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# Framework Difficulties

Finola McCarthy, Partner, RDJ LLP

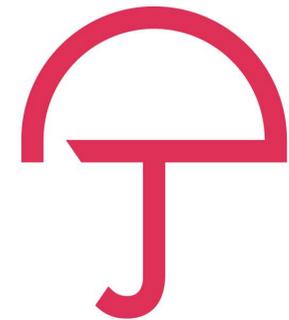
Whitepaper Conference

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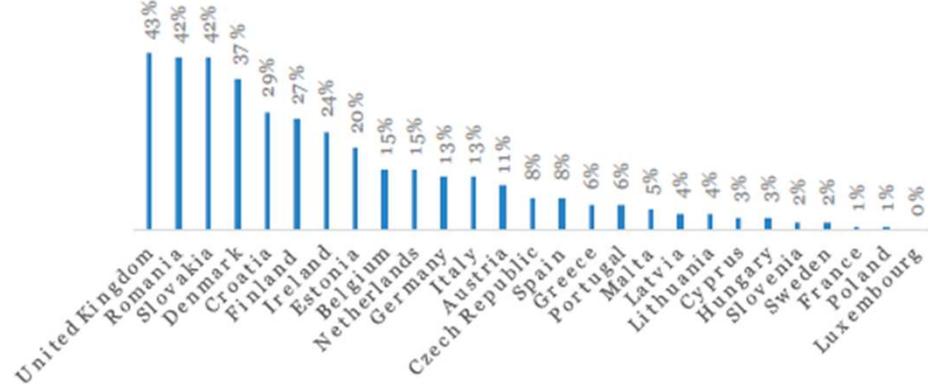
## Framework Difficulties

**Question:** How do you control - and overcome - difficulties with frameworks, including call off contracts, renewal options and exceeding estimated contract values?

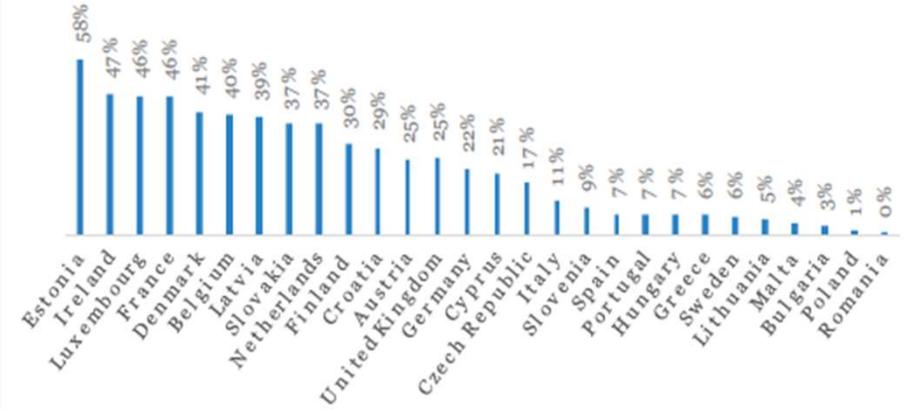


## Use of Frameworks

Use of Framework Agreements in EU Member States in 2014



Use of Framework Agreements in EU Member States in 2019

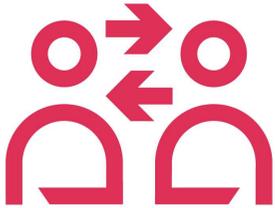


Source: World Bank Group Guidebook for Setting Up and Operating Framework Agreements 2021 (Data from TED)

## Framework Rules – Recap

Classic 2014/24/EU		Utilities 2014/25/EU	
<b>A. 33(1) &amp; Recital 62</b> <b>Regulation 33(2)</b>	Not exceed 4 years except exceptional case Call-Off contracts may be longer or shorter	<b>A.51(1) &amp; Recital 72</b> <b>Regulation 50(2)</b>	Not exceed 8 years except exceptional case Call-Off contracts may be longer or shorter
<b>A. 33(2) &amp; Recital 60</b> <b>Regulation 33(4) &amp; (5)</b>	contracts only with identified contracting authorities no substantial modifications permitted	<b>A.51(2) &amp; Recital 71</b> <b>Regulation 50(3), (4) &amp; (6)</b>	Contracts awarded on basis of objective rules and criteria set out in the FWA, may involve mini-competition.  Shall not use FWA improperly or to prevent restrict or distort competition
<b>A. 33(3)</b> <b>Regulation 33(6) &amp; (7)</b>	Single supplier framework – call-off contracts, terms within FWA and may be supplemented		
<b>A.33(4)</b> <b>Regulation 33(8)</b>	Multi-supplier framework: mini-competition if all terms not in FWA		
<b>33(5)</b>	Conduct of mini-competition: based on terms applied for award of FWA		

