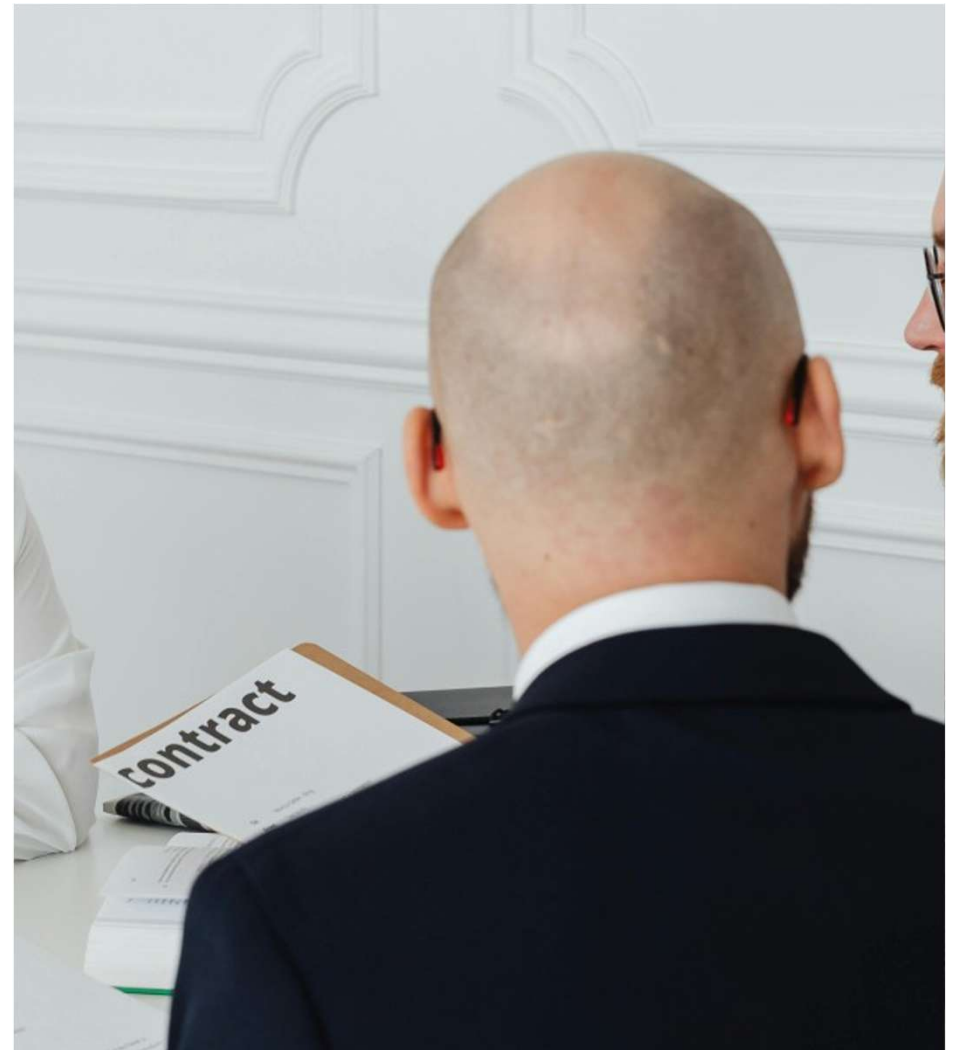


How far can you go in tightening or adding to participation conditions at the call-off stage under a framework, without breaching the framework's original structure or legal principles?

Valentina Sloane KC
Monckton Chambers

PART ONE

Relevant provisions of PA 23



Section 19 Award of public contracts following a competitive tendering procedure

(1) A contracting authority may award a public contract to the supplier that submits the most advantageous tender in a competitive tendering procedure.

...

(3) In assessing tenders for the purposes of this section a contracting authority—

(a) must disregard any tender from a supplier that does not satisfy the conditions of participation

Section 22 Conditions of participation

*(1) A contracting authority **may** set conditions of participation in relation to the award of a public contract under section 19 only if it is satisfied that the conditions are a proportionate means of ensuring that suppliers have—*

(a) the legal and financial capacity to perform the contract, or

(b) the technical ability to perform the contract.

(2) A “condition of participation” is a condition that a supplier must satisfy if the supplier is to be awarded the public contract.

(5) When considering whether a condition is proportionate for the purposes of subsection [\(1\)](#), a contracting authority must have regard to the nature, complexity and cost of the public contract.

