

# **Defence and Security Public Contracts Regulations 2011**

## **Chapter 10 -Framework Agreements**

### **Purpose**

1. This guidance explains how to place and use framework agreements under the Defence and Security Public Contracts Regulations (DSPCR) 2011.
2. Specifically, the guidance explains what framework agreements are, how to place the most appropriate type of and duration for a framework agreement along with amendments to framework agreements.

### **What are framework agreements?**

3. A framework agreement is an agreement or arrangement between one or more procurers and one or more suppliers that establishes the requirement and contract conditions that will apply to future contracts that the procurer(s) may enter into during the period for which the framework agreement is established.
4. A framework agreement enables the procurer(s) to award contracts (known as call-off contracts) under the framework agreement to participating, pre-assessed, suppliers without having to undertake a full procurement exercise each time they wish to award those contracts.

### **What is the legal framework?**

5. Regulation 20 (Framework Agreements) states the provisions for creating and using framework agreements, and awarding a call-off contracts.

### **What forms can framework agreements take?**

6. A “framework contract” is where a procurer is legally obliged to purchase and a supplier is legally obliged to supply under the terms of the “framework”. You should deal with these contracts as normal contracts under the DSPCR.
7. In a framework contract, the “framework” creates the legal obligation on the contractor to supply in the circumstances described in the framework. These contracts may include minimum order quantities that the procurer must place within the framework. They may also include a maximum order quantity for a given price or period.
8. A “framework agreement” is a type of arrangement described in paragraph 3 above. It is used where a procurer wishes to enter into an agreement to establish general terms and conditions, under which you may make specific purchases throughout the term of the arrangement, without obliging the procurer to buy anything. Unlike a framework contract, the procurer is not legally obliged to purchase.

9. Regardless of the status or legal form these agreements take, the provisions of Regulation 20 provide a mechanism to allow you to award contracts under the framework, without the need to re-advertise the requirement and follow the procedures of the DSPCR from the outset again.

10. Ministry of Defence (MOD) practice is to place a framework agreement that is legally binding on the contractor(s) that are a party to the agreement by requiring the procurer to pay consideration of £1 to each contractor. This means that the framework contractor(s) are bound to the terms set out in the framework agreement for orders accepted for the duration of the framework, which is particularly relevant if prices are included in the arrangement. When contractors accept orders placed by procurers under the framework, these orders become specific contracts. However, the framework does not oblige suppliers to accept orders.

11. If no consideration is paid, the framework agreement is not legally binding on the contractor(s). However, framework agreements are subject to Regulation 20 of the DSPCR whether they are legally binding or not.

## **Types of framework agreements**

12. The term “framework agreement” describes a variety of scenarios. Two typical arrangements, together with particular issues to take into account, are set out below.

### **Single-supplier framework agreement**

13. In a single-supplier framework agreement, the procurer may award call-off contracts under the framework as and when required, if the call-off is within scope of the original requirement.

### **Multi-supplier framework agreement**

14. In a multi-supplier framework agreement, there are two methods by which you may award call-off contracts:

- a. Where the terms set out in the framework are sufficiently precise, the procurer may apply the terms of the framework agreement and select the supplier for a particular requirement.

In order to award a call-off in this way, procurers should consider whether they envisage awarding contracts directly without running a mini-competition. If they do, the framework itself should clearly set out how the procurer will select a supplier.

This method of selection can be used for each call-off award, for example, by ranking the suppliers using the original award criteria and selecting the highest scoring supplier who is capable of performing the contract for that call-off.

- b. Conduct a mini-competition between every framework supplier in the framework agreement capable of performing the contract.

You should not use mini-competitions between suppliers in the framework as a means of re-negotiating the key terms of the framework agreement.

You can however supplement or refine the basic terms for the particular requirements of the specific call-off during a mini-competition.

15. You can divide a multi-supplier framework agreement into categories, each covering different supplies, services or works that allows call-off or mini-competitions for the particular category or categories encompassed by a particular requirement. In order to ensure that mini-competitions conducted under the framework are manageable it is worth considering limiting the number of suppliers on the framework or in each category when you are placing the framework agreement.

## **Setting up a framework agreement**

16. You must consider at the outset if a framework agreement is the appropriate method to purchase particular goods, works or services. This will be a value for money judgement taking account of:

- a. the kinds of purchases involved;
- b. the anticipated volume of purchases; and
- c. the ability to specify the key contractual terms with sufficient precision by the time you advertise the requirements for the framework.

