

Agenda

- **Framework agreements**
 - Current regime
 - New regime
- **Focus**
 - Above threshold
 - No exemptions apply
 - Goods, services and works



Framework agreements

Why use a framework agreement?

- **What is it?**
 - Pre-approved suppliers from whom public sector can procure goods, services or works
 - Often divided into lots
 - Repeat goods, services or works
 - Can be single or multiple provider framework
 - Rarely guarantee volume of work



- **Pro's**
 - Simplified and quicker procurement process for call-off contracts once framework established
 - Access to a ready market
 - Reduced procurement costs
 - Economies of scale
 - Compliance – pre-approved suppliers with set T&Cs

- **Con's**
 - Limited supply pool reducing competition
 - Rigidity of terms
 - Reduced innovation



Framework agreements under the Procurement Regulations 2015



Can we throw out PCR 2015?

- **24 February 2025**
- **Transitional provisions**
 - Procurements started under PCR 2015
 - Contracts awarded under PCR 2015
 - Call off contracts for frameworks agreements awarded under PCR 2015
 - Contract management eg material changes etc

Framework agreements under PCR 2015

- Regulation 33
- Case law
- Regulation 33(2)

“framework agreement” means 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.





OCS Group UK Ltd v Community Health Partnerships Ltd [2023] EWHC 3369

➤ **Facts**

- P incumbent provider
- Cleaning services procurement
- 9 year contract worth circa £236m
- Call-off competition
- Difference in scores 0.02%
- Concerns raised regarding the level of detail in the feedback

➤ **Decision**

- No obligation to provide the reasoning but applying Lancashire Care NHS Foundation Trust v Lancashire County Council [2018] EWHC 1589 duty of transparency requires contracting authority to demonstrate sufficient reason for the scores awarded



Consultant Connect Limited v NHS Bath and North East Somerset & others [2022] EWHC 2037 (TCC)

➤ **Facts**

- D = NHS clinical commissioning groups
- Joint procurement for “advice and guidance services” for GPs
- Product demonstration event at which D scored products against undisclosed sub-criteria
- D decided
 - that the winning bidder (Cinapsis) was the preferred option
 - to award to under an existing framework agreement to which winning bidder was party, but P was not
- Framework did not permit direct award
- D concluded that the winning bidder was the only member of framework capable of performing the contract.
- D undertook a “mini-competition”
 - Only invited bid from the winning bidder
 - Negotiated commercial terms
 - Made award.



➤ **Decision**

- D had used the framework agreement to enable the direct award which breached principles of transparency and equal treatment
- D had tried to use the framework as a shield to allow the direct award
- The mini-competition
 - wasn't real
 - breached principles of equal treatment and transparency
 - breached the PCR rules
 - only one invited
 - requirements tailored to winner
 - pricing not related to that contained in framework agreement
- Two members of staff involved had conflicts of interest and no steps were taken to deal with them



➤ **Take away points**

- A non-member of a framework agreement can challenge its use:
 - contract award breaches relevant duty to the non-member
 - non-member suffers loss as a consequence
- Contracting authorities therefore need to ensure that the procurement route is appropriate and not just a way of achieving preferred outcomes

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

- **Clarification provided on membership of framework**
 - New suppliers cannot be added
 - Contracting authorities, including “*secondary contracting authorities*” can call-off a framework provided that they are clearly identified in the tender documentation as a potential beneficiary.

- **Membership takeaways**
 - Before utilising a framework agreement to facilitate a call-off competition contracting authorities must ensure that they are entitled to do so.



➤ **Clarification provided on value**

- Framework must set from the outset the maximum value to be called off
- Once maximum value is reached the framework will no longer have effect

➤ **Value takeaways**

- A record must be kept of all contracts called-off under a framework agreement
- Contracting authorities utilising a framework agreement that is not within its ownership must make enquiries as to the value expended.





Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark (C-23/20)

➤ **Facts**

- Single party framework
- Contract notice did not include estimate quantity or value of products to be supplied under the framework
- Challenger relied on C-216/17 that obligation to indicate maximum value required
- Contracting authority argued that
 - requirement does not apply to framework agreements as article 33 requires the estimated quantities “where appropriate”
 - C-216/17 limited to contracting authority acting on behalf of another contracting authority



➤ **Decision**

- Requires a maximum quantity or value otherwise contracting authorities free to deviate
- Authorities are bound by the maximum set out
- Once reached the framework can no longer be used

➤ **Take aways**

- Court noted that framework agreements can be modified within the confines of Regulation 72
- Where a contract notice fails to include any estimate on value it would be disproportionate for the framework to be open to a sanction of ineffectiveness.

PCR 2015 framework agreements key take aways

- If the procurement of the framework agreement was commenced under PCR 2015, they will continue to apply to the frameworks award, management and call-offs
- Non-members to a framework agreement may still be entitled to challenge
- Contracting authorities need to ensure that they are entitled to call off under the framework agreement
- Once the value of a framework agreement has been reached it cannot be used to call-off further contracts
- Framework agreements can however be amended within the confines of Regulation 72.
- Where contract notices don't state any estimate, courts are unlikely to sanction ineffectiveness as same would be disproportionate.



Frameworks under the Procurement Act 2023

All change?

- Largely familiar themes
- General paraphrasing
- Use of “framework” rather than “framework agreement”
- Open frameworks
- Ability to modify within the confines of the Act
- No caselaw..... yet!!!





Key provisions of the Procurement Act 2023

- **Procurement Act 2023**
 - Chapter 4
 - Section 45 – Frameworks
 - Section 46 – Frameworks: competitive selection process
 - Section 47 – Frameworks: maximum term
 - Sections 48 – Frameworks: implied terms
 - Sections 45 – Open Frameworks



- **Procurement Regulations 2024**
 - Regulation 20 – Tender notices: frameworks
 - Regulation 27 – Contract award notices except those published by private utilities
 - Regulation 30 – Contract award notices published by private utilities – frameworks
 - Regulation 33 – Contract details notices: frameworks

- **Guidance note**
 - Guidance: Frameworks

Frameworks

- Section 45 (2)

“A “framework” is 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.”

- Frameworks can be awarded:
 - following a competitive tendering process
 - directly (except open frameworks).



- Section 45(5) - Framework **must include**:
 - Description of good, services or works to be called off
 - Price or price mechanism to determine price under call-offs
 - Estimated value of framework
 - Requires an estimate of all call-offs to be awarded under the framework
 - If divided into lots contract notice has to include estimated value of each lot – which must be adhered to
 - Selection process to award call-off
 - Term of framework
 - Authorities entitled to call-off under framework
 - Whether framework is awarded under an open framework



- Framework **must not**:
 - Permit award of a call-off to an excluded or excludable supplier – implied term
 - Prevent additional information from being sought from the suppliers by contracting authority before awarding a public contract

- Section 45(7) - Framework
 - can charge supplier **percentage fee** of estimated value of contract awarded provided set out in the framework and relevant notice
 - cannot charge to gain access to framework or management fees.



