Framework Agreements

Procurement Advice Note (PAN) for the Public Sector in Wales
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1. Introduction

1(i) POINTS TO NOTE – please ensure you read this section first

• The information set out in this Procurement Advice Note is not legal advice and is not intended to be exhaustive – contracting authorities should seek their own independent advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases. This document is correct as at August 2012.

• The Welsh Government’s Legal Services Department has approved this note.

• This note builds on, and is consistent with, the information available in the Procurement Route Planners (PRPs) on www.Buy4Wales.co.uk for general goods and services, social care, construction, food and training. The note therefore assumes a certain level of knowledge of public procurement.

• This note supplements the framework guidance produced by ERG (Efficiency and Reform Group) formerly the Office of Government Commerce (OGC) – a division of the UK Government. Reference is occasionally made to PPNs (Procurement Policy Notes) which ERG issues periodically providing further information in certain policy areas.

• Although this note is primarily written for general goods and services, the principles equally apply to other areas such as social care and construction. For these other areas, the terminology is different so the following definitions should be noted:-:

<table>
<thead>
<tr>
<th>General Goods/Services</th>
<th>Social Care</th>
<th>Construction</th>
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<tbody>
<tr>
<td>Buyer/Procurer</td>
<td>Commissioner</td>
<td>Buyer/Procurer/Client</td>
</tr>
<tr>
<td>Supplier</td>
<td>Provider</td>
<td>Contractor/Supplier</td>
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<tr>
<td>Market</td>
<td>Sector</td>
<td>Market</td>
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</table>

1(ii) Issues Addressed

Framework agreements are not suitable for all procurements. A carefully planned framework agreement that is used well can bring many benefits for the economy and save time/money through being able to call-off requirements. Conversely, a poorly planned framework that is used incorrectly can create issues for buyers and suppliers and is at risk of challenge.

This Procurement Advice Note has been produced by Value Wales (a division of the Welsh Government) to encourage a consistent approach to framework agreements and to ensure they are set up and used effectively and correctly, in line with Welsh Government procurement policies wherever possible, whilst utilising Value Wales’ policy guidance and tools.

It is designed to meet the needs of all levels of procurement staff with varying knowledge of procurement so users can either work their way through it step by step, or if specific guidance is needed in a certain area, go straight to that section or to the Frequently Asked Questions (FAQ) at the back of the document that relates to it.
2. Types of Agreement

The main difference between contracts and framework agreements is the level of commitment involved.

There are various types of agreement in law but the main two used most widely in the public sector tend to be contracts and framework agreements. In law, a contract and a framework agreement are two very different things, the main difference being the ‘commitment’ involved. These are looked at in more detail below.

2(i) Contracts

A contract (in this context) is an agreement between a public body (known in public procurement law as a ‘contracting authority’) and a supplier under which the supplier is required to supply goods, works or services in return for ‘consideration’ (normally a sum of money although it can be in other forms). This arrangement amounts to a mutual agreement between the contracting authority and the supplier where the former pays for the goods, services or works as specified in the contract which the supplier is obliged to provide.

2(ii) Framework Agreements

A framework agreement, on the other hand, merely sets out the terms of an agreement under which a public body may purchase goods, services or works, usually without there being any commitment to using the agreement. There is no up-front consideration, instead a contract is formed each time the contracting authority calls-off from the framework and pays for the goods or services. A framework agreement sets out the terms and conditions for specific purchases (which will be described in this document as ‘call-offs’). The expiry date of the framework agreement is specified up front but the mere existence of the framework agreement does not commit potential purchasers to any purchases. Frameworks are often used for goods, works or services which are needed by a number of contracting authorities where the intention is that the greater volumes lead to better prices and terms. They are also used where contracting authorities identify a need to make repeated purchases over a period of time but cannot specify exactly the quantities which they will need or precisely when the need will arise.

2(iii) Framework Agreements and the EU Regulations

The Regulations define a framework agreement as:

“The Regulations define a framework agreement as:

“An agreement or other arrangement between one or more contracting authorities 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”.

The European Union (EU) Directive 2004/18/EC (‘the Directive’) which governs public sector procurement, includes a provision on framework agreements under Article 32. The Public Contracts Regulations 2006 (‘the Regulations’) which implement this Directive in England, Wales and Northern Ireland (and came into force on 31 January 2006) cover this provision in Regulation 19 and can be accessed on the PRP via:-

http://www.buy4wales.co.uk/PRP/general/framework/euprocurementlegislation/index.html
2(iv) A Note on Approved Lists

Some contracting authorities in Wales operate ‘approved lists’ of suppliers. To a certain extent, for some specialist areas such as social care and construction, it is recognised that these can be valid arrangements. However, their use is not recommended as the standard approach and careful consideration should be given as to how such arrangements will affect the market, the impact on other suppliers and whether best value for money is being achieved. The operation of such approved lists varies from one contracting authority to another. Some lists are classed as ‘open’ and are run under a fair and formal process, providing opportunity for new suppliers to join periodically. Others however are ‘closed’ and once established offer no opportunity for new suppliers to join for 3 – 5 years.

Research suggests there is also confusion regarding the definition of an approved list. For some, it is an informal list of suppliers that have demonstrated an ability to provide goods/services in the past, whilst for others it could be a list of suppliers resulting from a the award of a framework agreement.

Given the inconsistencies and possible negative effects on suppliers and value for money, Value Wales discourages the use of approved lists and would recommend that, where such an arrangement is required, that they be openly advertised and run in a fair and equitable way.

3. Setting up a Framework Agreement – What to Consider

Before everything else, getting ready is the secret of success *(Henry Ford)*

Before deciding to set up a framework agreement, there are early considerations that contracting authorities need to be aware of and which should assist with the decision on whether a framework agreement is the best course of action or not.

3(i) Does a framework agreement suit your procurement?

Framework agreements do not suit all procurements and sometimes a contract is more appropriate. The contracting authority will need to make a value for money judgement on whether a framework agreement – and in some cases a collaborative framework agreement involving other public sector organisations – is the most appropriate solution.

Frameworks generally work well when buying standard goods, services and works and where better prices or other value for money benefits can be achieved through aggregating volume. However, for certain areas such as professional services, social care or construction, the ability of the provider/contractor to tailor its specific services to what the client really needs is key. In social care, for example, markets are often geographically bound, new requirements may be needed at short notice, and it may be important to expand capacity rather than restricting market entry during the period of a contract. Whilst frameworks can operate successfully in these areas, greater thought needs to be given to mitigating the risks.
There are certain considerations on the demand/buyer side and the supply side which need to be addressed and should help facilitate the decision on what type of agreement best suits the procurement in question:

<table>
<thead>
<tr>
<th>Demand-side</th>
<th>Supply-side</th>
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<tbody>
<tr>
<td>STRATEGY AND BASELINE</td>
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<tr>
<td>Has the relevant contracting authority’s procurement strategy been reviewed to ensure any potential framework is consistent with it? For example are there over-riding organisational policy commitments that a collaborative framework may struggle to meet, for example in supporting local markets?</td>
<td>Is there a role for the Supplier Development Service (part of Department of Business, Enterprise, Technology and Science (BETS) within the Welsh Government) in identifying suitable suppliers to bid for the work and supporting collaboration on the supply side such as joint ventures?</td>
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<tr>
<td>Is there a defined programme of activity and assured funding? A framework should only be established where this is in place.</td>
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<td>Has a Sustainability Risk Assessment (SRA) and/or Construction Quality Assurance (QA) template been completed?</td>
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<tr>
<td>Can potential users and spend be easily identified? Can data on current demand and prices be established?</td>
<td>Are there suitable suppliers out there to meet your requirements? Have you checked suppliers on Sell2Wales?</td>
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<td>Is the contracting authority able to legally award framework agreements on behalf of other public sector bodies?</td>
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<tr>
<td>SCOPE</td>
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<td>Is there already a framework agreement in place that could be legitimately used? Has Buy4Wales been checked?</td>
<td>What are the key features of the market and how competitive is it? Are you dealing with a local, regional, national or international market? Could the Supplier Development Service assist (mentioned above).</td>
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<td>If you were to consolidate spend would this change the answer? How might this change the landscape when you want to re-compete at the end of the contract?</td>
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<tr>
<td>Demand-side</td>
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<tr>
<td>Are there several discrete elements to the requirement – e.g. geographically or by product/service? Does it make sense to bring these all together into a single framework agreement or contract, or does this increase the risk and complexity to an unacceptable degree?</td>
<td>How competitive is the market? Are you the major purchaser? Is it possible that aggregating your demand might risk distorting the market and reducing the competition? If so, you might be better to split demand into smaller lots.</td>
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<td>Might a contract or framework exclude a range of suppliers and raise entry barriers for new firms (especially SMEs, third sector and supported businesses)?</td>
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<td>Might a multi-supplier framework be better in order to:</td>
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<td>• manage risk of supplier failure;</td>
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<td>• ensure some degree of on-going competition; and</td>
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<td>• maintain the competitiveness of the market?</td>
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<tr>
<td>Can specifications/requirements of all potential users be standardised/streamlined or are they just too diverse?</td>
<td>How much scope is there in the market for achieving economies of scale?</td>
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<td>Would better value for money be achieved by committing to firm volumes and securing pricing through a contract rather than a framework?</td>
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<tr>
<td>How easy is it to clearly specify requirements upfront? Is it likely that each call-off would need to be tailored to the needs of individual end-users?</td>
<td>What are the demographics of the suppliers – are they mainly in one area or are they spread across Wales (relevant when considering lotting strategy).</td>
</tr>
<tr>
<td>Can most of the contract terms and a broad pricing structure be agreed in advance, or might there be significant variations sought afterwards?</td>
<td>Do you want to:</td>
</tr>
<tr>
<td></td>
<td>• expand qualified and flexible capacity in the market (e.g. social care placements), or</td>
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<tr>
<td></td>
<td>• reduce costs and encourage innovation by encouraging investment in specific assets to meet our needs?</td>
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<td></td>
<td>The latter may favour a contract or a framework with fewer suppliers. The former may not.</td>
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<tr>
<td>Is it a contract that could, under Article 19 of the Directive, be reserved in whole or in part for sheltered workshops (ie where more than 50% of the workers are disabled)? Similarly, are there opportunities for third sector businesses to participate? Could community benefits clauses be included to achieve wider benefits throughout the community?</td>
<td>Does the market involve large conglomerate firms or complex group structures operating in discrete markets? Will the procurement, exercise increase regular contact between these firms therefore running the risk of facilitating coordinated or collusive behaviour, reducing the incentives to innovate and cut costs?</td>
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### TIMESCALES AND DURATION

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<tr>
<th>Demand-side</th>
<th>Supply-side</th>
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<tbody>
<tr>
<td>Is there sufficient time to carry out the appropriate scoping and feasibility study that a collaborative framework requires?</td>
<td>Is technology changing rapidly in the market? Might prices vary dramatically over a short timescale? Might a shorter contract deliver better value for money over its lifetime?</td>
</tr>
<tr>
<td>Does the procurement lend itself to being split into lots (regionally, in value bands, or by product/service) to open up opportunities for smaller suppliers?</td>
<td>Is significant investment needed in costly assets specific to this requirement? If so, what is the shelf life of the assets? What contract length would allow the supplier to make a return on this investment? What size of contract is needed to generate investment?</td>
</tr>
<tr>
<td>Is there confidence in the long-term stability of the buying organisation and its business objectives?</td>
<td>Is the market rapidly-changing, for example through mergers or financial failures? Can you predict how the market might look at the end of the suggested contract duration? Will you still be getting good value for money at that stage?</td>
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### MANAGEMENT AND RESOURCES

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<tr>
<th>Demand-side</th>
<th>Supply-side</th>
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<tbody>
<tr>
<td>Is it a priority to collaborate to make better use of scarce procurement and contract management resources? Might the greater complexity involved in letting and managing a multi-organisational framework negate the benefits gained?</td>
<td>What is the capacity in the market for frequent procurement exercises? Are the suppliers familiar with the type of procurement needed to set up a framework?</td>
</tr>
<tr>
<td>Is there sufficient resource/expertise for a dedicated framework manager to be put in place along with appropriate governance arrangements?</td>
<td>Will the supplier be able to offer a dedicated accounts/contract manager and the appropriate escalation procedures?</td>
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Some of these aspects are explored in more detail below.
3(ii) Organisational Procurement Strategy

An organisation’s procurement strategy is the means by which procurement policy will be achieved within an organisation’s procurement practices. In essence, it is about organising resources and developing processes and skills in order to maximise procurement’s contribution to the organisational goals.

