

Procurement Policy Note - Use of Framework Agreements Set Up By Non-Contracting Authorities



Action Note 15/10 12 July 2010

Issue

1. Some organisations that are not contracting authorities have either established or are attempting to establish arrangements described as framework agreements for use by contracting authorities across the public sector. These agreements should not be used by contracting authorities - this PPN outlines the issues and risks for contracting authorities considering the use of these agreements.

Dissemination

2. Please circulate this Procurement Policy Note (PPN) within your organisation, agencies, non-departmental public bodies (NDPBs), and any other bodies for which you are responsible, drawing it to the particular attention of those with a purchasing role.

Contact

3. Enquiries about this paper should be addressed to the OGC Service Desk 0845 000 4999 servicedesk@ogc.gsi.gov.uk.

Background

4. It has come to our attention that certain private organisations which are not contracting authorities are either setting up or in the process of setting up contracting arrangements which are described or promoted as being equivalent to framework agreements for use by the public sector. This issue appears to be a particular concern amongst public sector energy buyers who are being approached by bodies promoting energy *frameworks* which are described and promoted as being compliant with the public procurement rules¹. However, this practice is not exclusive to the energy procurement sector and has also occurred in other sectors. This note will focus on the practice in respect of public contracts and not on the utilities sector. However, the concerns outlined about the practice may also apply to the utilities sector although OGC has not yet seen any such examples.
5. The public procurement rules, taken as a whole, cover the procedures (the form and

¹ The Public Contracts Regulations 2006, The Utilities Contracts Regulations 2006 and The Public Contracts (Amendment) Regulations 2009 - http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_ukregulations_.asp.

substance of these) which apply to public purchasers and the remedies available if the rules are breached. This means that compliance cannot be demonstrated adequately by only pointing to the fact that a contract opportunity has been advertised in a particular way (e.g. in the Official Journal of the European Union (OJEU)) or by referring to a particular term such as framework agreement which is found in the rules.

6. The public procurement rules envisage a contracting relationship between contracting authorities (or in the utilities context, contracting entities) and economic operators. Contracting authorities are referred to by type of body or how they are formed in Regulation 2 of the Public Contracts Regulations 2006. Their common feature is that they are public sector bodies².
7. The Public Contracts Regulations 2006 define a 'framework agreement'³ as:
"an agreement or other arrangement between one or more contracting authorities⁴ and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies (emphasis added)".
8. The Utilities Regulations 2006 define a 'framework agreement'⁵ as:
"an agreement or other arrangement, which is not in itself a supply contract, a works contract or a services contract, between one or more utilities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a utility in the period during which the framework agreement applies (emphasis added)";
9. It is clear from the definitions in paragraphs 7 and 8 that only contracting authorities, and contracting entities, are able to establish framework agreements.
10. A contracting authority that concludes framework agreements for works, goods or services intended for one or more contracting authorities is referred to as a 'central purchasing body' ('CPB')⁶.
11. An organisation which is not a contracting authority could not set up a compliant

² All public sector bodies are not contracting authorities but all contracting authorities are public sector bodies.

³ Regulation 2 in the Public Contracts Regulations 2006.

⁴ And "Contracting Entities" in the utilities sector.

⁵ Regulation 2 in the Utilities Contracts Regulations 2006.

⁶ Regulation 2 in The Public Contracts Regulations 2006.

⁷ Regulation 22(2) The Public Contracts Regulations 2006.

⁸ [http://www.ogc.gov.uk/domestic_eu_and_international_procurement_policy_development_domestic_implementation_and_application_of_the_eu_and_wto_procurement_rules.asp#UK Procurement Infractions](http://www.ogc.gov.uk/domestic_eu_and_international_procurement_policy_development_domestic_implementation_and_application_of_the_eu_and_wto_procurement_rules.asp#UK_Procurement_Infractions)

framework agreement (as defined in the public procurement rules) on its own. Where a non-contracting authority is acting on behalf of a contracting authority a framework agreement can be established for use by the particular contracting authority and other contracting authorities, if appropriate.

12. It is unlikely that an organisation can legitimately promote a contracting arrangement as a framework agreement, which contracting authorities can use, if:
- (a) the organisation is not a contracting authority or acting *demonstrably* on the instructions of a contracting authority as the authority's agent;
 - (b) the terms of any relationship of agency between it and a contracting authority are inconsistent with the requirements of the public procurement rules;
 - (c) the arrangement was set up at the organisation's initiative, as part of its general business activities/interests with contracting authority participation secured subsequently.

Consequences for contracting authorities

13. Where a contracting authority makes purchases through a CPB under a framework agreement, it will only have complied with the public procurement Regulations to the extent that the CPB has complied with them⁷.
14. If contracting authorities or public bodies use agreements set up by an organisation that is not a contracting authority, then they would themselves be in breach of the public procurement rules and would therefore be at risk of formal challenge and possibly substantial penalties. In essence, any resulting contract could constitute an illegal direct award for the purposes of the procurement rules, regardless of the extent of competition that occurred either during the award of the (non)-framework agreement or at call-off stage. For more information on the kinds of remedies available through formal challenge, please see the link below to OGC's Guidance "The New Remedies Rules":
[http://www.ogc.gov.uk/documents/Remedies_Guidance_Part_3_Remedies_Rules\(1\).pdf](http://www.ogc.gov.uk/documents/Remedies_Guidance_Part_3_Remedies_Rules(1).pdf)
15. The UK government would also be at risk from infringement proceedings⁸ that can be brought by the European Commission. Where such proceedings cannot be resolved at an early stage they may proceed to the European Court of Justice and could result in substantial fines to correct any breaches that are found to have occurred.

Ensuring a Framework Agreement is Valid

16. Before accessing a framework agreement, contracting authorities should assure themselves that:
- a) A framework agreement has been awarded
 - b) The framework agreement has been established by one or more contracting authorities (or one or more utilities), as defined within Regulation 3 of the relevant regulations.
- (Even where a non-contracting authority is acting as agent, it is the contracting authorities/utilities that should be identified in Section I of the Contract Notice, although the contact details could be that of the agent or intermediary).
- c) The Contract Notice identifies that the contracting authority is purchasing on

behalf of other contracting authorities/utilities (Contract notice section I.2).

d) The Contract Notice identifies that their organisation is able to access the framework agreement (Contract notice section II.1.5).

17. It should also be noted that even if a private sector organisation acts as an authorised agent within specified parameters for a contracting authority, it cannot act outside this scope. If it did so, for example, by seeking to increase its access to public sector customers or gain an advantage over other competitors without going through competitive procurement, this would be inconsistent with the public procurement rules.

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