THE GHOST OF THE PROCUREMENT ACT 2023? AT WHAT POINT DO NEUTRAL-VENDOR AND SINGLE SUPPLIER FRAMEWORKS BECOME “PROCUREMENT BY THE BACK DOOR”?

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20 NOVEMBER 2026



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RECENT SPOTLIGHTS PLACED ON FRAMEWORKS IN THE UK



REPORTS AND GUIDANCE

- Competition in public procurement: lessons learned (July 2023)
- Efficiency in central purchasing (July 2024)
- Cabinet Office Procurement Compliance and Oversight Report (Aug 2026) – G-Cloud misuse
- The GCF Framework Practice Guide (Sept 2026)



PRESS COVERAGE AND LITERATURE

- Financial Times “Process for UK government contracts erodes ‘transparency’, warn experts” (3 June 2024)
- Financial Times “Private providers winning big fees on UK public sector contracts, experts warn” (7 June 2024)
- “The Marketisation of Framework Agreements in the UK” (Steven Brunning and Luke Butler)

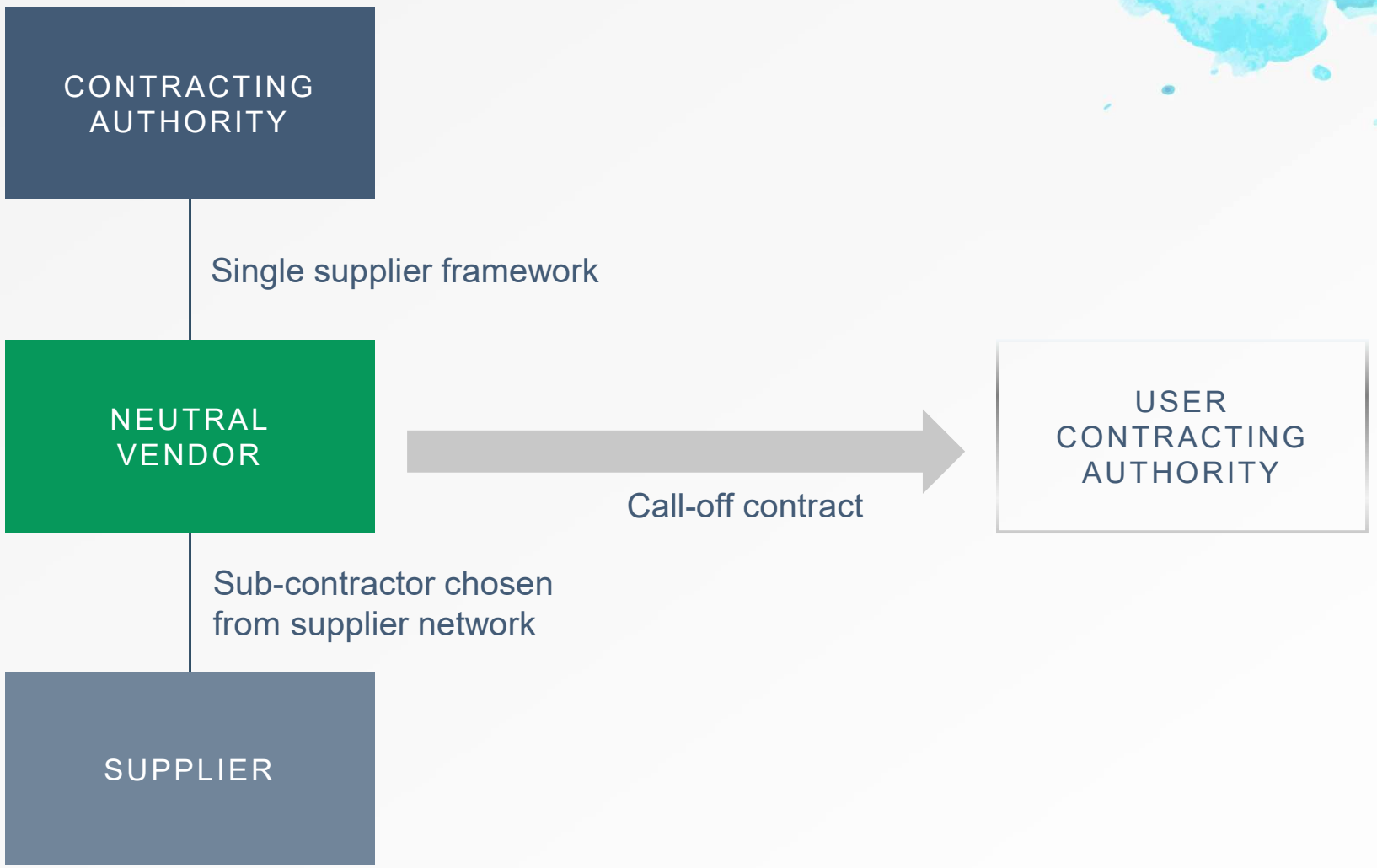




UK CASES / CLAIMS

- *Consultant Connect v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board & Ors [2022] EWHC 2037 (TCC)*
- *Pagabo v Alder Hey Children's NHS Foundation Trust (discontinued) (2024)*
