COMMISSION EUROPEAN
Directorate General Internal Market and Services

PUBLIC PROCUREMENT POLICY

EXPLANATORY NOTE – FRAMEWORK AGREEMENTS – CLASSIC DIRECTIVE[1]

1. Introduction and definitions

In its Article 1(5), the new Directive 2004/18/EC (hereafter "the Directive" or the "Classic Directive") defines a framework agreement as "an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged." This definition is substantially the same as that in Directive 2004/17/CE (the new "Utilities Directive"), which, in Article 1(4), defines a framework agreement as "an agreement

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between one or more contracting entities referred to in Article 2(2) and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged"[2].

However, although the definitions are almost identical, the legal frameworks applicable to framework agreements in the Utilities Directive and the Classic Directive, respectively, are very different. As regards the Utilities Directive, the combined provisions of Article 14 and Article 40(3)(i), which are substantially unchanged compared with Directive 93/38/EEC[3], provide that contracts concluded under a framework agreement may be awarded by a procedure without a call for competition if the framework agreement has been concluded in accordance with the Utilities Directive. However, the regime laid down by the new Classic Directive[4] is very different.

As the provisions of the new Utilities Directive are unchanged, the remainder of this note will be devoted to the new provisions in the Classic Directive.

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2 These definitions are moreover closely inspired by the definition contained in Article 1(5) of Directive 93/38/EEC: "'framework agreement' shall mean an agreement between one of the contracting entities defined in Article 2 and one more suppliers, contractors or service providers the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period".

3 Article 5 and Article 20(2)(i).

4 Recitals 11 and 16, Article 1(5), Article 32.

1.1. Types of framework agreements covered by the Classic Directive

Although the Classic Directive refers exclusively to "framework agreements", the provisions actually relate to two different situations: framework agreements that establish all the terms and those which do not establish them all. Purely for explanatory purposes, the first kind may be termed ***framework contracts*** and the second ***framework agreements*** **stricto sensu**. It should be stressed that the use of this terminology is not obligatory for implementing the Directive. It is also useful to recall that framework agreements that establish all the terms (framework contracts) are "traditional" public contracts and that consequently their use was possible under the old Classic Directives[5], provided they were concluded in accordance with the procedural provisions of these Directives[6].

Framework agreements that establish all the terms (framework contracts) are legal instruments under which the terms applicable to any orders under this type of framework agreement are set out in a binding manner[7] for the parties to the framework agreement — in other words, the use of this type of framework agreement does not require a new agreement between the parties, e.g. through negotiations, new tenders etc. Where such framework agreements are concluded with several economic operators, they come under the first indent of Article 32(4), while those concluded with a single economic operator are covered in Article 32(3)[8].

Framework agreements that do **not** establish all the terms (framework agreements *stricto sensu*) are by definition incomplete: this type of framework agreement either does not include certain terms or does not establish in a binding way **all** the terms necessary so that any subsequent orders under the framework agreement can be concluded without any further agreement between the parties. In other words, some terms still have to be established subsequently.

Whether a term is or is not established depends on national law; similarly, in the case of a framework agreement that does not establish all the terms and which is concluded with one economic operator, it is national law which determines whether this operator is obliged to supplement its tender.[9] Furthermore, the answer to the question whether an economic operator who is party to a framework agreement (single or multiple) that establishes all the terms[10] is obliged to deliver the agreed goods, work or services under

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5 Directives 92/50/EEC, 93/36/EEC and 93/37/EEC.

6 See the Judgment of the Court of 4 May 1995. Commission of the European Communities v Hellenic Republic. Case C-79/94. *European Court reports 1995 Page I-01071*

7 However, this does not mean that, for example, the price necessarily has to be established in the form of a fixed amount — it is entirely possible to set it by reference to a price index (e.g. the price on the Rotterdam "spot market" ± x%), provided that the mechanism chosen allows the establishment of the price for a specific order in an objective manner. It is also conceivable that the contracting authority is not **obliged** to use the framework contract — it nevertheless remains a framework contract if, once the decision to use it has been taken, the conditions are then established in a definitive manner.

