

Frameworks

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The question



- How open to challenge - and on what grounds - is the typical framework, e.g. Cabinet Office or NHS Supply Chain, at the stage that it is established/procured?

Framework challenges



- *DWF LLP v Secretary of State for Business Innovation and Skills (2014), CA*
 - Legal services
 - Contracts were “*bafflingly called a ‘framework’*”

- *Lettings International Ltd v London Borough of Newham (2008)*
 - Construction contracts

- *McLaughlin & Harvey Ltd v Department of Finance and Personnel (2011), NICA*
 - Maintenance and management of housing

- *Amaryllis v HM Treasury sued as OGCBuying Solutions (2009)*
 - Furniture

- *Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland (2011)*
 - Construction

- *Medicure Ltd v The Minister for the Cabinet Office (2015)*
 - Locum doctors

Usual grounds of challenge



- Elimination at PQQ
- Scoring challenges
- Undisclosed criteria, weightings

Specific requirements of a framework which may give rise to challenge (1)



- Term not to exceed 4 years save in exceptional cases duly justified, in particular by the subject-matter of the framework (Reg 33(3))
- See also, Recital 62:
“.....while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer. In particular, it should be allowed to set the length of individual contracts based on a framework agreement taking account of factors such as the time needed for their performance, where maintenance of equipment with an expected useful life of more than four years is included or where extensive training of staff to perform the contract is needed.....”

.....It should also be clarified that there might be exceptional cases in which the length of the framework agreements themselves should be allowed to be longer than four years. Such cases, which should be duly justified, in particular by the subject of the framework agreement, might for instance arise where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement.”

Specific requirements of a framework which may give rise to challenge (2)



- Call off contracts can only be made between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework as concluded (Reg 33(6))

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- Case under Directive 2004/18 where the wording was slightly different but explicit reference made in the judgment to wording of Directive 2014/24
- An authority wishing to call off must be clearly identified in the tender documents with an explicit reference that makes both the secondary authority and any interested EO aware
- Reference can be in the framework agreement or another part of the tender documents provided advertising, legal certainty and transparency are complied with

➤ See also Recital (60) to Directive 2014/24:

The instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as it is. However, certain aspects need to be clarified, in particular that framework agreements should not be used by contracting authorities which are not identified in them. For that purpose, the contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified.....

- *..... This implies for instance that where a central purchasing body uses an overall register of the contracting authorities or categories thereof, such as the local authorities in a given geographical area, that are entitled to have recourse to framework agreements it concludes, that central purchasing body should do so in a way that makes it possible to verify not only the identity of the contracting authority concerned but also the date from which it acquires the right to have recourse to the framework agreement concluded by the central purchasing body as that date determines which specific framework agreements that contracting authority should be allowed to use.*

Specific requirements of a framework which may give rise to challenge (3)



- A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged (Reg 33(2))

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- The phrase “where appropriate” does not mean that an indication of the quantity of services which the framework agreement covers is merely optional:

- (i) Requirement (*now Reg 6(8)*) to take into account maximum estimated value of all contracts envisaged for total term. It is imperative that the original CA states the total quantity which subsequent contracts may comprise

- (ii) Where there is a single contractor, contracts must be awarded within the limits of the terms laid down in the agreement - so once the limit is reached, the agreement will no longer have any effect

- (iii) This interpretation ensures that the fundamental principles governing the awarding of public contracts are observed:
 - All conditions and rules must be drawn up in a clear, precise and unequivocal manner
 - Principles of equal treatment and transparency would be affected if the original CA did not set out the total quantity covered by the agreement
 - Obligation of transparency is particularly important given that CAs are not bound to publish a notice of the results of a call off contract
 - Reference to the “usual requirements” of the other specified CAs is not sufficiently explicit
 - If a CA was not obliged to indicate the quantity and maximum amount at the outset, this could be used to divide a contract artificially so that it remained below threshold

- (iv) The requirement to indicate the quantity and amount of the services that the agreement will cover is a manifestation of the prohibition on using framework agreements improperly or so as to prevent, restrict or distort competition

- Court's conclusion:
“it cannot be accepted that contracting authorities that are not signatories to the framework refrain from determining the quantity of services that may be required”

- How much specificity is needed?
 - Not vague (the usual requirements)
 - An estimate but.....
 - *“the maximum estimated value, net of VAT, of all contracts envisaged for the total term of the framework agreement...” (Reg 6(8))*

Specific requirements of a framework which may give rise to challenge (4)



- Contracts may under no circumstances entail substantial modifications to the terms laid down in the framework agreement (in particular, where there is a single framework contractor) (Reg 33(7))

- Mini-competitions shall be based on the same terms as applied for the award of the framework and, where necessary, more precisely formulated terms, in accordance with the following procedure:
 - CAs must consult all EOs capable of performing
 - Time limit must be sufficiently long
 - Tenders must be in writing
 - CAs shall award each contract to the EO submitting the best tender on the basis of the award criteria for the framework agreement (Reg 33(11))

Specific requirements of a framework which may give rise to challenge (5)



- Prohibition on improper use
 - See Regulation 19(12) of the 2006 Regulations
 - Not in the 2015 Regulations
 - But see Recital 61 of Directive 2014/24:

“...Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition...”

- See consideration (and rejection on facts) in *Medicure*

Outsourcing Playbook



Version 2, June 2020:

- Frameworks are *“an efficient method for government to procure common goods and services”*
- To purchase common goods and services including locum doctors, laptops, police cars and electricity
- Using frameworks inappropriately can have negative consequences for CAs, markets and EOs and can unintentionally inflate prices
- Common goods and services should be purchased through a government framework
- Bespoke services should be subject to a full procurement process that allows for appropriate dialogue with the market

Bidders - incentives and disincentives to challenging framework procurements



- Losing bidders shut out of a wide market for 4 years (or more)
- During the course of a procurement, unattractive to tenderers to object to:
 - A longer than 4 year term
 - Possibility of other CAs joining
 - Uncertain estimate of overall value
- Damages for a losing bidder may be uncertain (although this may help on an application to lift the automatic suspension)

Authorities – prepare for risk areas



- Scoring errors
 - Wide margin of discretion
 - But challenges can succeed – *Woods Building Services v Milton Keynes Council* (2015); *EnergySolutions EU Ltd v NDA* (2016)

- Reasons and record keeping
 - Beware unclear reasons and inadequate record keeping
 - *Woods v Milton Keynes; Lancashire Care NHS Foundation Trust v Lancashire County Council* (2018)

Facing the challenge – issues to consider



- Disclosure
- Confidentiality
- Expedited trial