The procurement strategy will need to be borne in mind when considering setting up a framework agreement. This will ensure that any procurement activity is conducted in accordance with the strategy and will reflect its policy objectives and commitments.

Value Wales has developed a Sustainability Risk Assessment (SRA) for goods and services, which contracting authorities are encouraged to complete before embarking on procurement exercises. These SRAs highlight the environmental, social and economic risks associated with the procurement and how best to mitigate them. These can be accessed on the PRP via:-
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/sustainabledevelopment.html

There is a similar tool available for construction contracts - a Construction Quality Assurance (QA) template which can be accessed on the Construction PRP via:-
http://www.buy4wales.co.uk/PRP/construction/conintro/index.html

On-going completion of the Sustainable Procurement Assessment Framework (SPAF) is also recommended to ensure action plans are drawn up and performance is measured. The SPAF is available on the PRP via:-
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/sustainabledevelopment.html

3(iii) Who can set up collaborative framework agreements?

Only contracting authorities are able to establish framework agreements, otherwise the agreement is non-compliant and any call-offs will not comply with EU procurement law – the onus is on end-users to check before using.

Before leading on a collaborative framework which will be open to other public sector bodies, the contracting authority should satisfy itself that it has the powers laid down by law to do so.

Central Purchasing Bodies (CPBs)

In line with the definition of a ‘framework agreement’ under the Regulations (Section 2 above refers), only contracting authorities are able to establish framework agreements. Where this is done for use by one or more contracting body, that contracting authority is a ‘Central Purchasing Body’ (CPB).

Whilst a non-contracting authority or third party intermediary can act as an ‘agent’ on behalf of another contracting authority, they cannot act as a CPB. An agent or third party would need to ensure that the contracting authorities are identified in Section 1 of the OJEU contract notice, whilst the contact details could be those of the agent or third party.

An organisation cannot legitimately promote a contracting arrangement as a framework agreement, which contracting authorities can use, if:

- The organisation is not a contracting authority or acting demonstrably on the instructions of a contracting authority as the authority’s agent;
- The terms of any relationship of agency between it and a contracting authority are inconsistent with the requirements of the Regulations;
• The arrangement was set up at the organisation’s initiative, as part of its general business activities/interests with contracting authority participation secured subsequently.

3(iv) Utilising Existing Framework Agreements

Early consideration should be given to other framework agreements in existence that your organisation may be able to legitimately utilise. However, it should be noted that when using a framework agreement set up by a CPB, contracting authorities are only as compliant with the Regulations in as much as the CPB was compliant with them. Contracting authorities risk breaching the Regulations if they use an agreement set up by an organisation that is not a contracting authority, regardless of the level of competition that the agreement went through beforehand - this could result in legal challenge and penalties under the Remedies Directive.

Therefore, prior to using such an agreement, to mitigate the risk of using a non-compliant framework agreement, the contracting authority needs to check the contract notice and/or speak to the lead authority to ensure that:-

(i) A framework agreement has been established;
(ii) It has been awarded by a contracting authority as defined in the Regulations, acting as ‘lead’ authority;
(iii) It identifies the framework agreement as set up on behalf of (itself and/or) other contracting authorities;
(iv) It clearly identifies the potential users of the framework and covers the appropriate sectors, regions and scope of goods/services required;
(v) The total value of call-offs that have gone through the framework to date has not exceeded the estimated value of the Framework agreement.

There are several ways to find out what other framework agreements exist:-

• Check the Contracts and Resources section on www.Buy4Wales.co.uk for details of Value Wales-led or supported frameworks in Wales and also Frameworks let by the Government Procurement Service (GPS).
• Contact the Collaborative Procurement Team at Value Wales for information on specific frameworks.
• Speak to colleagues in other authorities to see if they are planning similar procurements.
• Check with the consortium or procurement group representing your sector to find out what existing sectoral agreements are in place.

3(v) Comparing Existing Agreements

There may well be a number of framework agreements that could meet an organisation’s needs. Whilst it is prudent to consider all available frameworks to identify the best one to meet your requirements, you should avoid directly comparing offers from more than one framework agreement (i.e. by conducting mini-competitions under two separate frameworks then comparing the best offer from each one select a supplier).

This is due to the fact that mini-competitions are carried out against the terms established in the original framework and any bid comparison between two different frameworks is unlikely to be on a like for like basis as different evaluation criteria will be used. This practice is not in line with EU treaty principles. It may breach the requirement of transparency and so is not recommended.
3(vi) The Requirements and Scope of the Agreement

A truly collaborative agreement should take into account the end-user requirements of the contracting authorities to which it will be open. The likelihood is that these will differ greatly from one organisation to another and from one sector to another (often more so in the case of cross-sector agreements) and it can be a time-consuming task to review these and make sense of them.

Ideally, products/services should be streamlined and standardised wherever possible to remove duplication, aggregate demand and improve pricing. Setting up a project group is advisable to assist with this, consisting of representatives from user organisations. However, sufficient time needs to be built into the process to do this and – as stated previously – not all types of goods, works and services will lend themselves to this type of approach so the contracting authority will need to make that decision.

It is important the full scope of the agreement and exactly what is to be included is well thought out in the beginning. Once the framework is awarded, it is not possible to extend the scope of the agreement to include fundamentally new products or services that were not originally advertised. This is likely to attract a challenge as it is unfair on suppliers who would have bid if those other products or services had been included at the start.

3(vii) Assessing the Potential Users and Value of a Framework Agreement

For a framework agreement to be truly ‘collaborative’, the necessary preparatory work needs to be carried out upfront to establish the demand, the likely value, the likely users and their requirements.

Framework agreements which are led by one contracting authority and open to other contracting authorities to use, should clearly specify the permissible users in the Official Journal of the European Union (OJEU) contract notice and ITT. The EU Commission is tightening up in this area and has made it clear that the OJEU notice is the primary transparency mechanism. Vague terms such as “any contracting authority” or “all public bodies in Wales” lack transparency and are no longer regarded as acceptable.

If a contracting authority is leading on a collaborative framework agreement with a view to it being open to all public sector bodies, the necessary preparatory work needs to be carried out to reduce the risk of challenge. An in-depth **scoping and feasibility study** should be undertaken to assess demand, secure commitment from those organisations wishing to use the agreement and establish what their potential spend is. Estimated volumes and values of business based on responses to this study should then be included in the tender documentation, along with the list of committed users. Thereafter, provided all bidders have an equal chance of accessing the information, a hyperlink in the contract notice/ITT to www.Sell2Wales for a full list of all public sector bodies as potential users can be provided. It should be made as clear as possible to suppliers which organisations are ‘committed’ users and which ones are merely ‘possible’ users during the term of the agreement. In the unlikely event that a bidder cannot access the internet, an offer to provide the list to any bidder on request may be prudent.

All reasonable efforts should be made to provide as much information as possible upfront for suppliers; openness, transparency and equal treatment are key. If potential users have been vaguely or ambiguously listed, call-offs made under the agreement are likely to be considered by the Commission as illegal direct awards and possibly attract legal proceedings. Likewise, letting a collaborative framework agreement whilst having no accurate idea of usage or value does not comply with the Regulations. This, in turn, leads to an increased risk of challenge from suppliers and is not
recommended. Spend through the framework agreement should be monitored and the value should not exceed that which is indicated in the advert or ITT.

Please see ‘Advertising the Framework’ section 5(iii) for advice on what to include in the contract notice in relation to value and users.

3(viii) Single v Multiple Supplier Frameworks

The decision on whether to award a single or multi supplier framework needs to be considered early on in the process, before the Invitation to Tender (ITT) is issued and the answer will very much depend on the goods or services being bought.

Single Supplier Frameworks

A single supplier framework could mean one of two things:-

a) A framework agreement awarded to one supplier for the whole requirement: or

b) A framework agreement consisting of various lots where there is one supplier per lot

The decision as to which type of agreement to award rests with the contracting authority and will depend on what goods/services are being bought and the nature of the market.

Single supplier frameworks tend to suit straightforward, generic goods such as stationery, paper and computer consumables, where there is an element of standardisation and it is relatively simple to establish exact pricing and terms up front.

Some of the potential benefits and drawbacks of single supplier frameworks are shown below and these need to be offset against each other:–

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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<tbody>
<tr>
<td>More scope to standardise specifications and requirements</td>
<td>Could be a perception by end-users of lack of choice</td>
</tr>
<tr>
<td>Less contract management – only one supplier to focus on per product area</td>
<td>Potential over-reliance on one supplier and inability to spread risk across suppliers</td>
</tr>
<tr>
<td>Potential to work more closely with one supplier to build a relationship</td>
<td>Risk of distorting the market so that it becomes less competitive, particularly when the public sector is a major purchaser in the market</td>
</tr>
<tr>
<td>No need to run mini-competitions which can often be time-consuming and resource intensive</td>
<td>Lack of mini-competitions will mean no degree of on-going competition to test market prices and other factors</td>
</tr>
<tr>
<td>Ability to more easily monitor and measure the quality of the goods or services being bought</td>
<td>If quality problems are experienced, there are no other suppliers on the framework to utilise whilst these are being rectified so this could affect quality/continuity of supply/service</td>
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</tbody>
</table>
Multi-Supplier Frameworks

A multi supplier framework is a framework agreement that is awarded to more than one supplier for the supply of certain goods, works or services. These can be useful for more complicated service contracts such as consultancy, training, social care or construction, where it is more difficult to establish exact pricing and user requirements will vary.