8 As explained later, this provision also covers framework agreements *stricto sensu* concluded with a single economic operator.

9 See point 3.3. below.

10 See points 3.1. and 3.2. above

the terms established and whether the contracting authority may possibly compel him to do so also depends on national law, as does the question whether an economic operator can oblige a contracting authority to order goods, services or works.

Although the Directive covers two different types of framework agreements, the majority of the specific provisions apply to all types of framework agreements, whether they establish all the terms or not. Unless otherwise stated, the term "framework agreement" will therefore be used below to refer to all framework agreements without distinction[11].

2. Conclusion of framework agreements.

2.1. All types of framework agreements (whether they establish all the terms or not)

To conclude a framework agreement, the contracting authorities use the normal procedures, i.e. the open or restricted procedures or, when the conditions explicitly referred to in Articles 30 or 31 are satisfied, a negotiated procedure, with or without prior publication[12]. Consequently, the normal rules, in particular concerning publicity, time limits, criteria for exclusion, selection and award, apply — with modifications depending on the procedure chosen. However, attention needs to be drawn to the special rule concerning multiple framework agreements (i.e. concluded with several economic operators) laid down in the first subparagraph of Article 32(4), under which the minimum number of economic operators with whom a framework agreement can be concluded is three, naturally on condition that the number of "acceptable" tenders and/or economic operators permits this. This rule applies regardless of the procedure chosen for the conclusion of framework agreements[13].

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11 That Article 32 covers both types of framework agreements (in other words, both framework agreements *stricto sensu* as well as framework contracts) is confirmed by the provision's history. In fact, the provision in the original proposal, COM(2000) 275 final of 10.5.2000, applied exclusively to framework agreements that do not establish all terms and specified — as the only possibility — that contracts based on a framework agreement would be awarded after a new competition. The explanatory memorandum explicitly stated that: "Framework agreements are not public contracts within the meaning of the Directives; they are not contracts to the extent that they do not lay down specific terms and thus cannot give rise to performance as a contract does. By contrast, it is pointed out that contracts with several economic operators (such as widely used purchase order contracts) are public contracts within the meaning of the Directives (see Article 1(2)). They must be awarded in accordance with those provisions if the thresholds are exceeded." During the first discussions in Council, this was further clarified through a change in the wording of the recital on framework agreements, cf. for instance document SN 4075/1/00 REV 1 (MAP) of 31.10.2000: "A Community definition of these buying techniques, known as 'framework agreements', should therefore be provided, together with specific rules, (-) ***without prejudice to other existing buying procedures and techniques which comply with the Directive, irrespective of how these are designated under national law. ...***" The recital was, however, redrafted to take into account the evolution of the provision and this part of the recital was thus eliminated.

12 No provision in the Directive explicitly prohibits the possibility of concluding framework agreements at the end of a competitive dialogue; it is however difficult to imagine cases where the conditions governing the use of a competitive dialogue would be satisfied and where a framework agreement would be practicable.

13 If the contracting authorities choose, in accordance with Article 44(3), to limit the number of **candidates** in a restricted or negotiated procedure for concluding framework agreements, they

The last part of the second subparagraph of Article 32(2) lays down that framework agreements can only be used "between the contracting authorities and the economic operators ***originally*** party to the framework agreement". When a framework agreement is to be used by several contracting authorities, therefore, these contracting authorities must be identified explicitly[14] in the contract notice, either by naming them directly in the notice itself or through reference to other documents (e.g. the specifications or a list available from one of the contracting authorities[15], etc.). In other words, framework agreements constitute a closed system which no-one else can enter, either as a purchaser or a supplier.

The duration of framework agreements is limited to 4 years, which is also the case for the contracts based on framework agreements[16]. However, framework agreements may have a longer duration in "exceptional cases duly justified, in particular by the subject of the framework agreement". Thus, for example, a longer duration could be justified in order to ensure effective competition for the contract in question if its performance required investment with a depreciation period of more than 4 years. This is because the development of effective competition in the public procurement sector is one of the objectives of the Directives dealing with this area, as recalled by established case law[17] and the second recital of the Classic Directive. Moreover, it should be noted that the public procurement directives do not operate in a legal vacuum — both Community and national competition rules apply to them.