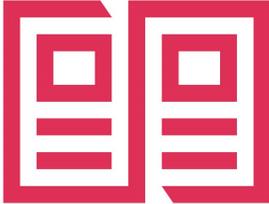
# Difficulties with framework



**Call-offs**



**Exceeding  
estimated value**



**Renewals**

## Call-Offs

### Who is entitled to call-off?

#### **Case C-216/17 Autorità Garante della Concorrenza e del Mercato Antitrust and Coopservice (19 December 2018)**

- Regional health authority Lake Garda
- Single supplier framework for sanitation and waste disposal
- Extension clause allowing 18 named authorities to accede to the framework
- A second authority exercised extension
- Existing provider challenged as a direct award

## Case C-216/17

**Q:** do all potential contracting authorities have to be signatories to the FWA?

**CJEU:** authority must be clearly identified explicitly in the tender documents as a potential beneficiary but does not have to be a signatory.

### How to avoid difficulty?

- Clearly identify potential beneficiaries in the tender documents – must be explicit reference
- A.33(2): *“those contracting authorities clearly identified for this purpose in the call for competition or the invitation...”*
- Recital 60: *“clearly identified by name or ... by reference to a given category of contracting authorities so.... can be easily identified*

## Call-Offs – Some other points

- Award of Call-Off contract must comply with call-off mechanism in FWA
  - Risk of challenge for breach of mechanism
    - Medicare Ltd v Minister for the Cabinet Office [2015] EWHC 1854
- No substantial amendments to call-off contracts are permitted
  - *but* rigid terms may create difficulty
  - include provisions to allow some flexibility
- Improper use of framework
  - Consultant Connect Limited v (1) NHS Bath ICB (2) NHS Gloucestershire ICB and (3) NHS Bristol ICB [2022] EWHC 2037 (TCC)

## Exceeding estimated value

### Rules on estimates

- Estimated value of frameworks: maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement (A.5(5)/A.16)
- Contract notice: “..., indication of the planned duration of the framework agreement, stating, where appropriate, the reasons for any duration exceeding four years; **as far as possible, indication of value or order of magnitude and frequency of contracts to be awarded, number and, where appropriate, proposed maximum number of economic operators to participate**” (Annex V part C.10(a) – no equivalent in Utilities Directive)

## Exceeding estimated value



### **Case C-216/17 Autorità Garante della Concorrenza e del Mercato Antitrust and Coopservice**

- The quantity of services required was referred to as “usual requirements”

Held: Estimate must be stated in the contract notice or tender documents and can't be exceeded

*A contracting authority “...can make commitments on its own... only up to a certain quantity and once that limit has been reached the agreement will no longer have any effect”*

## Case C-23/20

### Case C-23/20 **Simonsen & Weel A/S v Region Nordjylland 17 June 2021**

- 1 region in Denmark with option for second region to participate
- Single party framework – 4 years duration
- Supplies – tube feeding equipment
- Contract Notice did not specify estimated or maximum value or quantity of products
- Tender documents had estimates of expected quantities (“the actual consumption may prove to be higher or lower”)
- S&W challenged award

## Case C-23/20

**Q:** Does the contract notice need to state an estimated value *and* a maximum value?

**CJEU:** referred to principles of equal treatment and transparency.

Held: Yes

- the estimated maximum value of all contracts to be awarded must be included in the Contract Notice or tender documents available to all tenderers

## Case C-23/20

- Contracting authority that is party to the FWA must indicate in the FWA the estimated and maximum quantity/value
- Must use best endeavours re maximum value and frequency of contracts
- Maximum amount can be stated as a whole and not per participating CA
- FWA can be amended under A. 72 as long as not substantial modification
- Above the maximum value the FWA will have no effect

## Exceeding Estimated value – Possible Solutions

- Include a maximum value higher than the estimate (not disproportionate) – a margin of flexibility
- Consider a review clause to address effect of price increases on the maximum value
- Careful contract monitoring during the lifetime of the framework
- Start planning early for new framework

## Renewals of Frameworks

Option to extend a framework is permitted if stated in the FWA

- Follow the procedure provided for exercising the option carefully
- Prior to renewal check the value of purchases v maximum value

But prohibition on using FWA in a manner that distorts competition

- Possibility of extending call off contract?
  - Recital 62 (Classic)/Recital 72 (Utilities)

*“It should also be clarified that, while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, **the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer.**”*

**Thank you for your time.  
Any questions?**

**Finola McCarthy**

**RDJ LLP**

Partner

**E [finola.mccarthy@rdj.ie](mailto:finola.mccarthy@rdj.ie)**

**T +353 21 4802771**

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