17. Regulation 20 applies to the setting up of a framework agreement except where:

- a. the subject of the framework agreement itself enables the procurer to exempt or exclude the agreement from the DSPCR;
- b. the subject of the call-off enables the procurer to exempt or exclude the call-off from the DSPCR although the framework agreement itself may have been placed under Regulation 20 of the DSPCR;
- c. a procurer is seeking offers for a framework agreement for only Part B services; or
- d. the estimated maximum value of the framework agreement for all the call-off contracts envisaged for the total term of the framework agreement does not exceed the relevant financial threshold.

18. If you apply a treaty exemption to a call-off contract, you do not have to follow the rules in Regulation 20 for the award of call-off contracts. However, any deviation from the rules should be the minimum necessary.

19. Although Regulation 20 does not apply if the framework is below-threshold or for Part B services only, procurers could consider following the procedures of Regulation 20 as a way of ensuring compliance with the general principles of non-discrimination and transparency that apply to below-threshold and Part B services.

20. Regulation 20(12) prohibits procurers from using a framework improperly or in such a way as to prevent, restrict or distort competition. Before establishing a framework agreement you must be able to define the goods, works and services with sufficient precision that tenderers will understand the nature and amount of the work for which they are tendering.

21. You must also be aware of and consider the market for the particular goods, works or services you are purchasing for which you will award contracts under the framework. You must assess whether it will be possible to apply a single set of selection and award criteria to the goods, works or services you are purchasing – and only proceed if you can.

## **Reserving framework agreements**

22. Procurers are able to reserve for suppliers who operate supported business or factories the right to participate in contract award and framework agreement award procedures or reserve performance of contracts within the context of supported employment programmes.

23. “Reserving” a contract means that only supported factories and businesses or those operating supported employment programmes can tender for that particular contract. These organisations can be from anywhere in the European Union (EU), but where a contract has been reserved, the process must allow for fair and open competition among tenderers.

24. You cannot reserve contracts for a specific organisation and you must assess all tenders from supported factories and businesses, submitted under the reserved contracts arrangements, on a value for money basis and award the contract to the tender offering best value for money. You can apply these arrangements both above and below the threshold levels in Regulation 9 (Thresholds) but if above the threshold level they must be in accordance with Regulation 8 (Reserved contracts).

25. Where a contract is reserved, you should indicate in the Official Journal of the European Union (OJEU) contract notice that the contract is “reserved for sheltered workshops under Article 14 of the Directive”.

26. You can find details of the goods and services provided by supported employment organisations in England, Scotland and Wales at the On-line Supported Business Directory website at [www.base-uk.org/business](http://www.base-uk.org/business). Where appropriate, you can also reserve a lot or category within a framework for competition between supported factories and businesses.

## **Duration of framework agreements**

27. Regulation 20(10) states that a framework agreement should not exceed seven years (it was previously four years under the Public Contract Regulations (PCR) 2006) except in exceptional circumstances which you must properly justify.

28. The DSPCR allow you to determine exceptional circumstances by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties that a change of supplier may cause. If you decide that exceptional circumstances exist and the framework should last for longer than seven years, the procurer should record the reasons for this decision in accordance with Regulation 33(12)(j) (Information about contract procedures).

29. Procurers may need to consider placing framework agreements with a duration exceeding seven years for complex equipment requirements where genuine competition is only available at the time of purchasing the equipment.

These frameworks will typically require a significant investment from the supplier to achieve the technical requirements and to manage the inherent risks with these complex requirements. While not mentioned in the DSPCR, we assume that exceptional circumstances can cover these circumstances where you require a longer period to ensure that there is sufficient return on any capital employed by the contractor.

30. The longer the proposed duration, the more the procurer should consider whether a framework is in fact appropriate. In some circumstances, you should look to place a contract instead.

31. You must also explain the justification for the framework duration being longer than seven years in the contract award notice. This allows suppliers to understand why you consider the longer duration is necessary and to enable them to challenge the decision if they believe it is inappropriate.

32. It is therefore important that you carefully assess whether there are exceptional circumstances and reasons which justify reaching the decision to potentially close off the market for a longer period and whether a framework agreement is the most appropriate way in which to purchase the goods or services.

## **Calculating the value of a framework**

33. You should record the method you use to calculate the estimated total value of the framework agreement on file. Small variations from the estimated and advertised value are not likely to result in a successful challenge. However, if the actual value of call-off contracts placed under the framework exceeds the estimate by a material amount, i.e. an amount that could have affected a supplier's decision to tender or a supplier's tender, then the framework agreement itself or call-offs placed under it could be challenged.