Some of the potential benefits and drawbacks of multi-supplier frameworks are shown below and these will need to be offset against each other by the contracting authority to establish which is the best approach:

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>More choice for buyers in terms of meeting their requirements</td>
<td>Potential ambiguity amongst buyers about which supplier to use</td>
</tr>
<tr>
<td>Ability to spread the risk – if one supplier fails, one of the other suppliers can be used so supply and service disruption is minimised</td>
<td>Contract management of several suppliers can be onerous and time-consuming</td>
</tr>
<tr>
<td>Mini-competitions can be run between suppliers to ensure a degree of on-going competition to encourage innovation and cost reduction</td>
<td>Mini-competitions can be a time consuming and resource intensive process</td>
</tr>
<tr>
<td>Reduced risk of distorting markets and making them less competitive for the future</td>
<td>The lack of commitment to one particular supplier may limit the potential for a) exploiting economies of scale and b) promoting up-front investment in cost-saving actions.</td>
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<tr>
<td></td>
<td>More difficult to monitor and measure quality of goods or services</td>
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4. What to Include in the Framework Agreement

The more transparency and clarity there is at this stage, the less risk there is of potential legal challenge under the Remedies Directive

Once it has been decided that a framework agreement will be established, the necessary time should be dedicated to following best practice in planning the procurement process to ensure an effective framework agreement is established.

There are often many elements to consider in the planning phase, especially when running a collaborative framework agreement that involves other contracting authorities in Wales. Effective planning and keen foresight during the early stages are key to getting it right and ensuring its future success.

The Remedies Directives which came into force in December 2009 allows easier recourse for suppliers to raise a challenge and the consequences of a flawed procurement exercise are more serious than was previously the case. So, there is greater need than ever for procurement exercises to be properly executed, fair and transparent. There is a need for clarity - not only in relation to the requirements and specification (which are not covered in this section but clearly require careful consideration and thought) - but also in relation to how they want the framework structured and how they intend it to operate.
The following are some of the key considerations when planning a framework agreement and are looked at in further detail below:-

- Duration
- Pricing
- Lotting
- Sub-contracting
- How the framework will be used
- E-auctions
- Sustainable procurement

4(i) Duration of the Framework Agreement

The Regulations stipulate that the duration of a framework agreement must not exceed four years. However, contracting authorities should not just automatically apply this four year duration as the standard length of their agreements. Careful thought needs to be given to the length, bearing in mind the types of goods, works or services being bought, the supply base/market and volatility of pricing.

It should be borne in mind that once a framework is awarded, suppliers are locked out of the framework agreement for its entire term. This can often be detrimental to small indigenous suppliers and new start-ups which perhaps missed out on the opportunity to bid for the work or were unsuccessful. Awarding shorter-term agreements so the requirement is put out to competition more often and suppliers have the chance to bid again needs to balanced against the fact that this would result in increased work for buyers and suppliers having to go through the tender process more frequently.

Welsh Government practice is to award longer term framework agreements and to work with and develop suppliers to ensure high levels of quality and customer service.

4(ii) Pricing Under the Framework Agreement

It is also important to consider how pricing will be dealt with under the framework and this very much depends on what goods, works or services are being bought and the nature of the particular industry/market involved. For generic goods and services, it is usually possible to clearly specify requirements upfront and establish fixed prices for a certain period, whilst also perhaps agreeing volume discounts or catalogue discounts. It should be remembered that whilst longer-term fixed pricing can provide stability and peace of mind, if pricing in that particular market or industry decreases during that period, contracting authorities could find themselves paying above market value for the goods or services.

Consideration should be given as to the length of time for which prices will be fixed and the mechanism applied thereafter to any price variations. There needs to be some form of control – otherwise it could be argued that, in the interests of fairness, the requirement should be subject to fresh competition. A pricing mechanism must be put in place to ensure both that value for money is achieved and that there is transparency and clarity upfront around pricing. At the tender stage it is often beneficial to request a breakdown of suppliers pricing in the key areas of:-

- Transport
- Overheads
If this information is requested upfront, suppliers can be asked to justify any future applications for price increases against these categories by providing evidence to show in which areas the increases have occurred. This could then be checked against the relevant industry index, Retail Price Index (RPI) or other data from the Office of National Statistics to verify the suppliers’ claims.

In addition, depending on the nature and complexity of the procurement – especially for some Part B services involving social care, consultancy, training and construction, it may be difficult to establish exact pricing upfront due to the diverse mix of services involved and varying nature of end-user requirements. In this instance, the framework’s terms and conditions would be established that apply to each call-off made under the framework, however there is more flexibility around pricing and it will be regulated by some sort of pricing mechanism or the following:-

- List the services required under the framework and establish hourly or daily rates where applicable;
- Establish a broad pricing-matrix showing the range of prices depending on the levels of staff involved or set maximum prices;
- For some health and social care projects, setting pricing may not be practical. In this instance, a thorough selection process should be carried out based on a provider’s technical capacity and financial standing, along with past experience and track record. Tender evaluations should be conducted based on the award criteria and quality elements of the tender and suppliers scored accordingly. The successful suppliers (chosen according to the criteria published upfront) would be offered a place on the framework as appropriate. Contracting authorities would then run mini-competitions under the framework terms, outlining their exact requirements to establish the provider offering the best value for money. The Social Care Procurement Route Planner (PRP) provides more information on commissioning and can be accessed via the following link: http://www.buy4wales.co.uk/PRP/social-care/contents/index.html

In general terms, it should be noted that where fixed prices have been agreed through the framework agreement, there is no scope to run a mini-competition to further reduce prices. Conversely, where only hourly/daily rates or a broad range of prices depending on the levels of staff involved have been agreed, a mini-competition can be run to establish firm pricing for call-offs.

4(iii) Lotting Strategy

Collaborative frameworks involve aggregation of demand and not necessarily of supply.

In recent years, there has been a move towards greater collaboration in the public sector – both in Wales, the UK and across Europe - with a view to aggregating requirements to achieve better value for money. Value Wales has led on and supported the establishment of numerous public sector framework agreements covering a wide range of goods and services (more details can be accessed in the Contracts and Resources section of www.Buy4Wales.co.uk).

There has been much debate about the effect such collaboration and large framework agreements have on Small and Medium Enterprises (SMEs) including small indigenous suppliers, third sector and supported businesses.
The SME definition as stated in the Directive is provided below:

**SME Definition**

“The category of micro, small and medium-sized enterprises (SMEs, including third sector and supported businesses) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro.” (Extract of Article 2 of the Annex of Recommendation 2003/361/EC)

Contracting authorities may want to consider how best to structure the tender to ensure that SMEs, including third sector and supported businesses, are given a fair chance of competing. At the contract award stage, there is significantly less opportunity to make specific provision for smaller firms as the award criteria must relate only to the subject matter of the contract which is set out in the specification. It is, therefore, at the planning stage that issues relating to SMEs, third sector and supported businesses are best considered.

Frameworks can be split into lots, either geographically or by product/service type, to open up opportunities to smaller suppliers and allow them chance to bid for smaller, more manageable chunks of work.

When deciding on the lotting structure, or indeed how many suppliers to appoint onto the framework, contracting authorities need to consider the issue of geographical spread. For example, one supplier might be able to service sites in North Wales but not be able to service requirements in South Wales. This is where knowledge of the supply base is important and how best that can be matched to the users of the framework agreement and their requirements.

Contracting authorities should note that where lots are used, the general need for full disclosure and transparency also extends to any pass/fail thresholds for the lots and there should be clarity around the number of suppliers to be awarded within each lot.

Some of the Value Wales collaborative public sector framework agreements have been let at national, regional and local levels. This provides a flexible solution, ensuring the potentially diverse and varied end-users’ needs are met effectively and also giving small indigenous suppliers, third sector and supported businesses a chance to bid.

Limiting the number of lots for which suppliers bid is an approach used by some contracting authorities in Wales. It should be noted however that to date there has been conflicting legal advice on this subject. There is an argument on the one hand that limiting lots in this way is not in line with MEAT (most economically advantageous tender) criteria under the Directives, as it is a restriction on competition, and as such brings with it a greater risk of challenge.

Conversely, others feel that for certain contracts, the decision to limit the lots bid for can be legitimately justified for reasons such as stimulating competition amongst SMEs, mitigating the risk of over-reliance on one supplier and avoiding monopoly situations.
It is therefore up to contracting authorities to make a judgement on whether they use this approach, taking into account what is being bought and the risks involved. If in any doubt, contracting authorities should seek their own legal advice.

This is an area where there are emerging thoughts however so Value Wales will keep contracting authorities updated on developments.

For procurement exercises where suppliers are not limited on the number of lots for which they bid, it is possible that larger suppliers may end up being awarded most of the lots. This is where opportunities around sub-contracting should be explored to give smaller indigenous suppliers a chance to be involved, and prompt payment clauses included to ensure they are paid within a reasonable time; these are looked at further in the next section.

Welsh Government practice is not to restrict the number of lots suppliers can bid for unless there are legitimate reasons for doing so.

4(iv) Sub-Contracting

Value Wales encourages contracting authorities to promote sub-contracting opportunities through their framework agreements, in line with the principles set out in the Opening Doors SME Charter. This should be made clear in the tender so that suppliers and main contractors are aware of these objectives.

In tenders, questions can be asked about suppliers’ plans to review their supply chain to identify and maximise sub-contracting opportunities. The tender might also allow suppliers to sub-contract work to other suppliers to cover the areas not served by the main contractor.

There is a Tier One facility on www.Buy4Wales.co.uk, which enables prime contractors to widely advertise sub-contracting opportunities - contracting authorities are encouraged to promote the use of this to their suppliers. In addition, Value Wales has produced Communities Benefits guidance which helps contracting authorities build clauses into tenders in order to benefit the wider community.

Prompt payment to suppliers is vitally important in the current economic climate, not only by public sector organisations to suppliers but also by main contractors to sub-contractors. Contracting authorities should ensure the message on prompt payment is communicated clearly to all suppliers throughout the supply chain.

For framework agreements which include main contractors and sub-contractors (especially in construction), it is recommended that a specific contract condition is included on prompt payment and the number of days within which this must happen should be specified. This could then be monitored through Key Performance Indicators (KPIs) for the duration of the agreement and discussed regularly at contract review meetings to ensure it is complied with.

For more information on the Prompt Payment Code follow the link below:
http://www.promptpaymentcode.org.uk/

4(v) Clarity on how the framework agreement will be used

Contracting authorities need to clearly state in the ITT how they envisage the framework agreement being used once awarded. It is important that the end-users and also the suppliers (bear in mind the latter may not understand how framework agreements work) understand the process for supplier selection and how the framework will be used throughout its duration.

If a multi-supplier framework is planned, the process that will be used for identifying and selecting suppliers from which to call off should be made clear (section 7 provides further detail).
4(vi) E-auctions

Careful consideration needs to be given to whether an e-auction will be used and also at what point. An e-auction can either be used for the award of the main framework agreement or can operate at the call-off stage – the point at which it will be used must be disclosed in the advert and ITT.