- *Bouygues (U.K.) Limited v Secretary of State for Education (2026 ongoing)*
- ***Good Law Project v East of England Broadband Network (settled 2022)***
- **See CJEU cases on single supplier frameworks (later slide)**

CHARACTERISTICS OF A NEUTRAL VENDOR FRAMEWORK



TYPICAL CHARACTERISTICS OF A NEUTRAL VENDOR FRAMEWORK



Advertised and procured by a CA as a single-supplier framework



For use by a wide CA user base



Appoints “managed service provider” or similar to manage a route to market – a pseudo CPA?



Wide range of requirements, high level CPV codes and high estimates of value



Marketplace of suppliers established during framework - a sub-multi-supplier framework of sorts?



CA using framework enters into call-off contract with managed service provider (direct award), not actual supplier

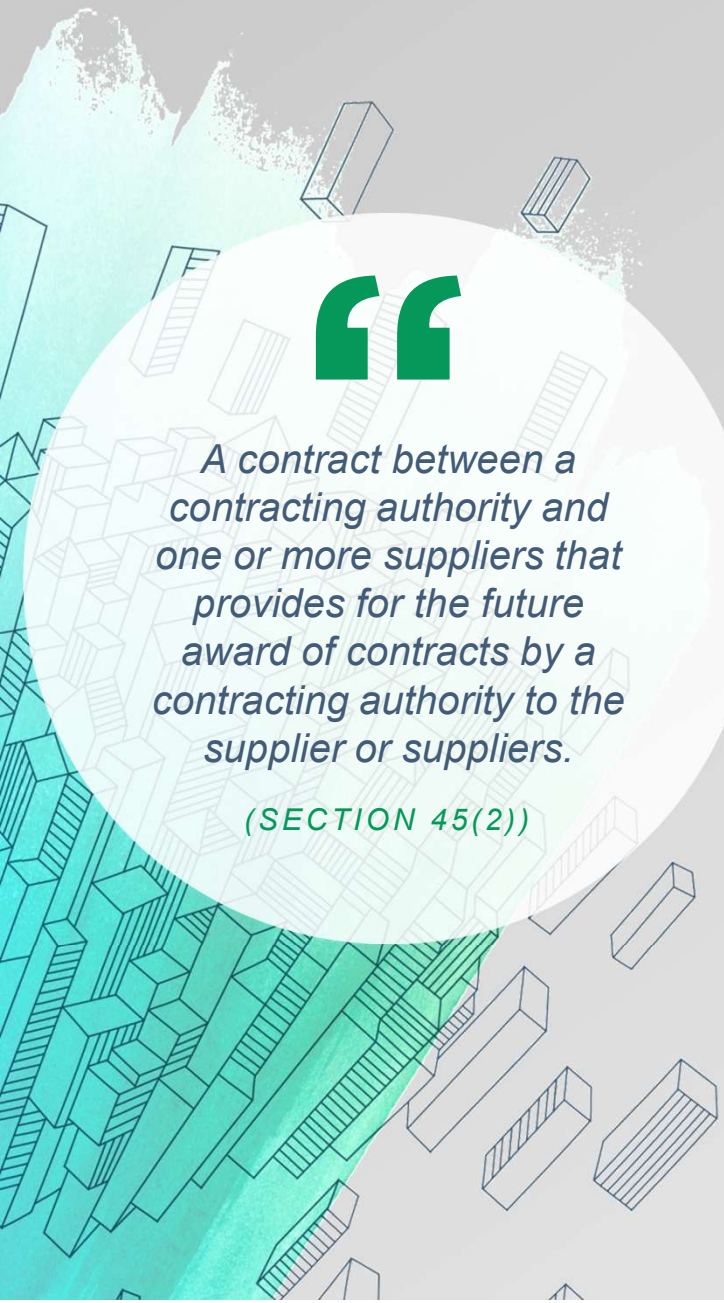


Managed service provider sub-contracts with chosen supplier



Fees payable by user CA/Supplier (depending on applicable procurement legislation?)

PA 23 FRAMEWORK DEFINITION



A contract between a contracting authority and one or more suppliers that provides for the future award of contracts by a contracting authority to the supplier or suppliers.

