



Llywodraeth Cymru
Welsh Government

Speculative Framework Agreements

**Procurement Advice Note (PAN)
for the Welsh Public Sector**

October 2017

1. Introduction

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 October 2017.*

What is the aim of this Procurement Advice Note?

This Procurement Advice Note (PAN) highlights the need to exercise caution when buying from “speculative framework agreements” (defined below) and highlights the risks associated with acting as the lead contracting authority for such a framework, sometimes known as ‘fronting’ it.

This PAN is not intended to be a comprehensive guide to operating frameworks (there is a separate Welsh Government PAN on [Framework Agreements](#)). It focuses on the main areas of relevance to speculative framework agreements.

2. Setting the Scene

2.1 Public Procurement in Wales

Public procurement in Wales is underpinned by the Wales Procurement Policy Statement (WPPS) which contains ten principles against which the Welsh Government expects public procurement to be undertaken. The WPPS can be accessed via the link below:-

<http://gov.wales/topics/improvingservices/bettervfm/publications/procurement-policy-statement/?lang=en>

In recent years, there has been a move towards greater collaboration in the public sector with a view to aggregating requirements to remove duplication and achieve better value for money. Through the WPPS, Welsh Government procurement policies seek to balance that with the need to open up opportunities for smaller firms

and third sector suppliers and strengthen the economy in Wales.

2.2 The National Procurement Service (NPS)

In Wales, the National Procurement Service (NPS) is responsible for setting up collaborative framework agreements for commonly bought goods and services in the Welsh public sector. The NPS should be considered as your first port of call when seeking out available framework agreements for your use because it engages with end-users and stakeholders to establish requirements, as well as building Wales' Procurement Policy into its procurement activity, including:-

- **The Wales Procurement Policy Statement** – simplifying the procurement process to make it easier for smaller suppliers and Third Sector firms to bid for work, ensuring opportunities are open and accessible and promoting supply chain opportunities for local suppliers where possible.
- **The Code of Practice for Ethical Employment in Supply Chains** - ensuring workers in public sector supply chains are treated fairly and with respect, helping to eliminate things like Modern Day Slavery, blacklisting, false self employment and promoting payment of the living wage.
- **Community Benefits** – applying social clauses so that training places and apprenticeship opportunities are created, helping to improve employment, strengthen the economy and tackle poverty in Wales.
- **Reserved Contracting** – promoting engagement with supported businesses and firms with a social mission, framework agreements for certain goods and services can be reserved for this important sector, which plays a vital role in providing public services in Wales.
- **Wellbeing of Future Generations (Wales) Act 2015** – ensuring the seven goals of the Act and five ways of working are built into all NPS procurement activity and framework agreements. This includes ensuring cultural issues such as Welsh Language considerations are applied, along with ensuring the safety of data used through all NPS frameworks - reducing cyber security

risks through adoption of the Cyber Essentials scheme plus ensuring frameworks reflect current Data Protection legislation.

In light of this, before considering using a speculative framework agreement, you are advised to check whether the NPS has an alternative framework agreement which meets your needs and for which you are listed as a user. If the NPS does not have a suitable framework, it is advisable to check whether another public sector buying organisation, such as Crown Commercial Services or Yorkshire Purchasing Organisation (YPO), has a suitable framework for which you are listed as a user.

The NPS frameworks are accessible for all local authorities, the NHS, all Welsh higher and further education institutions, the four police services in Wales, the three fire services in Wales, nine Welsh Government sponsored bodies, the Welsh Government and the National Assembly for Wales and the third sector as its customer organisations.

More information on the NPS, the current frameworks and a pipeline of work can be accessed via <http://nps.gov.wales/?skip=1&lang=en>

3. Framework Agreements

A framework agreement sets out the terms of an agreement under which a public body may purchase goods, services or works, a contract being formed each time the contracting authority “calls-off” from the framework and purchases goods, services or works. For more information on letting framework agreements in Wales please refer to the [Framework Agreement Procurement Advice Note](#).

3.1 Benefits of Frameworks

An effective framework agreement that is awarded / used correctly and reflects end-user’s requirements can bring many benefits, saving time / money through users being able to call-off requirements without the need to go through a new advertised competition. As mentioned above, NPS frameworks also bring additional benefits incorporating important social, economic, environmental and cultural issues for Wales. Conversely, a poorly planned framework that is awarded / used incorrectly

and has no formal buy-in from end-users can create issues for buyers and suppliers, may not offer best value for money and is at risk of challenge.