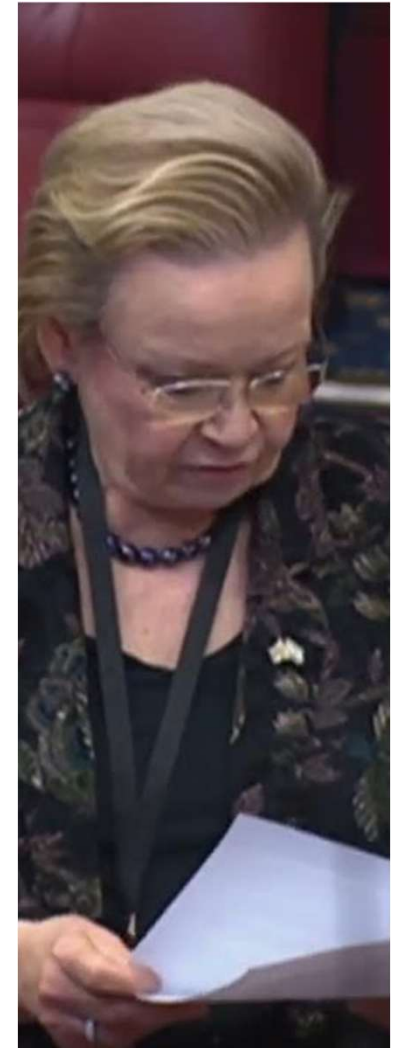
(6) A condition of participation may require the provision of evidence that is verifiable by a person other than the supplier.

*(7) If a supplier does not satisfy a condition of participation, the contracting authority **may** exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure.*

(8) A supplier is to be treated as satisfying a condition of participation to the extent that a supplier associated with the supplier satisfies the condition.

Interplay between “must”/”may”

- Baroness Noakes: *“an Alice in Wonderland world where a supplier which has fallen foul of participation provisions can take part in the tender process, but only on the strict understanding that it cannot win the contract. That does not make any sense to me”*
- Baroness Scott of Bybrook: flexibility to decide when to assess
- Case C-403/21 *NV Consult*, para 65



Section 45 Frameworks

(3) Unless subsection (4) applies, a framework may only provide for the future award of a public contract following a competitive selection process.

(4) A framework may provide for the future award of a public contract without competition between suppliers—

(a) in circumstances where only one supplier is party to the framework, or

(b) if the framework sets out—

(i) the core terms of the public contract, and

(ii) an objective mechanism for supplier selection.

(5) A framework must include the following information—

(a) a description of goods, services or works to be provided under contracts awarded in accordance with the framework;

(b) the price payable, or mechanism for determining the price payable, under such contracts;

(c) the estimated value of the framework;

(d) any selection process to be applied on the award of contracts;

Concerns during passage of Bill

Lord Lansley:

- *“What often happens is that you end up with something that is a speculative framework”*
- *“subsequent competitions are, frankly, no less onerous than the original competition would have been”*
- *“can impose all kinds of difficulties, especially on SMEs”*
- *Important to entrench original competition for subsequent contracts on offer*

Risk of misuse

- Lord Scriven:

“frameworks used for a number of purposes completely alien to why the original contract framework was set. It debars competition and innovation, particularly when the public body decides that it wants something completely tangential to the original framework contract and the original purpose”

Old position

Call-off contracts

28. When awarding call-off contracts under a framework agreement, a contracting authority does not have to repeat many of the stages of a full competitive tendering process required by the Regulations, provided that the framework agreement itself was set up in accordance with the Regulations. For example, no contract notice is required for call-off contracts awarded under a framework agreement and as suppliers on the framework are already 'pre-qualified' there is no need to undertake this element of a normal full competitive process. 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 agreement was awarded and should not be repeated at the call-off stage. To do so would constitute a breach of the Regulations.

*"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

A “substantial and important amendment”

Baroness Neville-Rolfe:

- “It allows contracting authorities to set conditions of participation in a competitive selection process for the award of a contract under a framework”.
- “New subsections (3A) to (3F) impose restrictions on the use of such conditions to those which apply to conditions of participation in a competitive tendering procedure under Clause 21”.
- “These include limiting the conditions in various ways, for example, to those which are a proportionate means of ensuring that suppliers have the relevant qualifications, experience and technical ability to perform the contract, of ensuring that the conditions do not break the rules on technical specifications, and of requiring that equivalents must be allowed where particular qualifications are required”.

Section 46 Competitive selection process

(1) A competitive selection process **may** provide for conditions of participation only if the contracting authority is satisfied that the conditions are a proportionate means of ensuring that suppliers party to the framework have—

- (a) the legal and financial capacity to perform the contract, or
- (b) the technical ability to perform the contract.

(2) In this section, a “condition of participation” means a condition that a supplier must satisfy in order to be awarded a public contract in accordance with the framework.

(8) A competitive selection process may provide for the assessment of proposals, but **only by reference to one or more of the award criteria against which tenders were assessed in awarding the framework.**

(9) The award criteria may be **refined** for the purposes of subsection (8).