Frameworks - maximum term



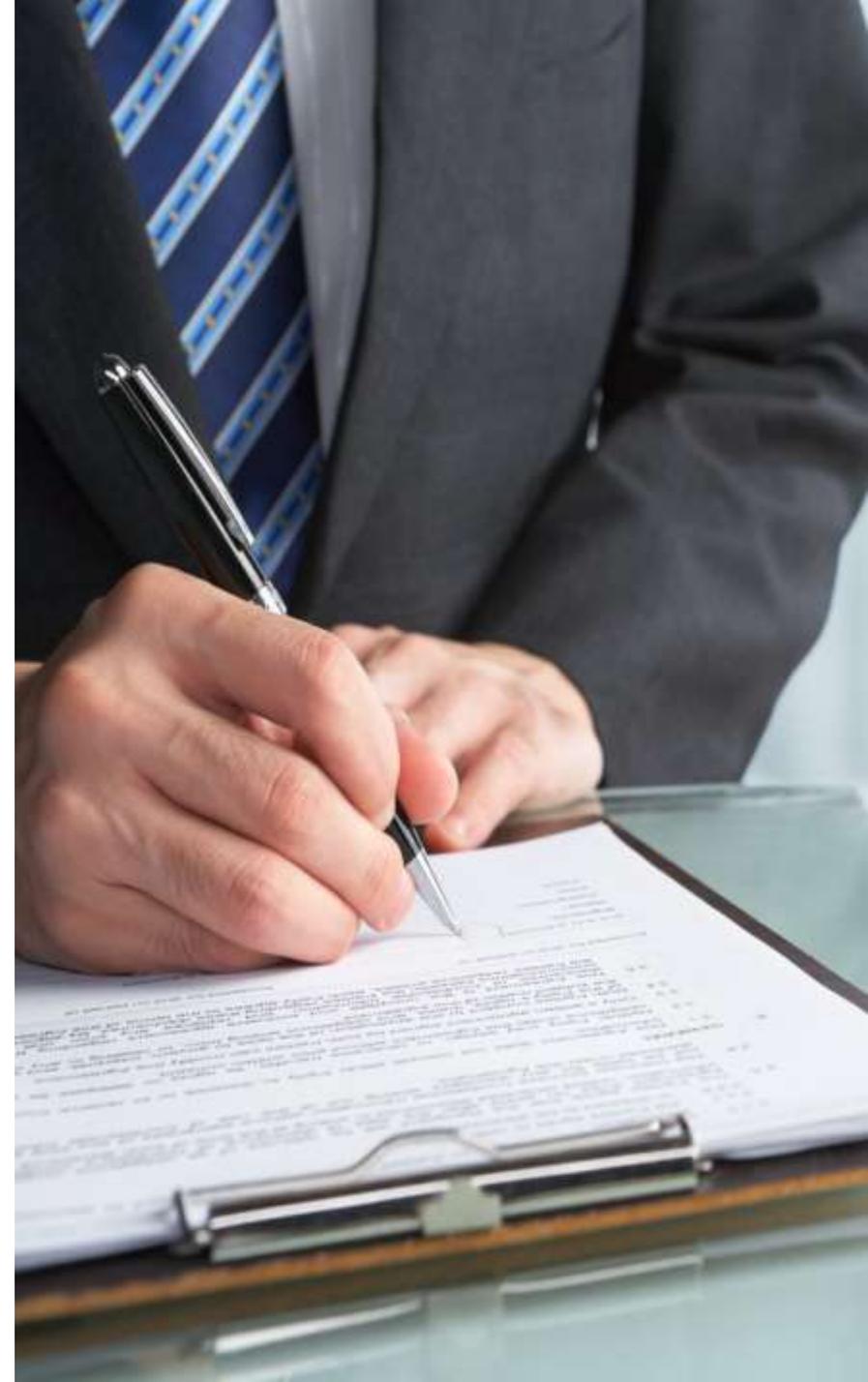
- Section 47
- 4 years
 - Exception 8 years
 - Defence and security
 - Utilities
- Can be longer if nature of the contract requires
 - Reasoning must be set out in the tender or transparency notice
 - eg large construction with various call-offs, upfront investment, funding cycles
 - Can modify framework term provided can justify given the nature of the contract and comply with rules on modification

Call-off contracts

- Section 45(1) - Public contracts can be awarded in accordance with a framework.
- Another framework or concession contract cannot be called off (section 45(8)).
- Call-off contracts can extend past the end of the framework
- Direct award call offs are not permitted, but not necessary.
- Not permitted to award call-off contract to supplier that becomes excluded or excludable – implied framework term under section 48