34. The requirement to give in the OJEU notice an estimate of the value of orders you expect users of the framework agreement to place under it, in practice imposes limits on the extent to which other users can use a particular framework agreement after it is established. You should therefore pay particular attention to the expected usage of the framework by other procurers when calculating the estimated value prior to advertisement in order to minimise the risk of exceeding the advertised scope of the framework.

## **Contract award procedures for framework agreements**

35. You must use the restricted, negotiated or competitive dialogue procedures to put in place framework agreements; see Chapter 8 – Procurement Procedures. All of these procedures require you to publish a contract notice in OJEU.

36. Although the DSPCR does allow for the use of the negotiated and competitive dialogue procedures to establish a framework agreement, if you are considering the use of these procedures you should assess whether a framework agreement is appropriate, bearing in mind the complexity, or otherwise, of the particular call-offs which are to be made under it.

37. In addition to the usual information you must state in the contract notice:

- a. that you are awarding a framework agreement;
- b. the identity of all procurers entitled to call-off under the framework agreement either by using individual names or generic descriptions. If you identify the procurers by general description or reference to a particular class of procurer, you should include an up to date list of the procurers concerned so that the tenderers know who the potential procurers will be – the more detail that you can provide on the identity of the procurers the better;
- c. the number of framework suppliers (you must intend to invite a minimum of three and include any proposed maximum, where appropriate) expected to be members of the framework;
- d. the estimated total value for the duration of the framework and, as far as it is possible, the value and frequency of call-offs to be awarded under the framework;
- e. where you are dividing the framework into lots or categories, an indication as to whether a supplier may tender for one, several or all of the categories;
- f. if the right to participate in the framework agreement is reserved to suppliers who operate supported factories, supported businesses or supported employment programmes in accordance with Regulation 8; and
- g. the length of the framework agreement and where this exceeds seven years, the exceptional circumstances justifying a longer period.

38. Procurers should refer to Chapter 14 – Supplier Selection for how to assess whether tenderers possess the necessary financial and economic standing and technical and professional ability to perform the contract in accordance with Regulations 23 (Criteria for the rejection of economic operators), 24 (Information as to economic and financial standing) and 25 (Information as to technical or professional ability). However, the purpose of the criteria for rejection set out in Regulation 23 is to ensure that you consider serious issues and exclude tenderers from the contract award process, if appropriate.

39. Timing is a particular issue in framework arrangements, where you may be awarding the binding call-off contract some time after you award the framework itself. The MOD therefore requires its suppliers to fill in a “supplier statement of good standing” on an annual basis. This requirement is included in the contract documents in order that the MOD can consider whether there are grounds for exclusion from mini-competitions under the framework that have arisen during the previous year. If they have, you should consider this carefully and seek legal advice.

40. In order to select the suppliers for the framework agreement you should apply the award criteria set out in accordance with Regulation 31 (Criteria for the award of a contract), as you would with other contracts (see Chapter 15 – Conducting the Tendering Exercise).

41. Prior to the award of a framework agreement under the DSPCR, procurers must apply the mandatory standstill rules. However, further standstill periods are not required when placing call-off contracts under the framework agreement



although procurers may choose to do this voluntarily (see Chapter 16 – Standstill Period, Contract Award and Voluntary Transparency) in order to limit the risk of a claim for ineffectiveness.

## **Call-off contracts under framework agreements**

42. For single-supplier framework agreements, call-offs must be within the advertised scope of framework agreement and awarded within its terms. There must be no material changes to the terms and conditions, especially the pricing terms, established in the framework agreement although you may consult in writing with the supplier to request the supplier to refine their terms if necessary. One example of a material change could be where you advertise a framework agreement for the purchase of stationery and a procurer then seeks to amend the framework agreement to include computers.

43. There are two possible options for call-offs for multi-supplier framework agreements, as below.

### **Option 1**

44. Where the terms of the framework agreement are sufficiently precise to cover the particular call-off, you can apply the terms of the agreement and award the call-off to the framework supplier who is best able to provide the goods, works or services.

45. You can base this award on price, timing, volume or another factor that is set out in the framework agreement. If the supplier ranked first is not able to fulfil the order, you can offer it to the next ranked supplier.

46. This method is similar to purchasing from a catalogue and is most likely to be suitable for the purchase of commodity items. However, it is difficult to capture qualitative issues and is therefore likely to be impractical for requirements that are more complicated.