It should be noted that because the nature of an e-auction is to establish final pricing in relation to the requirements, the circumstances under which e-auctions operate are limited – one instance in which they cannot be used is when setting up a multi-supplier framework which may be subject to mini-competition based on price.

Information about the e-auction process, connection details and conditions of bidding - particularly minimum differences required for a new bid – must be stated upfront in the ITT. Information to be provided during the course of the auction and when this will be made available electronically must also be detailed in the ITT.

Contracting authorities will need to ensure the OJEU notice is completed correctly to reflect the fact that an e-auction will be used and at what point – more information on this is provided in Section 5(iv).

Regulation 21 relates to using e-auctions under the Directives and can be accessed via the following link: http://www.legislation.gov.uk/uksi/2006/5/regulation/21/made

Please see ‘Advertising the Framework’ section 5(iv) for information on what to put in the contract notice when an e-auction is to be used.

4(vii) Sustainable Procurement Considerations

Sustainable procurement is “…a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment.” Sustainable Development Taskforce, ‘Procuring the Future’, 2006.

Good procurement is sustainable procurement and should be built into the process as part of contracting authorities’ day to day procurement activity.

The Welsh Government’s sustainable development duties are set out in Section 79 of the Government of Wales Act 2006 and illustrated in One Wales: One Planet. Contracting authorities in Wales are encouraged to promote sustainability through their procurement activities and to be mindful of its affects on the environment, economy and society whilst taking a whole-life costing approach.

Sustainability considerations can legitimately be included in tenders however contracting authorities must note the following:-

- They must be to the subject matter of contract
- They must be in line with value for money policies
- They must be in line with the Regulations and EU treaty principles

General requests for suppliers to submit their policies is not appropriate – it is better to ask for evidence to show that suppliers have the required expertise or skills to fulfil the requirement, or evidence that they are complying with relevant social and sustainability legislation, where appropriate.
Value Wales has produced the following tools and guidance in this area and recommends that these are considered as early in the procurement process as possible:-

**Sustainability Risk Assessment (SRA)**
There is a Sustainability Risk Assessment (SRA) for both goods and services, which organisations can complete before they embark on establishing a framework agreement. This helps to highlight some of the sustainability risks of the procurement and how they can be mitigated. This can be accessed via the PRP by following the link below:-
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/sustainabledevelopment.html

**Sustainable Procurement Assessment Framework (SPAF)**
Whilst not required at the tender stage, it is worth noting the SPAF tool that Value Wales has developed. The on-going use of the SPAF is core to the procurement strategy and allows contracting authorities to assess their performance in certain areas of sustainable procurement and create action plans for improvement. This can be accessed via the PRP by following the link below:-
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/sustainabledevelopment.html

**Social and Economic Considerations**

**Community Benefits**

> When planning a framework agreement, contracting authorities should consider the inclusion of community benefits as default.

Certain framework agreements relating to construction, service or supplies may be suitable for the inclusion of community benefits. This ensures that wider social and economic issues are taken into account through public sector procurement and includes such things as training and recruitment of unemployed people, job retention, supply chain initiatives and community initiatives.

Community benefits can either be a ‘core’ or ‘non-core’ to the contract, depending on the powers and duties of the public sector body undertaking the procurement and the extent to which the social requirements are linked to the subject matter of the contract. ‘Core’ approaches to Community Benefits are identified as central to the subject of the procurement exercise, should be included in the specification and conditions of contract and also scored within the ‘award criteria’. For the ‘non core’ approach, the social requirements may be included as contract conditions but must not form part of the specification and must not be assessed either at selection or award stage.

In the Local Government Compact there is a commitment to include community benefits clauses for all contracts over £2 million. A question has also been added to the Contract Notice on Buy4Wales asking if community benefits/social clauses are being applied to the contract, with a tick-box to indicate yes or no. It is important to bear in mind that their incorporation needs to be linked to the subject of the contract; they must be proportionate, deliver value for money and not discriminate against potential suppliers.

Value Wales has developed Community Benefits Guidance documents for buyers and suppliers, along with a Welsh Community Benefits Measurement Tool. This tool captures the community benefits resulting from public sector procurement by suppliers entering data in six key areas including community, employment and workforce. Where contracting authorities are building communities benefits into their tenders, they are encouraged to make it a contract condition that successful suppliers commit to completing the tool on a regular basis.
The guidance documents and measurement tool can be accessed via the PRP by following the link below:-
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/communitybenefits.html

### 4(viii) Equalities Duties

The Equalities Act 2010 establishes a new Single Equality Duty on public authorities, which consolidates the three existing public duties on race, disability and gender. In addition, there are specific duties for public sector procurement which involve contracting authorities showing they have given consideration to building equality into their procurement activities and have considered equality-related award criteria and equality-related contract conditions where appropriate and where linked to the subject matter of the contract.

In addition to ensuring the necessary equality and diversity considerations are included in the specification, there are a number of other ways to address equalities through procurement. These include the use of the Sustainable Risk Assessment (SRA), on-going use of the Sustainable Procurement Assessment Framework (SPAF), using the SQuID (Supplier Qualification Information Database) during the selection stage, using community benefits where appropriate and widely advertising the requirement through www.Sell2Wales to ensure small indigenous businesses, the third sector and supported businesses have opportunity to participate.

More information and guidance on equalities and procurement can be found via the following link:-
http://www.idea.gov.uk/idk/core/page.do?pageId=10527774

### 4(ix) Welsh Language Obligations

Where contracting authorities are procuring services which are delivered directly to the public in Wales, they need to comply with their Welsh language obligations. Welsh language requirements can be built into the procurement in a number of ways. Contracting authorities should complete the Sustainable Risk Assessment (SRA) and utilise the guidance produced by the Welsh Language Board ‘Contracting out Public Service Contracts and the Welsh Language’ which is available on the PRP via the following link:-
http://www.buy4wales.co.uk/PRP/general/framework/ukprocurementlegislation/index.html

### 4(x) Tick List Summary

As a guide, the following tick list outlines what needs to be included in the tender for a framework agreement and provides a handy reference point:-

<table>
<thead>
<tr>
<th>Section</th>
<th>Included (√)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear description of the purpose and scope of the agreement</td>
<td></td>
</tr>
<tr>
<td>Minimum requirements and standards clearly stated on a front sheet</td>
<td></td>
</tr>
<tr>
<td>Clarity on whether it is a contract or framework agreement (i.e. is there consideration)</td>
<td></td>
</tr>
<tr>
<td>Duration of agreement (not more than four years)</td>
<td></td>
</tr>
<tr>
<td>List of committed users (must be in ITT and can also go in advert)</td>
<td></td>
</tr>
<tr>
<td>Full list (or a link) to all potential users (must be in ITT and can also go in advert)</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>Included (✓)</td>
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<tr>
<td>------------------------------------------------------------------------</td>
<td>--------------</td>
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<tr>
<td>Indication of total estimated value</td>
<td></td>
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<tr>
<td>Estimated volumes</td>
<td></td>
</tr>
<tr>
<td>Specification, KPIs and terms and conditions of contract</td>
<td></td>
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<tr>
<td>Clear indication of the lots (if used) and the volumes per lot</td>
<td></td>
</tr>
<tr>
<td>Intended number of suppliers (need to consider framework as whole and/or per lot)</td>
<td></td>
</tr>
<tr>
<td>The selection and award criteria (together with sub-criteria, if any) plus full details of scoring and weighting</td>
<td></td>
</tr>
<tr>
<td>Any pass marks or thresholds</td>
<td></td>
</tr>
<tr>
<td>Whether it will be a single- or multi-supplier framework</td>
<td></td>
</tr>
<tr>
<td>Clarity on how the framework agreement will be used throughout its duration (i.e. direct award or mini-competition)</td>
<td></td>
</tr>
<tr>
<td>Confirmation for suppliers involved in multi-supplier frameworks - where either direct award or mini-competition is planned - that weightings and award criteria may be subject to a degree of variation in line with requirements (however they must be related to the original criteria)</td>
<td></td>
</tr>
<tr>
<td>Explanation of the process for supplier selection at call-off stage</td>
<td></td>
</tr>
<tr>
<td>Confirmation of whether an e-auction will be used or not (cannot be used when setting up a multi-supplier framework)</td>
<td></td>
</tr>
<tr>
<td>Clarity on the stage at which any e-auction will be used</td>
<td></td>
</tr>
<tr>
<td>Sustainable procurement considerations e.g. community benefits, etc.</td>
<td></td>
</tr>
<tr>
<td>Equalities and Welsh language considerations</td>
<td></td>
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<tr>
<td>Terms and conditions that apply to each call-off</td>
<td></td>
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<tr>
<td>Prices or pricing mechanism</td>
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<tr>
<td>Any discount arrangements</td>
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<tr>
<td>Established mechanism for dealing with poor supplier performance under the framework</td>
<td></td>
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<tr>
<td>Any limitations on the use of the framework agreement</td>
<td></td>
</tr>
</tbody>
</table>
5. Advertising the Framework Agreement

If the estimated total value of the framework agreement is likely to exceed the relevant EU threshold – and it is not covered by one of the exclusions set out in the Directives or a Part B service - it must be advertised in the OJEU and the full EU procurement process followed.

It is worth noting that not all procurements to establish framework agreements will be above the OJEU thresholds - some may well be below. This framework guidance note is equally applicable for procurements above and below the OJEU thresholds.

Whilst procurements below the OJEU thresholds are not subject to the full extent of the Regulations, the general EU Treaty principles of openness, transparency and equal treatment must always be followed and the requirement should be advertised as widely as possible in order to generate competition and achieve best value for money.

Welsh Government practice, as outlined in the Opening Doors: SME Friendly Procurement Charter, is to advertise all procurements over £25k on www.Sell2Wales.co.uk to open up opportunities as widely as possible to SMEs, third sector and supported businesses.

5(i) Part A and B Services

Under the Directive, services fall into two categories - Part A and Part B - and each is treated differently within the rules.

Part A – the full EU rules apply to Part A services and the OJEU process must be followed.

Part B – only some of the EU rules apply to Part B services – those relating to technical specifications and the need to place an OJEU Contract Award Notice, post-award, on Sell2Wales. The general EU Treaty principles of openness, transparency and equal treatment must be followed and the contract should be advertised as widely as possible in order to generate competition and achieve best value for money. Contracting authorities should seek legal advice if unclear as to the exact requirements for Part B services.

Part A and B services are listed in Schedule 3 of the Regulations which can be accessed via the following link:-

5(ii) Procedure to be Used

The open procedure will not necessarily increase the number of PQQs/bids received. By providing clear information upfront relating to requirements and minimum standards, suppliers are more easily able to de-select themselves where appropriate and thus avoid bidding unnecessarily.

The contracting authority will need to decide whether to advertise their requirements in the Official Journal of the European Union (OJEU) via the open or restricted procedure (or where conditions for their use are met, the negotiated or competitive dialogue procedures).