(10) In this section, a “competitive selection process” means a competitive selection process for the award of a public contract in accordance with a framework.

PART TWO

Comparison with EU law and the GPA



EU law and PCR: 3 categories

Selection criteria (Art 58)

“Limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded”

Award criteria (Art 67)

“Criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question”

Conditions of contract (Art 70)

- Special conditions
- Linked to subject-matter of contract
- Economic, innovation, environmental, social, employment

Selection criteria v award criteria

- *Lianakis*: “award criteria” do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers’ ability to perform the contract in question
- *Ambisig*: *The quality of performance of a public contract may depend decisively on the ‘professional merit’ of the people entrusted with its performance*

Selection criteria v conditions of contract

Case C-295/20 *Sanresa*: requirement to have a permit to ship waste could only be a condition of contract NOT a selection criterion

- *“The assessment of the technical and professional ability of a candidate or a tenderer thus depends, in particular, on a retrospective evaluation of the experience gained by the operators through the performance of previous contracts”*
- *“the obligation to obtain the consent of the competent authorities concerned, in order to transfer waste from a Member State to another State, equally does not relate to the technical and professional ability of a candidate or tenderer”*
- *“That assessment is not called into question by the fact that paragraph (g) of Part II of Annex XII to Directive 2014/24 permits economic operators to provide evidence of their technical ability through an indication of the environmental management measures they will be able to apply when performing the contract. The environmental management measures referred to in that provision are measures that an economic operator intends to apply on its own initiative”.*

Other conditions of contract

- Minimum wage requirements: Case C-115/14 *Regiopost*

GPA

Article VIII Conditions for Participation

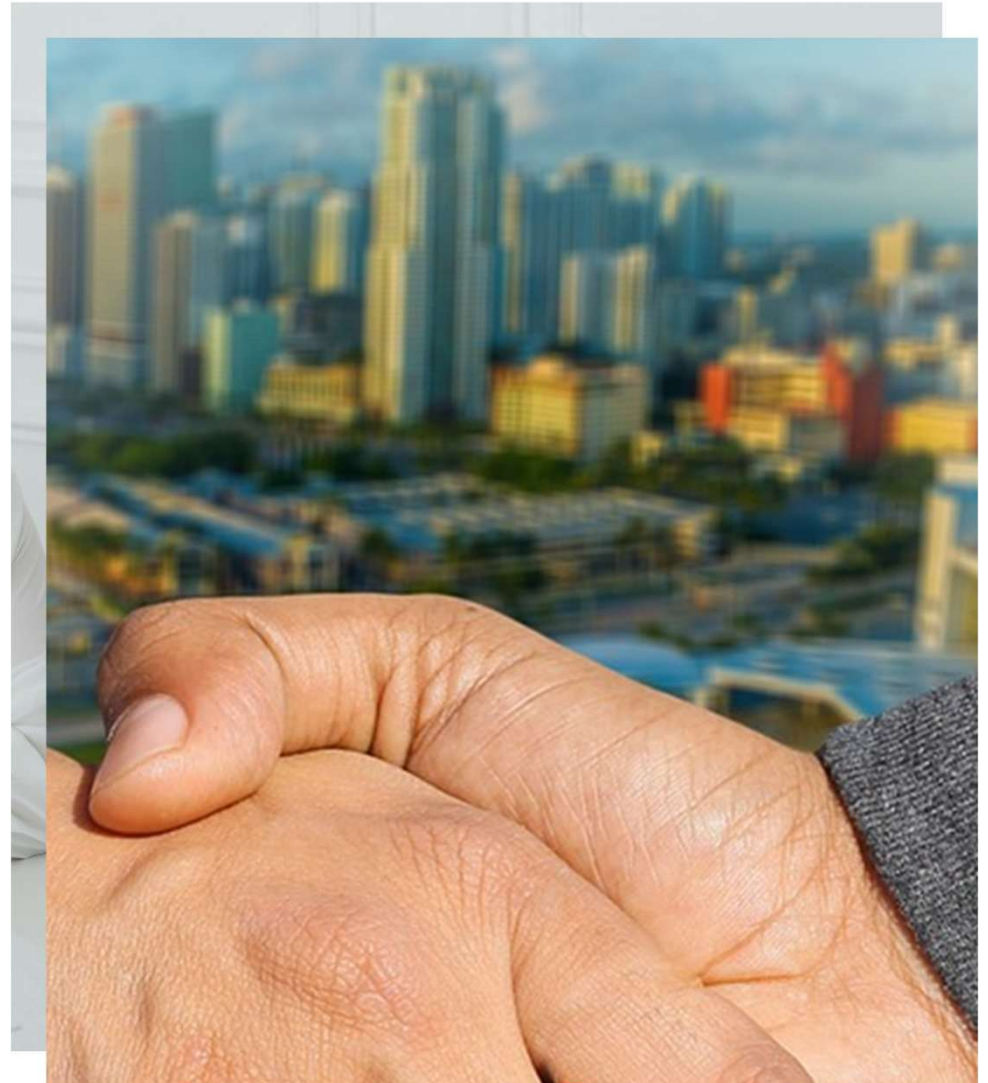
A procuring entity shall limit any conditions in a procurement to those that are **essential** to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement

Compare and contrast

- Green Paper on transforming public procurement: *“The Government proposes to simplify the selection stage through the use of basic supplier information”; “the supplier registration system will limit the types of selection criteria contracting authorities can apply to those which are provided for by the GPA”*
- Standard procurement questionnaire template

PART THREE

Which conditions of participation can be applied, particularly at the call-off stage of a framework?



Written submission during passage of Bill

“It is not clear whether these conditions can differ from those that applied at the award of the framework itself however and if so, to what extent. We consider very clear guidance is required here to ensure that selection criteria is not applied at the call-off stage that could undermine the selection of suppliers that were appointed to the framework at the appointment stage”.

Rationales for different conditions of participation at different FW stages

- Not mandatory so could have no conditions of participation at stage of appointment to FW
- Difficulty of applying proportionate conditions at stage of appointment to FW
- Could be high-level or relate to a variety of service areas

(1) Can they be new conditions at the call-off stage?

- Nothing in PA 23 precludes them from being new or requires them to be limited to “refined” conditions

(2) What are valid conditions of participation?

Easycoach (2012, N.I.):

“the amorphous terms in which the criteria were formulated and the exaltation of subjectivity and intuition to the detriment of objectivity and, consequentially, transparency. In these various respects, each of the selection criteria is materially indistinguishable from the others. I conclude that these selection criteria were not apt to establish fairly, transparently and objectively that bidders possessed specified minimum standards of technical and professional ability for the purpose of delivering the regional project/s for which they were tendering”.

(3) New conditions of participation v new award criteria

- Case C-927/19 *‘Klaipėdos regiono atliekų tvarkymo centras’ UAB* (the Lithuanian waste collection case).
- Contract notice stated that the service provider would be required to use municipal waste collection vehicles which had to comply, at least, with the Euro 5 standard on polluting emissions and be equipped with a fixed global positioning system (GPS) transmitter operating continuously, so as to enable the contracting authority to determine the exact position of the vehicle and its specific itinerary

Can be simultaneously conditions of participation and technical standards and conditions of contract

“appear apt to relate to the ‘technical resources’ of economic operators and, therefore, to be classified as selection criteria relating to their technical and professional abilities, within the meaning of Article 58(4) of that directive, provided that the tender documentation states that they are imposed specifically as abilities which tenderers must prove they have or will have in time to perform the contract, which it is for the referring court to verify”

(4) What does “proportionate” mean in practice?

- Compare case C-403/21 SC NV Construct SRL: *“As it is best placed to assess its own needs, the contracting authority is granted a broad discretion by the EU legislature when determining selection criteria”*
- *“it has some flexibility in setting those requirements for participation in a procurement procedure which it considers to be related and proportionate to the subject matter of the contract and appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities required to perform the contract to be awarded”.*
- More specifically, *“the contracting authority is free to determine which requirements for participation it considers appropriate, from its point of view, to ensure inter alia **the performance of the contract to a quality standard which it considers appropriate** (judgment of 31 March 2022, Smetna palata na Republika Bulgaria, C-195/21, paragraph 50).*

Importance of clarity

Lord Coaker:

“The Minister may need a little more time to reflect on that but, if you are seeking a contract under a framework, the word “proportionate” will mean everything—or nothing. It would be very helpful if the Minister could clarify that”.



Will write...



Baroness Neville-Rolfe:
"The question on proportionality is a good one. I do not have as good an answer for the noble Lord as I would like, so I will write to him on that point".

Useful resources

- The Marketisation of Frameworks in the UK, Dr Steven Brunning
- Guidance on frameworks: <https://www.gov.uk/government/publications/procurement-act-2023-guidance-documents-define-phase/guidance-frameworks-html>
- Module 6 on Supplier Selection: <https://www.gov.uk/government/publications/the-official-procurement-act-2023-e-learning/module-6-supplier-selection>
- Transforming Public Procurement Learning Manual:
https://assets.publishing.service.gov.uk/media/66b24baf0808eaf43b50de08/CCS0524204542-001_Transforming_public_procurement_Combined_3_.pdf
- Template Procurement specific questionnaire:
<https://www.procurementpathway.civilservice.gov.uk/documents/template/pa-2023-procurement-specific-questionnaire/business-need>

Valentina Sloane KC

Monckton Chambers
vsloane@monckton.com