(SECTION 45(2))

- Different to EU definition '*purpose of which is to establish terms…in particular with regard to price…*'
- An above threshold 'framework' that is not exempted is a 'public contract'
- Does not reference "pecuniary interest" like definition of other public contracts
- Framework Guidance states "The Act refers to 'frameworks' rather than 'framework agreements', as in the previous legislation, but otherwise they are generally similar."
- Max term of 4 years for public sector closed frameworks
- 8 years for open frameworks (4 from point of where there is a single supplier)
- Minimal explicit provisions on single supplier frameworks

APPLICATION OF THE FRAMEWORK PROVISIONS IN THE PA 23 TO THE NEUTRAL VENDOR MODEL

- Not caught by S.45(8)(b)? See Explanatory Note 299
- Falls within definition of a single supplier framework?
- Only other provision in PA 23 specific to single supplier frameworks:

  S.45(4)(a):

  "A framework may provide for the future award of a public contract without competition between suppliers:

  (a) in circumstances where only one supplier is party to the framework

  - GCF Guidance and Framework Practice Guide are silent on this model



HOW TO APPLY OTHER PROVISIONS IN PA 23 TO THE NEUTRAL VENDOR MODEL?

- S.45(6) - A framework may not permit the award of a public contract to an excluded supplier (S.45(6))
- S.28 on sub-contractors only applies when running a competitive tendering procedure
- S.23 and S.46(1) Conditions of participation (framework and call-off level when using competitive selection process?)
- S.24 and S.46(8) Award criteria (framework and call-off level when using competitive selection process?)
- S.74 modifications – connection between framework award and call-off terms?
- Ultimately, CAs need to consider S.12
  - Is S.12 sufficient to regulate use of the neutral vendor model largely by itself?

NEUTRAL VENDORS – AN UNREGULATED SPACE



All call-offs of public contracts only covered by very limited rules on using a single-supplier framework



Rules on call-off procedures for multi-supplier frameworks do not apply at all. Risk of framework shopping using direct award loophole?



No rules on setting out core terms and including an objective selection mechanism for direct awards to a supplier.



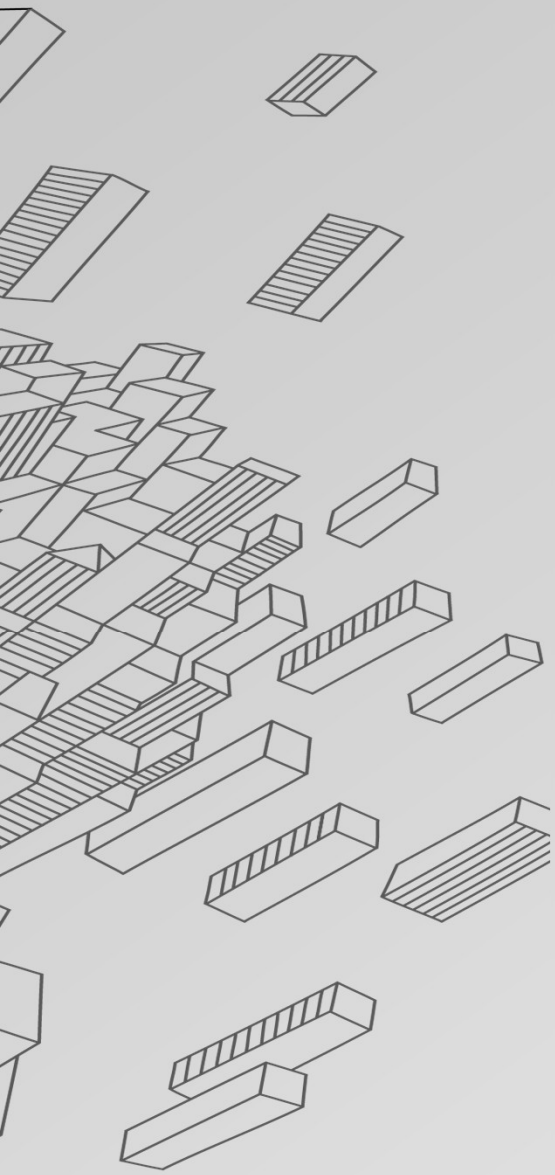
None of the rules on running a competitive selection process apply to the appointment of the supplier.



Neutral vendor able to set up its own marketplace for new suppliers to join at any time.



Does a supplier have standing to bring a procurement claim when not a party to the framework? (*National Lottery, Consultant Connect, Lightways)*



THE UK'S PATH TO MARKETISED FRAMEWORK MODELS

ORIGINAL EU OBJECTIVES UNDERPINNING INTRODUCTION OF RULES ON PUBLIC SECTOR FRAMEWORKS AND UK APPROACH

01.

