

SPECULATIVE FRAMEWORK AGREEMENTS

Purpose

1. This SPPN advises Scottish public bodies (for the purposes of the SPPN these are defined as all bodies that are subject to public procurement legislation) to exercise caution when buying from “speculative framework agreements” (as defined in paragraph 4 below) and advises on the risks associated with acting as the lead contracting authority for a framework.

Key messages

2. Many organisations now claim to offer legally-compliant framework agreements which public bodies can use to buy from. Public bodies should not automatically accept these claims, but should consider in each case:

- Can the public bodies anticipated to access the framework be clearly identified in the procurement documentation as a party to the framework?
- Was the advertised potential overall value of the framework realistic, clear and transparent?
- Was the framework awarded legally and is the public body confident that the named lead contracting authority has the capacity/capability to oversee the procurement and manage the framework?
- Does the framework offer value for money?

3. Any public body approached by a private organisation to act as a named lead contracting authority for a framework agreement (so that a named contracting authority is seen to award it) should consider the risks and legal implications of doing so.

Background

4. We are aware of a number of organisations claiming to offer legally-compliant framework agreements to Scottish contracting authorities. In some cases it is clear that these framework agreements have been awarded without prior consultation with those authorities and may have been established without any real understanding of the authority's actual requirements. This may have significant legal and value for money implications for public bodies. For the purposes of this SPPN, we are referring to these as speculative framework agreements.

5. This note is not intended to be a comprehensive guide to operating frameworks; it focusses on the main areas of relevance to speculative framework agreements.

What is required for use of a framework to be legally compliant?

6. If a public body is relying on a framework agreement to award a contract which would otherwise have to be advertised, the framework itself must have been awarded in compliance with applicable procurement law. A contract notice must have been published which:

- names the contracting authority which will be responsible in law for the procurement process and subsequent framework;
- clearly defines who might use the framework;
- defines what users wish to buy, including the scope and estimated value; and
- sets out what is required in order to participate in the process or how to obtain the necessary information on participation.

7. This information should be accurate enough to enable potential bidders to take an informed decision as to whether they should participate in the process.

8. The framework should establish the terms and conditions on which subsequent contracts ("call-offs") are to be awarded. Awarding call-off contracts is subject to certain specific legal requirements regarding the award criteria which must be applied and the circumstances in which a mini-competition is required.

Benefits of Framework Agreements

9. Used correctly, framework agreements offer a quick and relatively easy/inexpensive route to market. They establish in advance the terms under which subsequent call-off contracts are awarded and can, if awarded in compliance with procurement law, remove the need for subsequent contract awards to follow a new advertised competition. Frameworks are used extensively by professional procurement organisations across the UK (and beyond) to underpin collaborative contracting and/or to meet recurring requirements in a legally compliant and cost-effective way. EU and national procurement legislation specifically provides for the use of framework agreements. While such agreements are a recognised route to market, used incorrectly they may be open to challenge under procurement law and may not deliver the best available value for money.

“Flag of convenience” contracting authorities

10. A private sector organisation cannot comply with EU public procurement law as legal right of redress for any infringements of such legislation is only available in relation to the actions of a contracting authority. In order to be compliant with public procurement law therefore, a contract notice must specify at least one lead contracting authority. For this reason, commercial organisations wishing to award a framework agreement that can be used by public bodies may invite a public body to act as the named lead contracting authority. In some cases the named lead authority may be a relatively small public organisation, and may not have any particular experience or expertise in relation to collaborative contracting. For the purposes of this SPPN we refer to such authorities as “flag of convenience” contracting authorities.

11. In some instances, the organisation/lead contracting authority may seek to disclaim all responsibility for legal liability for the establishment of the framework or the subsequent use of the framework by a public body. The organisation/lead authority may also ask public bodies using the framework to indemnify it from any claim by a third party arising from the public bodies actions in accessing the framework. Public Bodies should consider the risk and implications for them very carefully before accepting disclaimers of this type. The risk of challenge in relation to procurement activity is both real and substantial. A call-off contract placed under a framework that is held to be non-compliant would be regarded as an illegal direct award. As such it could be exposed to the full range of remedies, including ineffectiveness orders.

12. A public body which acts as a named lead contracting authority for a regulated procurement procedure is, in effect, assuming legal responsibility for the compliance of that procedure with procurement legislation. That liability does not end when a framework is awarded. The named lead contracting authority may be cited in any subsequent legal proceedings regarding the operation of the framework and any call-off contracts awarded under it. It might also be pursued by a user of the framework in relation to any losses suffered by the user; for example, in the event that a contract awarded under the framework was held to be non-compliant, resulting in damages and/or losses to the framework user.