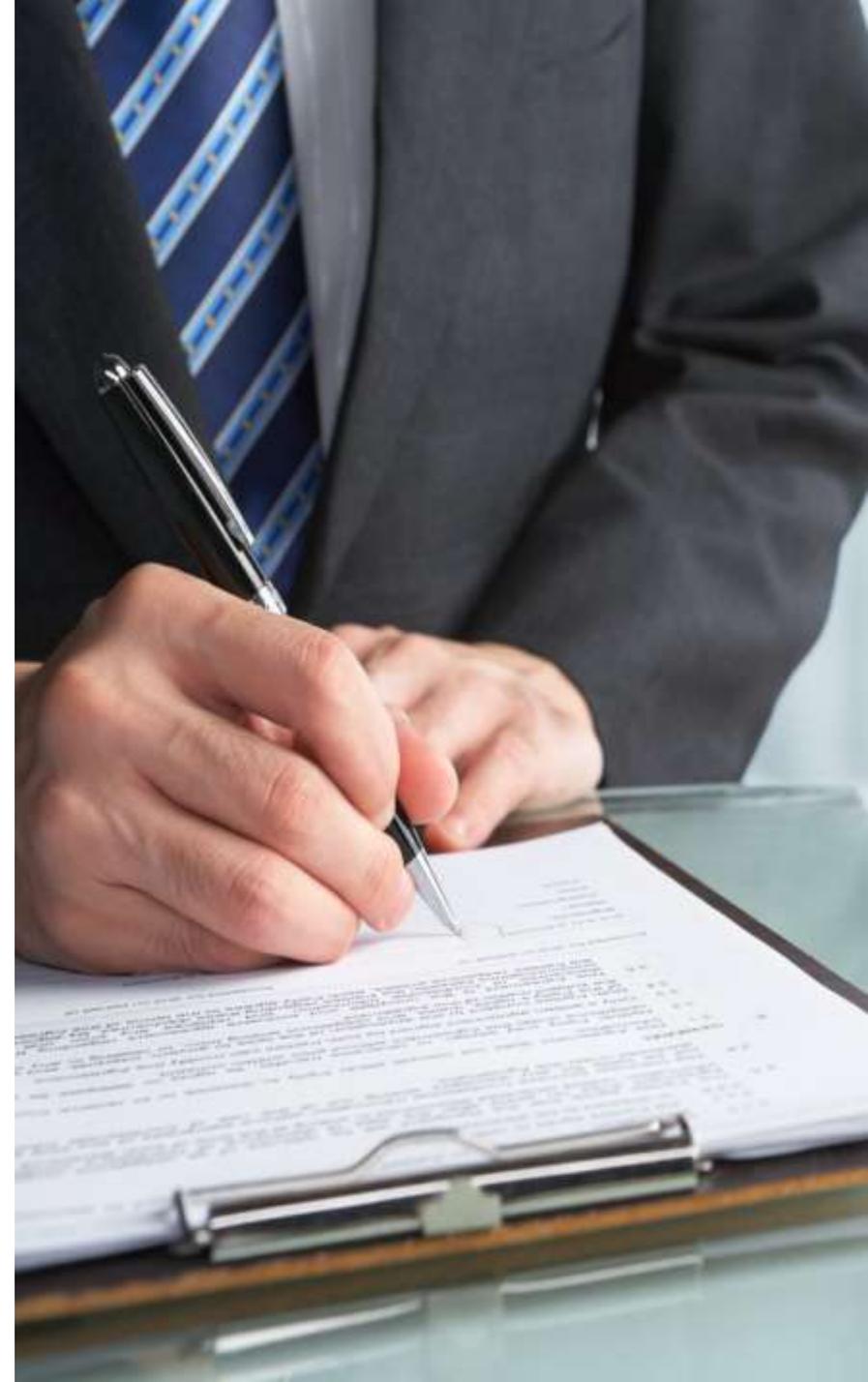
- Section 45 - Future call-off awards to be made by way of a competitive selection process unless:
 - single supplier framework
 - framework includes
 - core terms of the call-off; and
 - objective mechanism for selection
 - guidance examples include a taxi rank or a cap
- Level of detail of selection process required in the framework no dictated – scope to provide further or specific details eg must have conditions for participation



- Section 46 - **Conditions for participation** can be used as part of the selection procedure for the award of a call-off provided contracting authority is satisfied that it is proportionate way of ensuring suppliers have:
 - Legal and financial capacity
 - technical ability

- Proportionality is determined with reference to the nature complexity and cost of the contract