Skeletal set of rules driven by objectives of non-discrimination, free movement, removing barriers to trade

02.

Rules introduced to clarify what is permitted under EU law recognising frameworks as an efficient purchasing tool

03.

EU emphasis on substantial part of competition being carried out up-front to agree terms

04.

Provisions in EU directives about effective competition and risks associated with centralised purchasing

05.

Single supplier frameworks – added late in the day in 2004 Directive!

06.

UK copy out approach to EU Directives and lack of clarity in Green paper on objectives for frameworks in the PA 23

NOTE THE FOLLOWING HAVE NOT MADE IT INTO THE PA 23



Key purpose of framework "to establish the terms" (see Reg 33(2) PCR 2015)



A framework "should not be used improperly or in such a way as to prevent, restrict or distort competition" (see Recital 61 Directive 2014/24/EU)



Rule on allowing award of a public service contract for centralised purchasing activities to a CPA (see Reg 37(8) PCR 2015)



Procedures must be applied between CAs and suppliers party to the framework (*see Reg 33(5) PCR 2015 and Concorrenza*)



Cannot make substantial modifications particularly in case of single supplier frameworks (see Reg33(6) PCR 2015)



Must award within limits of framework and can consult supplier to supplement its tender (see Reg 33(7) PCR 2015)

COMPARE – RECENT EU DIRECTION OF TRAVEL ON CENTRALISED PURCHASING AND FRAMEWORKS



WHAT SHOULD A CA EXPECT FROM A SINGLE SUPPLIER FRAMEWORK TO SUPPORT LEGAL COMPLIANCE?

a.

CA able to demonstrate it can meaningfully satisfy obligations in S.12 and apply other provisions in PA 23

b.

Involved in preliminary market engagement – clarity on whether a joint or CPA framework

c.

Subcontractors tested at the outset when framework awarded

d.

Well defined scope of requirements

e.

Majority of substantive terms settled in framework and connection between framework award and call-off

f.

Contract with actual supplier or intermediary only where actual supplier tested as part of original procurement

g.

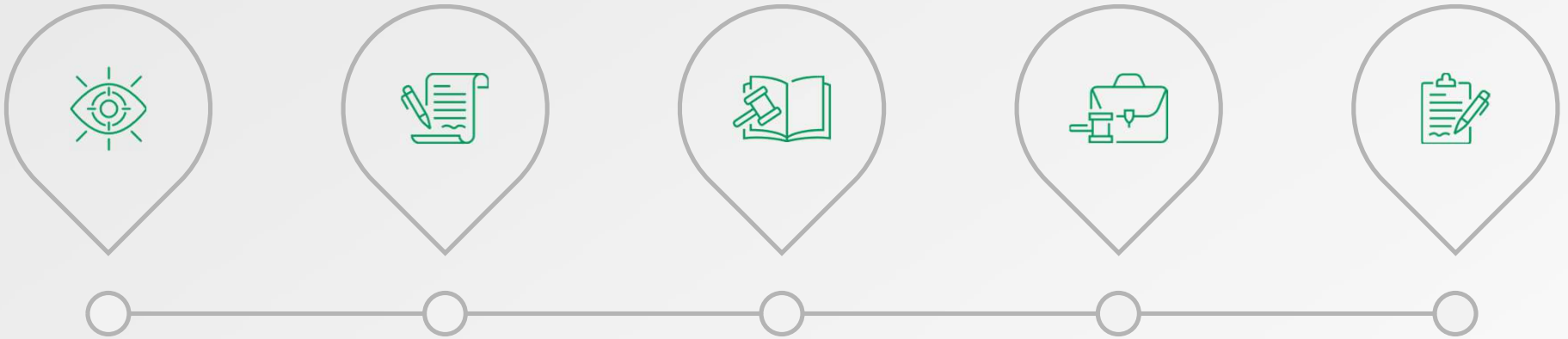
Transparent call-off process and fees calculated in accordance with procurement rules

h.

Ability to complete Contract Award Notice and Contract Details Notice transparently

NEED FOR FURTHER REFORM

ULTIMATELY, DO WE NEED:



- Clearer objectives underpinning centralised purchasing and use of the framework model?
- Clarify application of rules to different framework models? Does the NV contract model require specific regulation?
- Policy direction on involvement of private sector framework managers and NV models?
- A better and more workable open framework model (see UK's proposals in response to consultation on 2014 Directive)?
- Specific regulation of CPAs and effective sector specific policy initiatives? e.g. Ethical Framework Initiative



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