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therefore need to set the minimum number of candidates that they intend to ask to submit a tender or negotiate with so that they can comply with Article 32(4).

14 For example, in the case of a framework agreement concluded by a central purchasing body acting as an intermediary rather than as a "wholesale dealer", it would not therefore be sufficient to indicate that the agreement can be used by "contracting authorities" established in the Member State in question. In fact, such an indication might not render it possible to identify the entities that are parties to the agreement due to the difficulties that may arise in determining whether an entity does or does not meet the definition of a body governed by public law. On the other hand, a description permitting immediate identification of the contracting authorities concerned — for example "the municipalities of x province or of y region" – renders it possible to verify that the provision of Article 32(2), second indent has been observed.

15 E.g. the list of contracting authorities that have the right to use framework agreements concluded by a central purchasing body. It should however be noted that such lists must indicate the date from which the contracting authorities obtained this right.

16 This is because contracts based on a framework agreement are awarded "within the limits" of the latter, "by application of the terms laid down …" or through reopening competition "on the basis of the same .... terms …". However, the framework agreement can of course continue to be used right until the end, even if the performance of a specific contract based on the framework agreement would take place after expiration of the framework agreement itself. Under a three-year framework agreement on the supply of paper for photocopiers, it would thus be perfectly possible two weeks before expiration of the agreement to reopen a competition for supply even if the paper in question would be delivered two weeks after expiration. Again, let us imagine a framework agreement for the supply of photocopiers and for associated maintenance services over a two-year warranty period. In such a case, nothing would prevent the contracting authority from using the framework agreement a year before its expiration even if maintenance services would be rendered during the year after expiration of the agreement.

17 See for example point 35 of the decision by the Court of 7.10.2004 in case C-247/02 "Sintesi". In the case of framework agreements, this objective is moreover more or less restated in the fifth subparagraph of Article 32(2).

The limitation of the duration of framework agreements and the competition provisions may help avoid or limit the problems associated with the presence of dominant suppliers. However, this may not be sufficient due to the limits of Community competition rules. Other initiatives could therefore prove useful, even necessary, e.g. a division into lots of an appropriate size with a prohibition on tendering for all the lots — which could moreover be a useful instrument for promoting the participation of SMEs in public procurement under framework agreements.

Finally, it may be noted that the provisions of the first and second subparagraphs of Article 35(4) require the contracting authorities to send a contract award notice not later than 48 days after the conclusion of the framework agreement itself. On the other hand, they are exempt from this obligation when awarding individual contracts based on the framework agreement.

2.2. Framework agreements that do NOT establish all the terms (framework agreements *stricto sensu*, excluding framework contracts)

In the case of framework agreements *stricto sensu*, certain aspects are not set out in the agreement itself but are left to one side in order to be established later, upon reopening competition under multiple framework agreements or in subsequent consultation with the sole economic operator in the cases laid down in the second subparagraph of Article 32(3). The Directive does not require certain aspects to be established at the beginning: as regards the price in particular, it should be emphasised that this aspect does not need to be established in the framework agreement itself[18].

Particular care is necessary in drawing up the specifications[19] and terms of the framework agreement *stricto sensu* in view of the fact that they cannot under any circumstances be substantially amended afterwards, cf. the third subparagraph of Article 32(2). Moreover, the contracting authorities must ensure that the award criteria — not only for the award of the framework agreement itself, but also for the award of individual contracts based on the agreement[20] — and their weightings appear in the specifications of the framework agreement[21].

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18 The definition of framework agreements could allow one to think otherwise ("the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price"), but the possibility of not establishing the price(s) is taken for granted in the second subparagraph of Article 54(2) ("In the same circumstances, an electronic auction may be held when reopening competition among the parties to a framework agreement as provided for in the second indent of the second subparagraph of Article 32(4) ...").

19 If, for example, the object of the framework agreement is the supply of computers, it would be necessary to establish the technical specifications in terms of (minimum) performances and functionalities in order to permit the tenders submitted when competition is reopened to relate on each occasion to the latest models.