It should be noted that framework agreements do not suit all procurements and sometimes an alternative arrangement is more suitable, such as an ordinary contract or a Dynamic Purchasing System (DPS) which allows the involvement of more suppliers.

3.2 Who can set up collaborative framework agreements?

The Public Contracts Regulations 2015 state that only contracting authorities can set up and advertise framework agreements, both for themselves and on behalf of other contracting authorities. This is particularly common in the case of contracting authorities that act as Central Purchasing Bodies, defined in Regulation 2 of the PCR 2015 as “a contracting authority which provides centralised purchasing activities and which may also provide ancillary purchasing activities.”

Private organisations are not legally permitted to establish framework agreements and as such may well approach a public body to take overall responsibility for the management of the framework.

4. Speculative Framework Agreements

4.1 What is a “speculative framework agreement”?

The Welsh Government is aware that a number of organisations are claiming to offer legally compliant framework agreements to Welsh contracting authorities. In some cases, it is clear that these framework agreements have been awarded without prior consultation with those authorities and may have been established without any real understanding of the authority’s actual requirements. This may have significant legal and value for money implications for public bodies.

4.2 What are the issues with speculative framework agreements?

In order to rely upon a framework agreement and call off from it, the framework in question must have been awarded in compliance with procurement law. A contract notice must have been published which: -

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

This information should be as accurate and correct as possible, to allow potential bidders to be able to decide if they wish to be involved in the framework.

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

5. Key Considerations with Speculative Framework Agreements

If public bodies in Wales are approached by private organisations offering them use of a framework agreement, claiming that it is legally compliant, that public body should not automatically accept these offers and in each case should consider:-

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

- Does the framework represent value for money?

If a Welsh public body is approached to act as a named lead contracting authority for a framework agreement (so that a named contracting authority is seen to award it), that public body should carefully consider the risks and legal implications of doing so and seek legal advice as appropriate.

5.1 “Flag of convenience” named contracting authorities

For the purposes of this PAN, “flag of convenience” contracting authorities refer to those public bodies which commercial organisations may invite to act as the named lead contracting authority for the framework agreement they wish to establish.

Procurement law does not apply to private organisations, as the legal right of redress for any infringements in a procurement process is only available in relation to the actions of a public body (“contracting authority”). In order to be compliant with procurement law, therefore, a contract notice must specify at least one named lead contracting authority; hence the private organisation’s need for a “flag of convenience” contracting authority. In some cases, these named lead authorities may be relatively small public bodies and they may not themselves have any particular experience or expertise in relation to collaborative contracting.

In some instances, the organisation / lead contracting authority may seek to disclaim all responsibility for legal liability in respect of the establishment of the framework or the use of the framework by a public body while requiring any public body using the framework to indemnify the organisation etc. from any claim by a third party arising from the user's actions in accessing the framework.

It is important to understand that an authority which acts as a lead / named contracting authority for a regulated procurement procedure is, effectively, **assuming legal responsibility for the compliance** of the framework with procurement law. Furthermore, that liability does not end when a framework is awarded - the named authority may be cited in any subsequent legal proceedings regarding the operation of the framework and any call-off contracts awarded under it. The named authority might also be pursued by a user of the framework in relation to any losses suffered; for example in the event that a contract awarded under the

framework was held to be non-compliant, resulting in damages and/or losses to the framework user. Accordingly any public body asked to act as a “flag of convenience” contracting authority should consider the risks and implications very carefully before doing so.

When considering whether use of a particular framework is likely to be legitimate and legally-compliant, we recommend that the capability and capacity of the named authority should be an important factor. We therefore advise that any public body asked to act as a “flag of convenience” contracting authority considers carefully its own capability and capacity to do so and seeks legal advice if needed.

5.2 Named users of the framework

For a contracting authority to legally use a framework agreement, it needs to have been clearly identified in the contract notice. Unless the lead contracting authority has obtained the prior consent of other contracting authorities and taken into account their requirements and spend they should not be listed in a contract notice. To do so causes confusion for all parties – it is misleading for potential suppliers and can cause annoyance amongst contracting authorities who have not given their permission to be included. The same can be said of using vague terms such as “any contracting authority” or “all public bodies in Wales” or a blanket listing of every class of contracting authority, without any indication they have been consulted. This approach makes it difficult for a prospective bidder to ascertain which contracting authorities are likely to use the framework.

