

Defence and Security Public Contracts Regulations 2011

Chapter 11 - 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 orders or tasks (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 place orders or tasks under the framework agreement to participating, pre-assessed, suppliers without having to undertake a full procurement exercise each time they wish to place orders or tasks. The procurer is not legally obliged to place any orders or tasks under framework agreements.

What are framework contracts?

5. 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 contract. Unlike “framework agreements” as described at paragraph 3 above whereby the procurer is not legally obliged to purchase anything. For example framework contracts may include pre-agreed minimum order quantities that the procurer must place with the supplier. They may also include a maximum order quantity for a given price or period. You should treat framework contracts as normal contracts under the DSPCR.

What is the legal framework?

6. Regulation 20 (Framework Agreements) states the provisions for creating and using framework agreements, and placing orders or tasks under a framework agreement.
7. Regardless of the status or legal form these framework agreements take, the provisions of Regulation 20 provide a mechanism to allow you to place orders or tasks under the framework agreement, without the need to re-advertise the requirement and follow the procedures of the DSPCR from the outset again.

8. The 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 framework agreement by requiring the procurer to pay a consideration of £1 to each contractor. This means that the framework contractor(s) are bound to the terms and conditions set out in the framework agreement for orders and tasks accepted for the duration of the framework agreement, which is particularly relevant if prices are included in the arrangement. When contractors accept orders or tasks placed by procurers under the framework, these orders become specific contracts in their own right.

9. 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

10. 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

11. In a single-supplier framework agreement, the procurer may place orders or tasks under the framework agreement as and when required, provided that the orders or tasks remain within scope of the originally advertised requirement, estimated quantities and value.

Multi-supplier framework agreement

12. In a multi-supplier framework agreement, there are two methods by which you may place orders or tasks provided that the orders or tasks remain within scope of the originally advertised requirement, estimated quantities and value:

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

In placing an order or task in this way, procurers should consider whether they envisage placing orders or tasks directly without running a mini-competition. If they do, the framework agreement itself should clearly set out how the procurer will select a supplier.

This method of selection can be used for each order or task, for example, by ranking the suppliers using the original award criteria and selecting the highest scoring supplier who is capable of fulfilling the order or task.

b. Conduct a mini-competition between every supplier in the framework agreement capable of fulfilling the order or task.

You should not use mini-competitions between suppliers in the framework as a means of re-negotiating the key terms and conditions of the framework agreement. You can however supplement or refine the basic terms and conditions for the particular requirements of the specific order or task during a mini-competition.

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

Setting up a framework agreement

14. You must consider at the outset if a framework agreement is the most 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 and conditions with sufficient precision by the time you advertise the requirements for the framework agreement.

15. 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. a procurer is seeking offers for a framework agreement for only Part B services; or
- c. the estimated maximum value of the framework agreement for all the orders or tasks envisaged for the total term of the framework agreement does not exceed the relevant financial threshold.

16. If you apply a treaty exemption when placing an order or task, you do not have to follow the rules in Regulation 20. However, any deviation from the rules should be the minimum necessary.

17. Although Regulation 20 does not apply if the framework agreement is below-threshold or for Part B services only, procurers should 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.

18. Regulation 20(12) prohibits procurers from using a framework agreement 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.

19. You must also be aware of and consider the market for the particular goods, works or services being purchased for which orders and tasks will be placed under the framework agreement. You must assess whether it will be possible to apply a single set of selection and award criteria to the goods, works or services being purchased – and only proceed if you can.

Reserving framework agreements

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

21. “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.

22. 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, they must be in accordance with Regulation 8 (Reserved contracts).

23. 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”.

24. 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](#). Where appropriate, you can also reserve a lot or category within a framework agreement for competition between supported factories and businesses.

Duration of framework agreements

25. Regulation 20(10) states that a framework agreement should not exceed seven years (note: under the Public Contract Regulations (PCR) 2015 a framework agreement should not exceed four years) except in exceptional circumstances which you must properly justify.

26. 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 agreement 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).

27. 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 framework agreements will typically require a significant investment from the supplier to achieve the technical requirements and to manage the inherent risks with these complex requirements. Whilst not mentioned in the DSPCR, it is assumed 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.

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

29. You must also explain the justification for the framework agreement 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.

30. 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

31. You should record the method used to calculate the estimated total value (exclusive of VAT) 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 orders or tasks placed under the framework agreement 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 orders / tasks placed under it could be challenged.

32. In practice, the requirement for the OJEU notice to provide an estimate of the value of orders or tasks you expect users of the framework agreement to place under it, imposes limits on the extent to which a particular framework agreement can be used after it is established. You should therefore pay particular attention to the expected usage of the framework agreement 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 agreement. The risk can be mitigated further by providing a range of the estimated value for the framework.

Contract award procedures for framework agreements

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

34. 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 orders or tasks which are to be made under it.

35. 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 place orders or tasks under the framework agreement. 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 and wherever possible you must aim to identify each individually by name;
 - 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 agreement;
 - d. the estimated total value for the duration of the framework agreement and, as far as it is possible, the value and frequency of orders or tasks to be placed under the framework agreement;
 - e. where you are dividing the framework agreement 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.
36. Procurers should refer to Chapter 15 – Supplier Selection for how to assess whether tenderers possess the necessary financial and economic standing and technical and professional ability to fulfil 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).
37. Timing is a particular issue in framework agreements, where you may be placing orders or tasks some time after you award the framework agreement 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 contractual documentation in order that the MOD can consider whether there are grounds for exclusion from future mini-competitions under the framework agreement that have arisen during the previous year. If they have, you should consider this carefully and seek legal advice.
38. 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 16 – Conducting the Tendering Exercise).
39. 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 orders or tasks under the framework agreement although procurers may choose to do this voluntarily (see Chapter 17 – Standstill

Period, Contract Award and Voluntary Transparency) in order to limit the risk of a claim for ineffectiveness.

Amending framework agreements

40. 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 place orders or tasks; finalising the terms of any order or task under a framework agreement should not involve the re-negotiation of any of the terms and conditions already established by the framework agreement.

41. You cannot make material changes to the contractual terms and conditions. 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 a new product or category is added to the framework. Where you are considering a material change, you must consider whether the actual requirement has changed significantly enough to require advertising for a new framework agreement.

42. You can however amend a framework agreement to comply with new legislation as long as this does not require the re-negotiation of the terms and conditions or alter the competitive position of the framework agreement suppliers in relation to unsuccessful candidates or tenderers for the original framework agreement.

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

a. In single supplier framework agreements, you can do this by requiring the supplier to supplement its original tender as part of a written consultation exercise.

b. In multi-supplier framework agreements, it is also possible for the procurer to supplement the terms and conditions for a particular requirement or, where the original framework agreement makes provision for it, to provide additional terms and conditions.

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

Remedies

45. Specific remedies provisions apply to framework agreements and the orders or tasks placed under them. You can find more guidance in Chapter 18 – 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 place orders or tasks 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.