Value Wales encourages contracting authorities to use the open procedure (where appropriate) rather than the restricted procedure so as not to limit the opportunities for smaller suppliers. Using the open procedure and providing as much information as possible upfront ensures that prospective bidders understand the requirements before embarking on the process, allowing unsuitable suppliers to de-select themselves as early as possible.
The contracting authority must make it clear in the OJEU contract notice that a framework agreement is being awarded and indicate its duration. The maximum length of a framework agreement is four years (except in exceptional circumstances which are likely to be very limited).

The requirement should be stated clearly in the contract notice and tender documents so that unsuitable suppliers can more easily de-select themselves and full details on scoring, weighting and evaluation criteria must be disclosed upfront.

**Welsh Government practice is to use the open procedure as default unless there are legitimate reasons for not doing so.**

### 5(iii) Specifying the Value and Users of the Framework Agreement

In the ‘value’ field of the advert, the estimated total value of the framework agreement can be indicated, covering all the potential call-offs over the lifetime of the agreement. This information should also be provided in the ITT along with estimated volumes. Letting a collaborative framework agreement whilst having no accurate idea of usage or value does not comply with the Regulations. This, in turn, leads to an increased risk of challenge from suppliers and is not recommended. Spend through the framework agreement should be monitored and the value should not exceed that which is indicated in the advert or ITT.

As outlined in section 3(vii), where framework agreements are let by one contracting authority and open to other contracting authorities to use, an in-depth feasibility study should be carried out to identify those organisations committed to using the agreement – these should be listed in the advert and ITT. Thereafter, provided all bidders have an equal chance of accessing the information, a hyperlink in the contract notice/ITT to www.Sell2Wales for a full list of all public sector bodies as potential users can be provided. It should be made as clear as possible to suppliers which organisations are ‘committed’ users and which ones are merely ‘possible’ users during the term of the agreement. In the unlikely event that a bidder cannot access the internet, an offer to provide the list to any bidder on request may be prudent. Vague references to “any contracting authority” or “all public bodies in Wales” lack transparency and are not acceptable.

Please see section 3(vii) ‘Assessing the Potential Users and Value of a Framework Agreement’ for more information.

### 5(iv) E-Auctions

If the contracting authority plans to use an e-auction this must be stated in the advert. In Section II.1.5 of the advert, under “Short description of the contract or purchase(s)”, they should include a note that the framework agreement shall be awarded as a result of an e-auction.

If the framework agreement is being set up without an e-auction, Section IV.2.2 should be marked as “no”. However, if it is intended that an e-auction will be used to award subsequent call-offs following the reopening of competition amongst all suppliers on the framework agreement (i.e. a mini-competition), contracting authorities should ensure Section II.1.5 makes that intention clear.
6. The Tender Process

Having taken all the elements outlined in Section 5 into account, the tender documents will be issued and a return date set in line with EU timescales.

Once the tenders (under the open procedure) or Pre-Qualification Questionnaires (PQQs) (under the restricted procedure) have been returned and opened, the process of ‘selection’ and ‘award’ starts.

It is imperative that these are recognised as two distinct stages in the procurement process and are treated as such – one should be dealt with before the other and the same questions asked at selection cannot be asked again at award. Indeed, the Regulations are prescriptive on the selection and award stages and draw important distinctions between each, along with the criteria that should be applied at each stage (this also applies to mini-competitions under framework agreements).

Selection and award will be outlined only briefly here - Value Wales has produced a detailed guidance note on ‘Selection, Shortlisting and Award Criteria’ which can be accessed on the PRP on Sell2Wales.

6(i) Selection Stage

Any minimum requirements or standards should be stated clearly in the advert and on a front sheet in the PQQ/ITT so that suppliers can de-select themselves where appropriate.

During this stage, selection criteria are used – often through a PQQ or via a selection questionnaire - to identify applicants who have the necessary capacity, capability and financial standing to meet the requirement.

Further information on the criteria for the rejection of suppliers can be found in Regulation 23 of the Regulations via the following link:-

Contracting authorities should note that the European Commission considers the obligation of transparency that exists at award stage to also extend to the selection stage. The following information should be stated up front in the contract notice and/or ITT:-

- Full disclosure of PQQ scorings and weightings for criteria AND sub-criteria (this would also extend to any lots)
- Any pass marks, thresholds or minimum standards
- Critical questions which would disqualify the bidder from the process (these should be attached on a front-sheet so are clearly visible)

SQuID (Supplier Qualification Information Database)

The SQuID promotes a consistent approach to selection that is both risk-based and proportionate.

The SQuID has been developed collaboratively in Wales as a means of simplifying and standardising the selection process, and improving transparency for buyers and suppliers alike. It is currently available on the PRP via the link below and will be hosted on Sell2Wales in due course. The SQuID can be used during the open AND restricted procedures and for below AND above OJEU thresholds:-
http://www.buy4wales.co.uk/PRP/general/phase2/supplierselection/prequalificationquestionnaire.html
The SQuID is a set of common core-questions used at selection and when hosted on Sell2Wales, suppliers will be able to store their responses for multiple use and benefit from ‘once-only’ data entry. It also contains guidance for bidders that suggests a risk-based approach to picking the most appropriate selection questions for each procurement to ensure that the costs of participating in a public procurement are proportionate and do not inhibit SME participation. As much information as possible about the tender/contract should be provided upfront in the OJEU advert and/or PQQ, along with any exclusion questions/minimum requirements so that suppliers are more easily able to determine whether to tender or de-select themselves.

6(ii) Award Stage

The award or ‘tender evaluation’ stage is where tenders are evaluated against clearly defined evaluation criteria, to determine which tender offers the best value for money.

Under the Directive, contracts can either be awarded on the basis of lowest price or on the basis of the most economically advantageous tender (MEAT), a combination of price and quality of service and other factors having a bearing on performance of the contract.

The Directive is prescriptive in suggesting areas that can be assessed covering the non-price ie quality elements of the tender. These include but are not limited to: technical merit, environmental characteristics, running costs and delivery. Please see Regulation 30 of the Regulations for the full list and criteria for the award of a public contract.

To avoid any risk of challenge from suppliers, contracting authorities should ensure full transparency during the award stage. In order to comply with the Regulations, contracting authorities should be aware of the following:-

- The **award criteria and any sub-criteria, respective weightings** (or rankings if weightings not used) and **scores** must be set out in detail in the contract notice or ITT;
- Where a tender is split into lots, the above disclosure applies **per lot**;
- A high level summary (which lacks specific detail) is **NOT** acceptable;
- Contracting authorities cannot apply sub-criteria or weighting rules which have not been notified in advance to the tenderers.

It is Welsh Government practice to use the MEAT approach in order to ensure that all factors are considered and procurement decisions are not based on price alone.

7. Awarding the Framework Agreement

Framework agreements can either be awarded to a single supplier or multi suppliers. If multi, there must be more than one and a minimum of three providers (provided there are sufficient suppliers meeting the selection and award criteria). Consideration as to whether to award a single or multi-supplier framework should take place early in the process (see Section 4).

As already mentioned, the framework terms and conditions should be clearly set out in the agreement, along with delivery timescales and prices or daily/hourly rates.

Contracting authorities will need to comply with the mandatory standstill rules and the Remedies Directive. The standstill period only relates to the **framework** itself and does not need to be applied to call-offs made under the framework.
More information on the Remedies Directive can be found on the PRP via:
http://www.buy4wales.co.uk/PRP/general/framework/euprocurementlegislation/euremediesdirective2009.html

It should be noted that once the standstill period has passed and the framework agreement is awarded, a contract award notice must be sent to OJEU within 48 days of the award - this can be done via www.Buy4Wales.co.uk. More information can be found in Regulation 31 of the Regulations.

7(i) Calling off from the Framework

The contracting authority calling off a contract under a framework agreement must be able to justify why they have called off from a particular supplier.

When calling off from a framework, the general EU Treaty principle of equal treatment must always be observed and contracting authorities must ensure they do not engage in any conduct which could distort competition.

Once the framework agreement has been established, there are two ways that it can be used. Provided the rules in the Directive were followed in setting up the agreement, contracting authorities do not need to go through the full procedures again, they can ‘call-off’ the goods or services either by direct award or mini competition.

Direct Award

Direct awards (calling off without re-opening competition) are reasonable where there is an objective and transparent process in the framework agreement for determining which supplier offers the best value for money or other relevant determining factors.

Direct awards are used where the terms laid down in the framework agreement are ‘sufficiently precise’ to cover all the terms of the call-off. The ‘terms laid down in the framework agreement’ do not refer to the call-off terms but rather to the information that was included in the framework/ITT - as outlined in the ‘What to Include in the Framework Agreement’ section in Section 3(vi).

This would usually include the following:-

- How contracting authorities will decide whether to use direct award or mini-competition;
- The rationale contracting authorities will apply for supplier selection;
- How subsequent suppliers will be chosen if the first supplier selected cannot meet requirements

Using the direct award method can avoid the additional costs of a mini-competition and this should be the case for most generic and straightforward goods such as stationery, paper and computer consumables.

It is advisable that Framework User Guidance is produced by the lead contracting authority and issued to end-users containing the above information and other key details on pricing, supplier contacts, etc.

Single Supplier Frameworks

For framework agreements awarded to one supplier, call-offs will be made by direct award from that one supplier, in line with the call-off terms as well as any supplementary framework terms as outlined above.
Multi-Supplier Frameworks

Where several suppliers for the same goods, works or services are appointed onto the framework agreement, there are two ways to award call-offs:-

- Direct award, as described above, where the terms are sufficiently precise
- Mini-competition

In multi-supplier frameworks, it is important that the framework agreement clearly sets out how contracting authorities are to make the choice between different suppliers for the award of each called-off contract. Contracting authorities should note that even in “catalogue” style framework agreements, it is still not permissible to order directly from a “favourite supplier” if the terms need to be refined and/or which product or service in the catalogue provides best value for money cannot be immediately identified.

Mini-competition

This must be used in the following circumstances:-

- Where the terms laid down in the framework agreement are not precise enough to award a particular call-off
- The rationale showing the method contracting authorities will use for supplier selection is not clearly set out in the framework agreement.

For more complex goods or services, a mini-competition is sometimes required to better establish which supplier offers best value for money whilst meeting requirements. This process must comply with the Directives on framework agreements and contract award criteria and must be **objective** and **transparent**.

Contracting authorities running a mini-competition must:-

- Invite bids in writing (preferably via the Request for Quote (RFQ) facility on [www.Buy4Wales.co.uk](http://www.Buy4Wales.co.uk)) from all suppliers on the framework that are capable of delivering the particular requirement;
- Clearly state their call-off requirements;
- Set an appropriate time limit for responses;
- If using an e-auction for mini-competitions, comply with the e-auction rules in Regulation 21;
- Request bids are returned from suppliers in writing and treat them confidentially until after the deadline has passed;
- Use MEAT (most economically advantageous tender) to evaluate the tenders and award the call-off.

The framework specification and terms **must not be substantively changed** during this process. However, terms can be supplemented or refined slightly to reflect particular requirements e.g. delivery deadlines, invoicing arrangements, e-procurement requirements, any special terms.