20 These criteria are not necessarily the same as those that will be used for the award of individual contracts when competition is subsequently reopened, cf. point 3.4 below.

21 Specifications in framework agreements therefore have to clearly indicate whether the contracting authorities do not wish to establish all the terms in the framework agreement itself, thus opening the way to a reopening of competition, or whether they wish to establish all the terms and consequently exclude the possibility of reopening the competition.

3. Award of contracts based on a framework agreement

3.1. Framework agreements that establish all the terms and are concluded with a single economic operator (individual framework contracts)

This group includes, for example, purchase order contracts ("contrats à bon de commande"). Under Article 32(3), first subparagraph, contracts based on a framework agreement are "awarded within the limits of the terms laid down in the framework agreement". The second subparagraph of this paragraph, which is formulated in such a way as to cover all forms of framework agreements — whether or not they establish all the terms — then adds that "contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary." For contracts to be awarded under a framework agreement that itself establishes **all** the terms in a binding manner there is no scope for supplementing the initial offer. Orders are therefore placed exclusively under the terms established in the framework agreement and within the limits (in particular as concerns the range of products, works or services covered as well as the quantities) set in this agreement[22].

3.2. Multiple framework agreements that establish all the terms (multiple framework contracts)

As regards contracts based on this type of framework agreement, the Directive limits itself to specifying, in Article 32(4), second subparagraph, first indent, that they are awarded "by application of the terms laid down in the framework agreement without

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[22] This is also confirmed by the history of what has become Article 32(2), second subparagraph. Successively, this provision was formulated as follows:

"For the award of these contracts, contracting authorities may … consult the operator party to the framework agreement in writing, requesting it **to supplement its tender or to improve it as compared to the conditions established in the agreement**." (Unofficial translation from doc. SN 4075/1/00 REV 1(MAP) of 7.11.2000.);

"For the award of these contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it **to update its tender as necessary**." (Unofficial translation from doc. of 17.11.2000.); and

"For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary." (Unofficial translation from doc. of 22.11.2000.)

As can be seen, the first version gave contracting authorities an unconditional right not only to request that the tender be **supplemented ("completed")**, which presupposes that the tender is not complete, i.e. is a tender for a framework agreement not establishing all the terms – but also that the tender be **improved compared to the established conditions …** This last part would have been applicable both to framework agreements that do not establish all the terms and to framework agreements which do establish all the terms.

The second version of the provision would also have been applicable to both forms of framework agreements, given that the term "updating" does not presuppose either a complete agreement or an incomplete agreement.

The final version returns to the notion of "supplementing", having definitively discarded the two terms ("improving/updating"), which would have been applicable to complete agreements, i.e. framework agreements establishing all the terms.

reopening competition"[23]. The choice between the different economic operators for the execution of a specific order is, on the other hand, not explicitly regulated by the Directive. Consequently, this choice may be made simply by complying with the basic principles, cf. Article 2. One way of doing this is the "cascade" method, i.e. firstly contacting the economic operator whose tender for the award of a framework agreement establishing all the terms (framework contract) was considered the best and turning to the second one where the first one is not capable of or interested in providing the goods, services or works in question[24].

3.3. Framework agreements that do not establish all the terms (framework agreements *stricto sensu*) and are concluded with a single economic operator

Individual contracts based on a framework agreement of this type and concluded with a single economic operator are awarded within the limits (in particular as regards the range of products, services or works covered and the quantities) laid down in the framework agreement after consulting this operator in writing and asking it to provide further information in addition to its tender[25]. In so doing, account must be taken of the provision in the third subparagraph of paragraph 2 under which the terms cannot be substantially amended. An individual contract is concluded on the basis of the conditions established in the framework agreement itself in combination with the terms offered to complete the framework agreement where these were **not** initially established in the agreement.

3.4. Multiple framework agreements that do not establish all the terms (multiple framework agreements *stricto sensu*)

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[23] When the contracting authority has chosen to establish all the terms in the framework agreement itself, it no longer has the possibility of reopening the competition, given that Article 32(4), second subparagraph, second indent, reserves that possibility exclusively for those cases "where **not** all the terms are laid down in the framework agreement".