13. We recommend that the capability and capacity of the named contracting authority should be an important factor in considering whether use of a particular framework is likely to be legitimate and legally-compliant. We also recommend that any public body asked to act as a “flag of convenience” contracting authority considers carefully its own capability and capacity to do so.

Named users of the framework

14. Unless the lead contracting authority has a specific remit in relation to a group of contracting authorities, has their prior consent and/or has a realistic expectation (e.g. based on previous experience) that the framework will be used by other authorities, it is not good practice to list them in the notice as users of the framework. Doing so may cause confusion for potential contractors and is potentially misleading both in relation to the framework in question and other contracts for those public bodies and their requirements.

15. For a public body to use a framework agreement legally, it must be clearly identified in the contract notice. It can be acceptable to identify a class of public body in the notice, provided that the constituent members of that class can be precisely identified by other means (for example “Councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994” rather than “Councils”). The blanket listing of every class of public body, without any limitation or indication that they have been consulted may mean that it is difficult for a prospective bidder to ascertain with any degree of confidence which of those bodies from amongst that list is likely to use the framework. This might have implications as regards compliance with legal obligations of transparency and value for money.

16. For the avoidance of doubt, in the absence of its specific prior agreement, the Scottish Government and the other Scottish public sector Centres of Procurement

Expertise¹ do not consent to their details, or those of their members, being used in contract notices that are not placed by or on behalf of another Government department (e.g. the “Crown Commercial Service”) or other recognised public procurement body and they will consider all action available to them if they find that their details have been presented to the market in a contract notice without their consent.

Description of the value of the contract and the relationship between the accuracy of the framework value and Value for Money

17. For an OJEU contract notice to be legally compliant it must describe what the framework will cover in terms of value. Where there is a degree of uncertainty it is possible to advertise by referring to an estimated range. The lead contracting authority is still, however, obliged to present to the market the most realistic information available. In other words there should always be a reasonable basis for the estimate of scope and/or value included in the notice. Usage of the framework must be monitored to ensure that it stays within the scope and value specified in the notice.

18. Notices which are unrealistic and/or refer to exceptionally wide ranges of possible value may be open to challenge as they may not provide sufficiently accurate information to allow a potential bidder to decide whether it can or should participate. Knowingly advertising an unrealistically high estimate of potential scope/value is not only bad practice, a contractor that has suffered any losses having been misled in relation to a framework it has secured might bring legal action against the named lead contracting authority.

19. There is often a relationship between the volume of business a contractor expects to receive under a framework and the pricing it is able or willing to offer. As such, the degree of confidence a contractor has in the accuracy of estimates used in a procurement exercise can often have a significant impact on pricing.

20. Where a framework is being awarded on the basis of an exceptionally wide estimated range of potential values it is unlikely that the framework will offer the best value that would be possible under a more concrete offer of business to the market. If a contractor offers keen pricing based on an expectation of volumes of business that do not materialise there might be a number of negative consequences, including:

¹ Advanced Procurement Universities and Colleges (APUC), Collaborative and Scottish Government Procurement Division Scottish Government, NHS National Services Scotland National Procurement, and Scotland Excel.

- Reduced confidence in bidding for other public sector frameworks, leading to poorer value for money/pricing for other potential clients;
- Potential complaints about business conduct/ethics; and
- Claims that the market was knowingly misled.

What is the cost of accessing speculative framework agreements?

21. Central purchasing organisations (organisations that put framework agreements in place that other public bodies can use) may operate under a variety of different business models such as central funding, subscription and contract levy, with some business models combining elements of all three. A common model for speculative frameworks can be a contract levy, typically where contractors pay the organisation responsible for the framework a percentage fee relating to the value of the business they receive under the framework. So while the framework might be presented as being free to access, all that may mean is that the cost is embedded in the price users of the framework pay to the contractor.

Numbers of contractors to be admitted to the framework

22. Some speculative frameworks may specify unrealistic numbers in relation to how many contractors are to be admitted to the framework. While carefully planned and managed frameworks may sometimes cover large numbers of contractors, the approach adopted in relation to the number of contractors admitted to the framework should be appropriate in relation to the particular market and the business needs that the framework seeks to address. The number should not be excessive since, as in the case of unrealistic claims regarding framework scope/value, this may be challengeable under procurement law and risks bringing frameworks into disrepute.

Conclusion

23. We recommend that you treat claims that speculative framework agreements offer the prospect of “full procurement law compliance” with caution. Before using such a framework a public body should consider very carefully what reassurance it offers it regarding both legal compliance and value for money.

Dissemination

24. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

Contact

25. If you have any questions about this SPPN, please contact us on ScottishProcurement@gov.scot

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