Supplier ranking, to indicate the most economically advantageous tender to meet requirements, has been popular in the past however its use is now declining and it is not recommended as it is fraught with difficulties.
If contracting authorities do legitimately need to use this approach, here are some of the issues that will need to be taken into account:-

- It is likely that the order of supplier ranking at the start of the framework agreement will not be valid throughout its life, as prices and other factors change. You will need to decide how you will address that to ensure that the supplier ranked number one remains the supplier offering best value for money. Some suggest that re-ranking part way through a framework agreement is the answer however there are issues with that because it involves re-opening competition during the agreement and it could be argued that this is not an open and fair process for all suppliers. There is no case law or precedence on this so caution is advised.

- Generally, in a ranked framework for generic goods and services, contracting authorities should use the supplier ranked number one, if they can meet their requirements. Contracting authorities could not, for example, select supplier ranked number four just because ‘they’ve always used them’ – you will need to ensure there are legitimate reasons to justify the decision. Similarly, it is not appropriate in a ranked framework to run mini-competitions, as the suppliers offering the most economically advantageous tenders have already been identified.

- Suppliers hopes are raised when they are successful in gaining a place on a framework agreement however unless they are ranked top, it is unlikely they will pick up any business. This can often lead to disgruntled and disillusioned suppliers that may question the validity of such an arrangement.

Welsh Government practice is not to use ranking unless there are compelling reasons for doing so.

7(ii) Length of Call-offs

The period for which contracting authorities ‘call off’ from a framework is a decision for them, based on value for money considerations and the nature of goods or services being bought. Whilst the Directive does not stipulate the length of call-offs, a common sense approach is advocated here so if the framework agreement is coming to an end and only has say three months left to run, it would arguably be unreasonable to award a twelve month call-off from the framework. Contracting authorities are advised to seek their own legal advice if in any doubt as to the length of call-offs.

7(iii) Varying Weightings/Criteria

Ideally, the original weightings and award criteria that were used to set up the framework agreement should be used wherever possible for call-offs. However, for multi-supplier frameworks there is some degree of flexibility for contracting authorities in relation to varying these weightings and award criteria within the guidelines below, although there should not be any substantial changes:-

- Multi-supplier frameworks subject to mini competition
  Weightings for award criteria can be varied slightly however this intention must have been notified to suppliers in advance, along with ranges for each criterion. Award criteria for mini-competitions can also be altered however any new criteria must be related to ie derive from the original criteria.

- Multi-supplier frameworks subject to direct award
  Weightings at call off can be varied slightly in line with changes in requirement however some flexibility should have been included in the specification to reflect this.

When varying weightings and award criteria slightly, contracting authorities must always be able to justify why they have done so and the process must be transparent for suppliers.
7(iv) Framework User Instructions

In establishing the framework agreement, the lead contracting authority should issue instructions to all those utilising the framework. As well as providing the necessary information on duration, supplier information and pricing, for multi-supplier frameworks, it should also set out clearly the ranking of suppliers (if any) and how end-users should go about identifying which arrangement offers best value for money.

7(v) Supplier Debriefing

Supplier debriefing is the process by which the buyer provides feedback to unsuccessful suppliers regarding their bid so they know why there were unsuccessful and how they can improve their bid for the future. It is important that this is carried out as it is an integral part of an effective procurement process and something which suppliers are entitled to. Some of the benefits to buyers and suppliers are outlined below:

Benefits to the buyer:
- Demonstrates to the market that procurement processes in the Welsh public sector are carried out in a fair, open and transparent way, in accordance with the legislative and regulatory framework;
- Valuable feedback gleaned from bidders on how the procurement process could be improved in future;
- Increased likelihood that a well debriefed supplier will tender for future contracts, increasing competition to ensure maximum value for the Welsh pound; and
- Reduces risk of challenge from suppliers.

Benefits to the supplier:
- Increased confidence that procurement in the Welsh public sector is being undertaken fairly and in compliance with the legal and regulatory framework, and in accordance with the published evaluation criteria and scoring system;
- Recognition of the time, effort and resources they have invested in the process, which may encourage them to bid in future;
- Keener understanding of why they were unsuccessful, the strengths and weaknesses of their bid and the areas for improvement; and
- Less likely to challenge the process.

More information on supplier debriefing can be found on the PRP via the following link: http://www.buy4wales.co.uk/PRP/general/contractaward/supplierdebrief/index.html

8. Contract Managing the Framework Agreement

Good supplier relations can enhance performance under a framework agreement and lead to continuous improvement

The award of the agreement marks the end to the tender stage but heralds the start of the operational stage. It is vital that the contract and supplier(s) are monitored to ensure that the requirements and level of service agreed in the contract are being delivered, and value for money continues to be achieved throughout the life of the framework. More information on Contract Management can be found on the PRP via:-
http://www.buy4wales.co.uk/PRP/general/contractmanagement/index.html
Below is a brief outline of the suggested elements of contract management:

**Contract Management Group**
It is advisable for the contract manager to set up a group consisting of end-users of the agreement who can feedback on supplier performance. This group should meet regularly, usually quarterly, to discuss the contract, the Key Performance Indicators and spend and this will often be combined with contract review meetings with suppliers in attendance.

**Key Performance Indicators (KPIs)**
KPIs should be derived from the specification and built into the contract, as a way of measuring supplier performance in key areas and ensuring continuous improvement. The KPIs should be completed on a regular basis and monitored as part of the contract review meetings.

**Management Information (MI)**
Information relating to spend through the framework, along with the breakdown of spend between different users, should be submitted regularly from suppliers and should also be available on organisations’ internal financial systems. This information is vital in establishing the framework value and the users in readiness for re-tendering.

**Recording Savings/Benefits**
Any monetary savings, community benefits or any other benefits that have resulted from a procurement exercise and/or using e-procurement cards/tools should be recorded and backed up with the necessary evidence for audit purposes. Community Benefits should be captured using the Measurement Tool (please see Section 4(vii) for more details).

**Supplier Relationships**
It is important that time is taken to manage relationships with a supplier(s) under a framework and work together to achieve joint aims. When done effectively, this can improve performance and foster a ‘win-win’ culture, with good communication and a joined-up approach meaning that any problems are identified and rectified early.

**Dealing with Poor Performance**
Good contract management should effectively deal with any issues of poor supplier performance. There should be a mechanism in place for dealing with poor performance that is clear to buyers and suppliers. Contracting authorities using the framework should address any poor performance issues through their own contract and supplier review meetings whilst also highlighting the issue to the contract manager at the authority that led on the framework. If the issues cannot be overcome, there should an option to remove the poorly performing supplier from the Framework in advance of any re-competition.
### 9. Top 10 Do’s and Don’ts of Framework Agreements

<table>
<thead>
<tr>
<th><strong>DO</strong></th>
<th><strong>DON’T</strong></th>
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<tbody>
<tr>
<td>Do give careful thought as to whether a framework agreement is the best option to meet your needs</td>
<td>Don’t rush into tendering a framework agreement without the necessary feasibility study and clarity on users and value</td>
</tr>
<tr>
<td>Do ensure the requirements and scope of the agreement are well specified</td>
<td>Don’t rush into an agreement with unclear requirements/scope and a poor specification</td>
</tr>
<tr>
<td>Do ensure sustainable procurement considerations are built in upfront. Ensure a Sustainable Risk Assessment (SRA) is undertaken, any community benefits clauses have been built in to the tender where appropriate (and the community benefits measurement tool is referenced in the tender)</td>
<td>Don’t forget about the wider environmental, social and economic considerations where they can be linked to what is being bought. Try not to aggregate requirements into one large tender – split into lots wherever possible so smaller firms can more easily participate</td>
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<tr>
<td>Do use SQuID (Supplier Qualification Information Database) for the selection stage of the procurement</td>
<td>Don’t place unnecessary burdens on smaller suppliers by asking irrelevant questions and requesting large amounts of information</td>
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<tr>
<td>Do undertake your own due diligence before using someone else’s framework to check you can legitimately use it</td>
<td>Don’t just assume you are able to utilise any other framework agreement that is in existence</td>
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<tr>
<td>Do make sure if an e-auction is used, that suppliers have been notified upfront and the correct procedures are followed</td>
<td>Don’t assume you can just decide to run an e-auction at the evaluation stage of the tender</td>
</tr>
<tr>
<td>Do ensure you follow the appropriate process for calling off from the agreement</td>
<td>Don’t create “framework within a framework” type arrangements to narrow a larger field of suppliers for subsequent call-offs</td>
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<tr>
<td>Do disclose the weightings and scores to be used for evaluation when running a mini-competition</td>
<td>Don’t include criteria that has already been assessed or add unrelated criteria</td>
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<tr>
<td>Do remember you are bound by the original scope and framework terms and conditions</td>
<td>Don’t add or change the terms and conditions of the framework</td>
</tr>
<tr>
<td>Do carry out effective contract management and supplier development</td>
<td>Don’t ‘let and forget’ and hope the agreement will run itself</td>
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10. Examples of Framework Agreements

The following are examples of public works contracts taken from ERG Framework Agreement Guidance:-

**Minor works**: A framework is awarded to several contractors on a UK-wide basis, following OJEU, selection and award on the “most economically advantageous” basis. The contractors provide a range of services within categories, such as building, plumbing and electrical services. Hourly rates, call out charges and levels of quality are set under the framework agreement as well as information about how the authority will select contractors as requirements arise. When a call-off is required, the authority goes to the contractor providing the “most economically advantageous” offer, on the basis of the original award criteria, for the particular need. There is no need for a mini-competition in this case, as the terms do not need to be refined. An alternative approach might be to award a framework to a single contractor for each region.

**Major works 1**: A framework is needed for units to be constructed as part of a major works programme. Following an OJEU notice and a selection process, based on financial and economic standing and technical capacity, a framework is awarded to a small number of prime contractors for units to be constructed as necessary throughout the period of the agreement. The kinds of units in question might include prison cells, categories of hospital beds (eg acute, accident and emergency etc), garages etc, where there is a standard size, design or requirement. The awards are made on the basis of the particular mix of quality/unitary prices to meet the need. At the call-off stage, a mini-competition is held and bids are invited from all contractors capable of meeting the requirement for the specific units, with the call-off awarded to the contractor providing the “most economically advantageous” bid for the units required.

**Major works 2**: A framework is required for the construction of standard building units or office space in various locations over a four-year period. Following OJEU and the selection process, based on financial and economic standing and technical capacity, a framework is awarded to a number of prime contractors on “the most economically advantageous tender” basis. Each of the prime contractors has the skills and supply chains necessary to undertake the different aspects of the construction work during the period of the framework. A decision is made, at each call-off, as to whether a mini-competition is needed – based on whether the terms need to be refined. If a mini-competition is necessary, bids are invited from all prime contractors capable of meeting the particular need. Call-offs under the framework, which may be awarded any time up to the end of the agreement itself, can continue beyond the period of the agreement until the work is completed.
11. Frequently Asked Questions (FAQ)

Q. What is the difference between a contract and a framework agreement?

A. The main difference between a contract and a framework agreement is the commitment involved. A contract (in this context) is an agreement between a contracting authority and a supplier under which the supplier is required to supply goods, works or services in return for ‘consideration’ (normally a sum of money although it can be in other forms). A framework agreement, on the other hand, sets out the terms and conditions under which the contracting authority(ies) will, during the life of the framework, make purchases via the framework as and when the need to do so arises. The fact that a contracting authority is permitted to use a framework does not commit it to making any purchases from it. Section 2 refers.