[24] A decision as to which economic operator a specific order is to be placed with may also be made according to other criteria, provided that they are objective, transparent and non-discriminatory. Thus, let us imagine a large institution which, having photocopiers of different makes, has concluded framework agreements establishing all the terms for the maintenance and repair of this equipment with a series of economic operators so as to ensure the presence of at least one specialist for each make of photocopier in its machine pool. For the award of the framework agreements, the contracting authority has used award criteria such as price, speed of intervention, range of makes that can be catered for, etc. It is clear that an order to service e.g. a Rank Xerox machine may then be given to the specialist for this make even if the tender for Canons has been ranked first.

[25] The wording of the provision in the second subparagraph of paragraph 3 could allow one to think that this consultation and the supply of further information in addition to the initial tender would always be optional. This wording is necessary as it refers to both framework agreements that do as well as framework agreements that do not establish all the terms, cf. point 3.1 above. In the latter case, however, there are by definition aspects that are **not** fully determined (cf. the definition in point 1 above) and which must therefore be established to supplement the initial framework agreement.

Individual contracts based on a framework agreement are awarded following the reopening of competition in accordance with the procedures laid down in the second indent of the second subparagraph of paragraph 4[26].

The reopening of competition is on the basis of the "the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement", naturally subject to the prohibition on "substantial modifications" to the terms set out in the framework agreement[27].

Normally, all the economic operators party to the agreement must be consulted in writing. However, if the framework agreement relates for example to a certain range of office supplies and these are divided into lots, there is no obligation to consult those parties not covered by the framework agreement for the type of supplies that are the subject of the specific contract in question.

In this written consultation, the contracting authorities indicate the object of the specific contract for which tenders[28] are requested and the time limit for their submission[29]. The Directive does not establish any minimum time limit — it confines itself to specifying that this time limit must be "sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders". Therefore, if the contracting authority has prescribed the use of electronic means of communication and only a single aspect in the specific tender remains outstanding, such as the price, a short time limit could be sufficient. However, if the contracting authority decides to take up the option, under the second subparagraph of Article 54(2), to use an electronic auction for the reopening of competition, it will have to respect the minimum time limit specified at the end of the second subparagraph of Article 54(4)[30].

Under the second indent of the second subparagraph of Article 32(4)(d), the award of a contract is made "on the basis of the award criteria set out in the specifications of the framework agreement." It should be emphasised that the award criteria do not have to be the same as those used for the conclusion of the framework agreement itself. Thus, it would be entirely possible to conclude a framework agreement exclusively on the basis

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26 For framework agreements that do **not** establish all the terms, it is by definition impossible to award the individual contracts based on the agreement in accordance with the procedures provided for in the first indent of the second subparagraph of paragraph 4. In fact, in order to be able to award the contracts without reopening competition, **all** the terms must be established in the framework agreement itself, which by definition is not the case here.

27 See the third subparagraph of Article 32(2) and point 2 above.

28 As recital 12 notes, a tender for a reopened competition under a multiple framework agreement may "take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting authority in accordance with Article 42."

29 It should be noted that the provisions of Articles 39 and 40 do not apply at this stage of the procedure. Article 39 is not applicable because the procedure is, at this stage, not (or no longer) an open procedure and Article 40 is not relevant because the economic operators party to the agreement are not (or no longer) "candidates" as defined in the final sentence of the third subparagraph of Article 1(8).

30 "The electronic auction may not start sooner than two working days after the date on which invitations are sent out."

of “qualitative” criteria, in terms of the most economically advantageous tender, and to base the award of specific contracts solely on the lowest price, naturally on condition that this criterion was set out in the specifications of the framework agreement. Let us take the example of a framework agreement relating to computers and peripherals (printers, scanners etc.), concluded on the basis of the most economically advantageous tender using criteria such as price, technical value and cost of use. For awarding a specific contract solely for the supply of printers, however, the contracting authority could conceivably set out in the specifications of the framework agreement that, for such a contract, “technical value” will be measured in terms of “pages/minute” while “cost of use” will take account of energy consumption, the life of ink cartridges and their price.