront design work by whoever is establishing the framework.

On the issue of Price, the management of frameworks can suffer (in the same way as other public contracts), from a tendency to look simply for low hourly or day rates rather than making an informed judgement based on quality of outcomes and service levels. Good service providers save the client money over the life of the contract. Price competition comes from a variety of directions and sometimes providers will pitch extremely low rates, knowing that they are not sustainable. In either case (ie the purchaser setting the Price criterion as high as 50% or even 60% of the score or bidders pitching too low) the outcome is likely to be poor. And poor outcomes can lead to embarrassment for the customer organisation.

<sup>9</sup>OGC Guidance on Framework Agreements in the Procurement Regulations, September 2008 (now archived but still available on-line).

A clear, fair mechanism that offers the prospect of predictable work levels; mini-competitions based not simply on driving down the hourly rates (from those already subjected to competition at the framework stage) but focussed on outcomes and quality of service; and frameworks that do actually move the relationship on from the status of simply being the starting point for further, often costly competitive (mini-) tendering, will all contribute to accelerated procurement and improved services.

By involving users, providers, advisers and other stakeholders in the design process; anticipating the various avenues by which the users may seek to appoint a provider and publishing clear instructions to users that cover those eventualities, purchasing bodies can meet the challenge of government's demands for better procurement. What is needed is a sound appreciation of and respect for both *the purchase and supply-side* of the equation.

The procurement rules promote competitive tendering because that is good for securing efficient processes and quality outcomes. One thing is certain: compliance with the rules is not, despite what detractors may say, the enemy of delivering effective procurement. But at the same time compliance is not a substitute for good procurement.



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