### **Option 2**

47. Where you have not laid down all the terms of the proposed contract in the framework agreement, you should invite all of the framework suppliers capable of fulfilling the requirement to take part in the competition.

48. Award criteria must not include selection criteria (e.g. financial standing, technical professional ability) as you carried out the selection procedure when you awarded the framework itself.

49. The invitation to take part in a mini-competition should set out the award criteria based on the award criteria set out in the framework agreement, although it may be possible to vary the weighting of criteria in order to take account of the particular requirement. Where a procurer intends to apply a range of weightings tailored to particular requirements, you must make this clear in the framework agreement.

50. You may add refined award criteria as long as they relate to the award criteria set out in the framework agreement. You may vary weightings to reflect

the particular requirement, so long as you make it clear in advance of the mini-competition that those weightings will apply to certain award criteria.

51. You must hold the mini-competition between all those suppliers within the framework agreement who are capable of meeting the particular need. If you have divided the framework into categories, this means that you must invite all those suppliers in the relevant category (or categories) who are capable of supplying your particular requirement. Although it could be expensive to administer where there are a large number of suppliers, this method provides some flexibility as you may adjust the terms of the call-off contract to meet individual requirements.

52. The mini-competition is run by refining or supplementing, or both, the basic terms to reflect the particular circumstances, for example:

- a. delivery timescales;
- b. invoicing arrangements and payment profiles;
- c. additional security needs;
- d. particular mixes of quality and rates;
- e. associated services, e.g. installation and training.

53. The DSPCR do not specify how long a call-off contract awarded under a framework agreement may last and you may place call-off contracts at any point up until the end of the framework agreement. However, when considering the duration of the call-off contract you should consider what is typical for the particular goods, service or works you are purchasing.

54. You may place call-off contracts with a duration that ends sometime after the end of the framework agreement. You should however be particularly careful not to place call-off contracts with a longer duration than usual towards the end of a framework in an attempt to avoid the need for a competition after the end of the framework agreement.

## **Amending framework agreements**

55. Regulation 20(4) states that you should not substantially amend the contractual terms in the framework agreement. The purpose of setting up a framework agreement is to establish the terms on which you can enter into contracts; finalising the terms of any call-off contract under a framework agreement should not involve the re-negotiation of any of the terms already established by the framework agreement.

56. You cannot make substantive changes to the contractual terms of the framework agreement. There are particular risks where the proposed change could affect the position of the suppliers who are capable of meeting the requirement, e.g. where you add a new product to the framework. Where you are considering a material change, you must consider whether the actual requirement has changed to the extent that you should advertise a new framework agreement.

57. You can make amendments to framework agreements to comply with new legislation as long as they do not require the re-negotiation of the terms or alter



the competitive position of framework suppliers in relation to unsuccessful candidates or tenderers for the original framework agreement.

58. As described above, the DSPCR does allow for the contractual terms of a framework to be supplemented in certain circumstances:

- a. In single supplier frameworks you can do this by requiring the supplier to supplement its original tender as part of a written consultation exercise.
- b. In multi-supplier frameworks, it is also possible for the procurer to supplement the terms for a particular requirement or, where the original framework makes provision for it, to provide additional terms.

59. In both cases you should carefully consider any supplementary provisions in order to ensure that they are within the scope of the original framework, do not affect materially the terms and are limited to the particular requirement.

## **Remedies**

60. Specific remedies provisions apply to framework agreements and call-off contracts awarded under these agreements. You can find more guidance in Chapter 17 – Legal Review, Remedies and Ineffectiveness.

### **What are the key points to remember?**

1. You must consider if a framework agreement is the appropriate method to purchase particular goods, works or services. This will be a value for money judgement.
2. You must follow one of the procurement procedures set out in the DSPCR to set up a framework agreement.
3. You choose the suppliers to be included in the framework by applying the award criteria, in order to establish the lowest priced or most economically advantageous tender(s) in the normal way.
4. You should not place framework agreements that last longer than seven years except in exceptional circumstances.
5. You must take into account when considering exceptional circumstances for a longer duration:
  - a. the expected service life of any delivered items, installations or systems; and
  - b. the technical difficulties which a change of supplier may cause.
6. You may award call-off contracts under a framework agreement by either:
  - a. applying the contractual terms laid down in the agreement, if possible; or
  - b. holding a further mini-competition that involves refining or supplementing the basic terms in the agreement.