Q. Is an approved list the same as a framework agreement?

A. Not necessarily. The definition of an approved list varies - for some, it is an informal list of suppliers that have demonstrated an ability to provide goods/services in the past, whilst for others it could be a list of suppliers resulting from the award of a contract or framework agreement. Section 2(iii) refers.

Q. What are the drawbacks of approved lists?

A. Whilst some lists are classed as ‘open’ and are run under a fair and formal process, providing opportunity for new suppliers to join periodically, others are often ‘closed’ and once established offer no opportunity for new suppliers to join for 3 – 5 years. ‘Closed’ lists are not transparent and can have a negative affect on the market, unfairly lock out suppliers and jeopardise the achievement of value for money. For this reason, use of approved lists is not encouraged, except for certain specialist areas such as social care and then they should be run fairly and openly. Section 2(iii) refers.

Q. What are the early considerations that I need to think of before deciding on whether to set up a framework agreement or not?

A. When starting to think about the feasibility of setting up a framework agreement, it should be borne in mind that this kind of arrangement does not suit all procurements and sometimes a contract is more appropriate. This depends on what types of goods, services or works are being bought and the nature of the market/industry. There are also issues around who can set up frameworks, the need to clearly identify the potential users and value of the agreement and whether requirements can be accurately scoped. Section 3 refers.

Q. How do I decide if a framework agreement suits my procurement?

A. Framework agreements do not suit all procurements and sometimes a contract is more appropriate. Frameworks generally work well when what is being bought can be standardised and better prices or other value for money benefits can be achieved through aggregating volume. However, for certain areas such as professional services, social care or construction, the ability of the provider/contractor to tailor its specific services to what the buyer/client really needs is key. The contracting authority will need to make a value for money judgement as to whether a framework agreement is the best solution. There are certain considerations on the demand and supply side which need to be addressed and should help facilitate the decision on what type of agreement best suits the procurement in question. Section 3(i) refers.
Q. Who can set up a collaborative framework agreement?

A. It is clear from the definition of a framework agreement in the Regulations that only contracting authorities and contracting entities are able to establish framework agreements.

A. A non-contracting authority can only act on behalf of a contracting authority and establish a framework for use by that particular contracting authority and other contracting authorities, if they act in the official capacity of ‘agent’ and there is an agency agreement between both parties.

An organisation cannot legitimately promote a contracting arrangement as a framework agreement, which contracting authorities can use, if:

- the organisation is not a contracting authority or acting demonstrably on the instructions of a contracting authority as the authority’s agent;
- the terms of any relationship of agency between it and a contracting authority are inconsistent with the requirements of the Regulations or EU Treaty;
- the arrangement was set up at the organisation’s initiative, as part of its general business activities/interests with contracting authority participation subsequently secured.

It is the contracting authority’s responsibility to check these points. Section 3(iii) refers.

Q. Can my organisation buy off other framework agreements?

A. In order to use another contracting authority’s framework agreement, an organisation must have been listed in advance as a potential user and their potential spend included in the tender. They should therefore check with the authority that led on the framework agreement, before utilising it.

In addition, contracting authorities risk breaching the Regulations if they use an agreement set up by an organisation that is not a contracting authority. Regardless of the process adopted any call-off would constitute an illegal direct award and lead to challenge and possibly substantial penalties. Section 3(iv) refers.

Q. How do I find out about current Value Wales or Government Procurement Service Frameworks?

A. There are several ways to find out what other framework agreements exist:

- Check the Contracts and Resources section on www.Buy4Wales.co.uk for details of Value Wales-led or supported frameworks in Wales and also Government Procurement Service Frameworks.
- Contact the Collaborative Procurement Team at Value Wales on 01792 765806 for information on specific frameworks.
- Speak to colleagues in other authorities to see if they are planning similar procurements.
- Check with the consortium or procurement group representing your sector to find out what existing sectoral agreements are in place. Section 3(iv) refers.

Q. How should I go about identifying and listing participants in a collaborative framework agreement?

A. For framework agreements which are let by one contracting authority and open to other contracting authorities to use, an in-depth feasibility study should be carried out by the lead authority to identify those organisations committed to using the agreement – these should be listed in the advert and ITT. Thereafter, provided all bidders have an equal chance of accessing the information, a hyperlink in the contract notice/ITT to www.Sell2Wales for a full list of all public sector bodies as potential users can be provided. It should be made as clear as possible to suppliers...
which organisations are ‘committed’ users and which ones are merely ‘possible’ users during the
term of the agreement; openness, transparency and equal treatment are key. In the unlikely event
that a bidder cannot access the internet, an offer to provide the list to any bidder on request may
be prudent. Vague references to “any contracting authority” or “all public bodies in Wales” lack
transparency and are not acceptable. Section 3(vii) refers.

Q. How should potential spend through a collaborative framework agreement be estimated?
A. The in-depth feasibility study recommended above for identifying users should also identify the
likely spend of those users. All reasonable efforts should be made to provide as much information as
possible upfront for suppliers. Letting a collaborative framework agreement whilst having no accurate
idea of usage or value does not comply with the Regulations. This, in turn, leads to an increased
risk of challenge from suppliers and is not recommended. The EU Commission is very clear that the
OJEU notice is the primary transparency mechanism. In the ‘value’ field of the notice, the estimated
total value of the framework agreement can be indicated, covering all the potential call-offs over the
lifetime of the agreement. This information should also be provided in the ITT along with estimated
volumes. Spend through the framework agreement should be monitored and the value should not
exceed that which is indicated in the advert. Section 3(vii) refers.

Q. Is a single-supplier or multi-supplier framework best?
A. Single supplier frameworks tend to suit straightforward, generic goods such as stationery, paper
and computer consumables, where there is an element of standardisation and it is relatively simple
to establish exact pricing and terms up front. Multi supplier frameworks, on the other hand, can be
useful for more complicated service contracts such as consultancy, training or construction, where it
is more difficult to establish exact pricing and user requirements will vary.

There are however advantages and disadvantages to each approach and contracting authorities need
to make a decision depending on what is being bought and the risks involved. Section 3(viii) refers.

Q. Once I’ve decided to establish a framework agreement, what do I need to include in it?
A. There is a lot to consider when planning the procurement process for setting up a framework
agreement and contracting authorities need to build in sufficient time for this and ensure best
practice is followed. With recent changes to the law of remedies (allowing suppliers easier recourse
to challenge) there is now a greater need than ever for procurement exercises to be properly
executed, fair, transparent and exercised in a way which fully complies with the applicable law.
Full details of selection and award criteria, weightings/scores and any pass marks/thresholds must be
disclosed in the advert/ITT. As well as the need to produce a detailed specification and requirements,
there should also be clarity on now the framework is to be structured and how it is to operate.
The more transparency there is at this stage, the less risk there is of ambiguity and potential legal
challenge from a supplier further down the line. Section 4 refers.

Q. What is the maximum length of a framework agreement?
A. The Regulations stipulate that the maximum duration of a framework agreement is four years and
this can only be exceeded in exceptional circumstances. Section 4(i) refers.
Q. How should I deal with pricing in a framework agreement?

A. You need to consider upfront how pricing will be dealt with under a framework and this very much depends on what goods, works or services are being bought and the nature of the particular industry/market involved. Consideration should be given as to the length of time for which prices will be fixed and the mechanism applied thereafter to any price variations. There needs to be some form of control – otherwise it could be argued that, in the interests of fairness, the requirement should be subject to fresh competition. A pricing mechanism must be put in place to ensure both that value for money is achieved and that there is transparency and clarity upfront around pricing. At the tender stage it is often beneficial to request a breakdown of suppliers pricing in the key areas of:-

- Transport
- Overheads
- Materials
- Labour
- Profit

If this information is requested upfront, suppliers can be asked to justify any future applications for price increases against these categories by providing evidence to show in which areas the increases have occurred. This could then be checked against the relevant industry index, Retail Price Index (RPI) or Office of National Statistics to verify the suppliers’ claims.

It is sometimes harder to ascertain exact prices upfront for some Part B services and construction contracts – Section 4(ii) refers.

Q. Do framework agreements allow for pricing to be improved and under what circumstances?

A. When a call-off is made from a framework - whether by direct award or by mini competition - the terms and prices that were established in the framework itself must be used. So, whatever prices or pricing structure were agreed in the framework must be used for all call-offs. There cannot be a situation where there is a free for all on prices, when the framework has already established what those prices will be.

Where the terms laid down in the framework agreement are not precise or complete enough to enable a direct call-off, a mini-competition should be held with all those suppliers within the framework capable of meeting the particular need. This does not mean that basic terms can be renegotiated, or that the specification used in setting up the framework agreement can be substantively changed. Section 4(ii) refers.

Q. Is it possible to limit the number of lots suppliers can bid for?

A. Although used by some contracting authorities in Wales, there is conflicting legal advice on this subject. There is an argument on the one hand that limiting lots in this way is not in line with MEAT (most economically advantageous tender) as it could compromise value for money by restricting competition; as such it brings with it a greater risk of challenge. Conversely, some feel that for certain contracts, the decision to limit the lots bid for can be justified for reasons such as mitigating the risk of over-reliance on one supplier and avoiding monopoly situations.

It is therefore up to contracting authorities to make a judgement on whether they use this approach, taking into account what is being bought and the risks involved. If in any doubt, contracting authorities should seek their own legal advice. Section 4(iii) refers.
Q. What effect will collaboration and large frameworks have on small indigenous suppliers, third sector and supported business and how can I ensure they are not precluded from a framework tender?

A. Aggregation of demand to achieve better value for money does not necessarily mean aggregation of supply. There are various ways that contracting authorities can package tenders to ensure that they are accessible to smaller suppliers such as splitting the contract into lots, using the open procedure rather than restricted, including sub-contracting options, ensuring wide advertising of the requirement and encouraging main contractors to advertise sub-contracting opportunities on the Tier One portal on www.Buy4Wales.co.uk. Prompt payment is also encouraged – not only from authority to supplier but also – where sub-contracting is involved - from main contractor to SME. Sections 4(iii) & (iv) refer.

Q. What are the rules around e-auctions in relation to framework agreements?

A. An e-auction can either be used for the award of the main framework agreement or can be run at the call-off stage - it cannot be used in both instances. The point at which it will be used must be disclosed in the advert and ITT.