The identification ought to be either by name or by other means that makes them clearly identifiable. Where possible a link to a list of relevant contracting authorities should be provided. However, potential framework users may be identified by reference to a specific class of contracting authorities in a defined region that can be identified on the internet e.g. contracting authorities signed up to the National Procurement Service as listed at <http://nps.gov.wales/about-us/customer-member-organisations?lang=en>

For the avoidance of doubt, in the absence of specific prior agreement, the Welsh Government and public sector contracting authorities in Wales do not consent to being listed as users of any framework agreement which is not placed by a

recognised public procurement body unless they specifically consent to be included, and will consider all action available to them if they find that their details have been presented to the market in a contract notice without the necessary consent.

5.3 Description of the value of the contract

It is important that the full scope of the agreement and exactly what is to be included is well thought out in the beginning because once the framework is awarded, no substantial modifications may be made to its terms. It would be unlawful to extend the scope of the agreement to include fundamentally new products or services that were not originally advertised.

To ensure compliance with EU procurement law, the contract notice must provide an estimated value for the framework agreement. For collaborative framework agreements, every effort should be made to ensure this estimate is representative of all the potential call-offs over the lifetime of the agreement that may be made by contracting authorities that are permitted to use the framework. This is only likely to be accurate if contracting authorities named as being party to a framework have been consulted on their involvement and potential scale of demand.

It is permissible to provide an estimated value range if there is a degree of uncertainty but there is still an obligation on the lead contracting authority to provide the market with the most realistic information available i.e. there should always be a reasonable basis for the estimate of scope and/or value included in the notice.

There is a risk of challenge from suppliers if contract notices are unrealistic and/or refer to exceptionally wide ranges of possible value, as they may not provide sufficiently accurate information to allow a potential bidder to decide whether it can or should participate. As well as being bad practice, there are risks associated with knowingly providing an unrealistically high estimate of potential scope / value. If a contractor suffers any losses after being misled in relation to a framework it has secured, it may bring legal action against the lead contracting authority.

5.4 Impact of framework value on pricing

Suppliers often use the estimated framework value to determine what prices they offer in the tender. This reinforces the importance of ensuring the estimated value is as accurate and realistic as possible so suppliers have a degree of confidence when setting prices.

5.5 Cost of accessing speculative framework agreements

Central purchasing organisations operate under a variety of different business models such as central funding, subscription and contract levy, with some business models combining elements of all three. A contract levy is a common model for speculative frameworks, where suppliers pay the organisation responsible for the framework a percentage fee relating to the value of the business they receive under the framework. So while the framework might be presented as being free to access, all that may mean is that the cost is embedded in the price that users of the framework pay to the contractor. Furthermore, any levy paid to private bodies through use of such agreements could be regarded as payment for procurement agency services and as such appointment of the private provider should be done through a compliant public procurement process managed by a public body before such frameworks could be considered for use.

5.6 Numbers of economic operators to be admitted to the framework

There have been instances of speculative frameworks that have specified wholly unrealistic numbers in relation to how many suppliers are to be admitted to the framework. As in the case of incorrect / unrealistic claims regarding framework scope / value, this is potentially challengeable under procurement law and risks bringing frameworks into disrepute.

6. Conclusion

You are advised to treat speculative framework agreements and claims that they are “legally compliant” with caution. Carefully consider the legal implications and value for money considerations before using any speculative framework. If in any doubt, seek advice from your Head of Procurement and/or Legal Services. You could also check with the National Procurement Service to see if they have a framework that

would meet your needs and which you could legitimately use at nationalprocurementservice@gov.wales. Alternatively, you can send any queries to VWPolicy@gov.wales.

7. Dissemination

Please bring this PAN to the attention of all relevant staff in your organisation / sector and any other sponsored public bodies within your area of responsibility.

Contact

If you have any questions about this PAN, please contact us at VWPolicy@gov.wales.

8. Acknowledgements

Welsh Government acknowledges that it has drawn upon the following publications in the production of this Procurement Advice Note:-

- Public Contracts Regulations 2015
- Scottish Procurement Policy Note (SPPN 3/2017) on Speculative Framework Agreements, July 2017
- Wales Procurement Policy Statement, Welsh Government, 2015