It should further be noted that because the nature of an e-auction is to establish final pricing in relation to the requirements, the circumstances under which e-auctions can be undertaken are limited – one instance in which they cannot be used is when setting up a multi-supplier framework which will be subject to mini-competitions. This is a complicated area where we especially recommend legal advice in individual cases. Section 4(vi) refers.

Q. How can I ensure sustainability is built into a framework agreement?

A. Value Wales has developed a number of tools to assist organisations with this. There is a Sustainable Risk Assessment (SRA) for organisations to complete before embarking on a procurement exercise, which highlights some of the sustainability risks of the procurement and how they can be mitigated. Community Benefits guidance and a Welsh Measurement Tool has also been produced which suggests how the public sector can include social criteria in their tenders and enables you to measure the benefits – more information can be accessed via the following link: http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/communitybenefits.html

Q. What does ‘community benefits’ mean and how does the ‘core’ approach differ from the ‘non-core’ approach?

A. Community Benefits can either be ‘core’ or ‘non-core’ to the contract, depending on the powers and duties of the public sector body undertaking the procurement and the extent to which the social requirements are linked to the subject matter of the contract. ‘Core’ approaches to Community Benefits are identified as central to the subject of the procurement exercise, should be included in the specification and conditions of contract and also scored within the ‘award criteria’. For the ‘non core’ approach, the social requirements may be included as contract conditions but must not form part of the specification and must not be assessed either at selection or award stage. Section 4(vii) refers.

Q. How can I build equalities duties into my procurement?

A. The Equalities Act 2010 establishes a new Single Equality Duty on public authorities, which consolidates the three existing public duties on race, disability and gender. In addition, there are specific duties for public sector procurement which involve contracting authorities showing they have given consideration to building equality into their procurement activities through equality-related award criteria and equality-related contract conditions where appropriate and where linked to the subject matter of the contract.
Other ways to address equalities through procurement include the use of the Sustainable Risk Assessment (SRA), on-going use of the Sustainable Procurement Assessment Framework (SPAF), using the SQuID during the selection stage, using community benefits where appropriate and widely advertising the requirement to ensure small indigenous businesses, the third sector and supported businesses have opportunity to participate. **Section 4(viii) refers.**

More information and guidance on equalities and procurement can be found via the following link:- http://www.idea.gov.uk/idk/core/page.do?pageld=10527774

**Q. How do I include Welsh language requirements in my procurement?**

A. Where contracting authorities are procuring services which are delivered directly to the public in Wales, they need to comply with their Welsh language obligations. Welsh language requirements can be built into the procurement in a number of ways. As well as completing the Sustainable Risk Assessment (SRA), contracting authorities can also utilise the guidance produced by the Welsh Language Board ‘Contracting out Public Service Contracts and the Welsh Language’ which is available on the PRP. **Section 4(ix) refers.**

**Q. What is the difference between Part A and B services?**

A. Under the Directives, certain services including but not limited to health and social services, legal services, recreational, and sporting and cultural services are classed as ‘Part B’ services. This means they are not covered by the full extent of the Directives except those relating to technical specifications and the need to place an OJEU Contract Award Notice, post-award. However, the general EU Treaty principles of openness, fairness and non-discrimination must be followed and the contract should be advertised as widely as possible in order to generate competition and achieve best value for money. Always take great care to ensure that the correct category is chosen - the full list of services can be found in the Public Contracts Regulations. Contracting authorities should seek legal advice if unsure how to operate tenders for Part B services. **Section 5(i) refers.**

**Q. Which EU procedure is it better to use when awarding a framework?**

A. If your aim is to open up competition to smaller suppliers, we recommend that the open procedure is used and the opportunity advertised, for instance, on Sell2Wales. This ensures that contract opportunities are opened up to allow smaller suppliers to bid. If the requirement and minimum criteria are made clear upfront, suppliers are able to de-select themselves where appropriate so this approach should help reduce the workload rather than increase it. **Section 5(ii) refers.**

**Q. What do I need to disclose to suppliers during the selection and award stages?**

A. Full details of the scoring and weightings for sections and sub-sections must be disclosed to suppliers in the advert and/or ITT. The EU Commission has made it clear that the transparency that applies at award stage also extends to the selection stage. The more transparent and open you are, the less risk there is of being challenged. It is also important to keep the selection and award stages separate and distinct. **Section 6 refers.**

**Q. What is SQuID?**

A. The SQuID (Supplier Qualification Information Database) is a set of common core questions used at the selection stage of a procurement exercise. It has been developed collaboratively in Wales as a means of simplifying and standardising the selection process. It promotes a risk-based and proportionate approach to choosing selection questions to ensure that the costs of participating in a public procurement are proportionate and do not inhibit SME participation. The SQuID aims to improve transparency for buyers and suppliers alike and can be used during the open AND restricted procedures
Q. How should I call off from a framework – by direct award or mini competition?

A. It is imperative that the lead authority clearly states how the framework will be used in the ITT ie either by call-offs through direct award or mini-competition, where the terms are not precise enough. Under the Regulations, where the terms laid down in the framework agreement are sufficiently precise to cover the particular call-off, the authority should award the call-off without re-opening competition. It is only where the terms are not precise enough to cover requirements – or for more complex goods or services to better establish which supplier offers best value for money whilst meeting requirements – that a mini-competition should be used. The process must comply with the Directives on framework agreements and contract award criteria and must be objective and transparent. Section 7 (i) refers.

Q. In a multi-supplier framework, can I just use my ‘favourite’ supplier?

A. No, contracting authorities should note that even in “catalogue” style framework agreements, it is still not permissible to order directly from a “favourite supplier” if the terms need to be refined and/ or you cannot immediately identify which product or service in the catalogue provides best value for money. Section 7 (i) refers.

Q. Should supplier ranking be used?

A. Supplier ranking, to indicate the most economically advantageous tender to meet requirements, has been a popular approach in the past. However, its use is now declining and it is not recommended as it is fraught with difficulties, some of which include the issues around initial supplier ranking not being a true reflection once prices change, the inability to run mini-competitions on a ranked framework and lower-ranked suppliers not picking up any business. Section 7(i) refers.

Q. If we have agreed all the main terms in a framework, what would we run a mini competition on?

A. Whilst neither the basic framework terms nor the specification can be changed substantively, terms can be refined slightly to reflect particular end-user requirements e.g. delivery deadlines, invoicing arrangements, e-procurement requirements and any special terms. Section 7(ii) refers.

Q. Can the weightings and criteria be changed when running a mini-competition?

A. Whilst the weightings and criteria can be ‘refined’ to reflect end-user requirements, they cannot be fundamentally changed and must always relate back to those of the original framework. Section 7(iii) refers.

Q. What is a supplier debriefing and why is it important?

A. Supplier debriefing is the process by which the buyer provides feedback to unsuccessful suppliers regarding their bid so they know why there were unsuccessful and how they can improve their bid for the future. It is important that this is carried out as it is an integral part of an effective procurement process and something which suppliers are entitled to. Section 7(v) refers.
Q. How do I deal with poor supplier performance issues under the framework?

A. Poor performance should be picked up as part of contract management post-award. Contracting authorities should address any poor performance issues through their own contract and supplier review meetings whilst also highlighting the issue to the contract manager at the authority that led on the framework. There should be a mechanism in place (and form part of the contract conditions) that where poor performance issues are not resolved, the supplier involved may be removed from the Framework in advance of any re-competition. Section 8 refers.

Q. Who has intellectual copyright for documents/ideas developed through a framework agreement?

A. It is vital that this is thought about up-front before tendering and written into the terms and conditions of contract. Quite often where consultants are involved, framework agreements include a provision granting that the consultants retain intellectual property rights, but that departments/public sector bodies have full user rights. However, this varies so you will need to give it careful consideration and decide how you want to approach it, seeking legal advice if in any doubt.

12. Guidance and Tools

Below are some of the policy guidance documents and supporting tools that are available to you for use in your procurement activity (in alphabetical order):

Buying Safe Food Guidance and Food Charter, 2010
http://www.buy4wales.co.uk/PRP/food/introduction/index.html

Community Benefits Guidance, Maximising Value from the Welsh Pound, Value Wales 2010
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/communitybenefits.html

Community Benefits Measurement Tool for Wales, Value Wales, 2011
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/communitybenefits.html

Opening Doors: The SME Friendly Charter, Value Wales, 2006
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/sustainabledevelopment.html

Procurement Route Planners (PRPs):

General Goods and Services
http://www.buy4wales.co.uk/PRP/general/prp_intro/index.html

Construction
http://www.buy4wales.co.uk/PRP/construction/conintro/index.html

Social Care
http://www.buy4wales.co.uk/PRP/social-care/contents/index.html

Food
http://www.buy4wales.co.uk/PRP/food/introduction/index.html

Procurement Training
http://www.buy4wales.co.uk/PRP/training/introduction/index.html

Public Contracts Regulations 2006 (please note that the Regulations are updated from time-to-time so be sure the version you access is up to date).
Selection and Award Criteria Guidance, Value Wales, 2010
http://www.buy4wales.co.uk/PRP/general/planning/selectioncriteria/index.html

Smarter Buying, Tougher Times, Value Wales, 2011
http://www.buy4wales.co.uk/PRP/general/strategy/keywagpolicy/makingtheconnections.html


Supplier Qualification Information Database (SQuID), Value Wales 2011
http://www.buy4wales.co.uk/PRP/general/phase2/supplierselection/prequalificationquestionnaire.html

Sustainable Risk Assessment (SRA), Value Wales, 2006
http://www.buy4wales.co.uk/PRP/general/phase2/supplierselection/prequalificationquestionnaire.html

Sustainable Procurement Assessment Framework, 2006
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/sustainabledevelopment.html

Third Sector and Supported Businesses Framework
http://www.buy4wales.co.uk/PRP/general/strategy/procstrat/sustainabledevelopment.html

Tier One Facility enabling prime contractors to advertise sub-contracting opportunities
www.Buy4Wales.co.uk

Value Wales-led and supported Collaborative Framework Agreements
http://www.buy4wales.co.uk/UsefulResources/contractsframeworks.html

13. Acknowledgements

Value Wales is pleased to acknowledge that it has drawn upon the following publications and organisations to supplement its own research to produce this guidance note:

Chartered Institute of Purchasing and Supply (www.cips.org)

Community Benefits Guidance, Maximising Value from the Welsh Pound, Value Wales 2010

Community Benefits Measurement Tool for Wales, Value Wales, 2011


OGC EU Procurement Guidance, Cabinet Office, 2008

Opening Doors: The SME Friendly Charter, Value Wales, 2006

Public Contracts Regulations 2006

Selection and Award Criteria Guidance, Value Wales, 2010

‘Small Supplier Big Opportunity: Flagging your Contracts to SMEs’, OGC/BIS, 2010

‘Smaller Supplier Better Value’, Cabinet Office, 2005

Smarter Buying, Tougher Times, Value Wales, 2011

Supplier Qualification Information Database (SQuID), Value Wales 2011

Sustainable Risk Assessment (SRA), Value Wales, 2006

Sustainable Procurement Assessment Framework, Value Wales, 2006


Value Wales Procurement Route Planners (PRP)