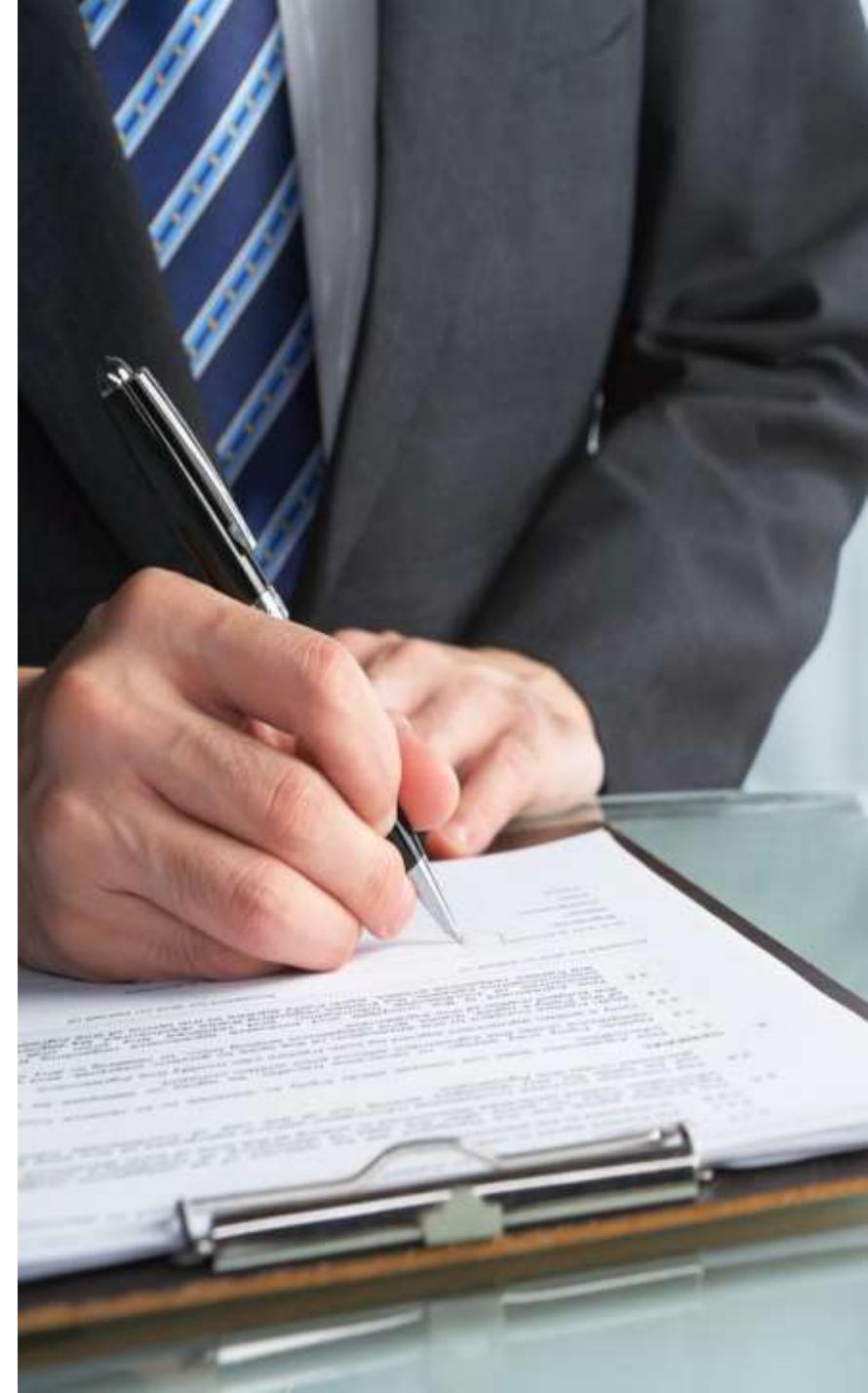
- **Legal and financial capacity**
 - Can only require audited accounts from those required to provide under Companies Act 2006 or oversee equivalent
 - Cannot require insurance to be in place before contract award.



- **Qualifications, experience and technical ability**
 - Cannot require contract to have been awarded
 - under the framework or
 - by a particular contracting authority
 - Must comply with the rules on specifications
 - Must allow equivalent experience
 - Evidence may be requested from a third party

- If a condition is not fulfilled, supplier can be excluded from participating or progressing in the competition – no obligation to exclude but must fulfil to be awarded.

- Assessment of the proposals to be based on the award criteria to get onto the framework however these can be developed.

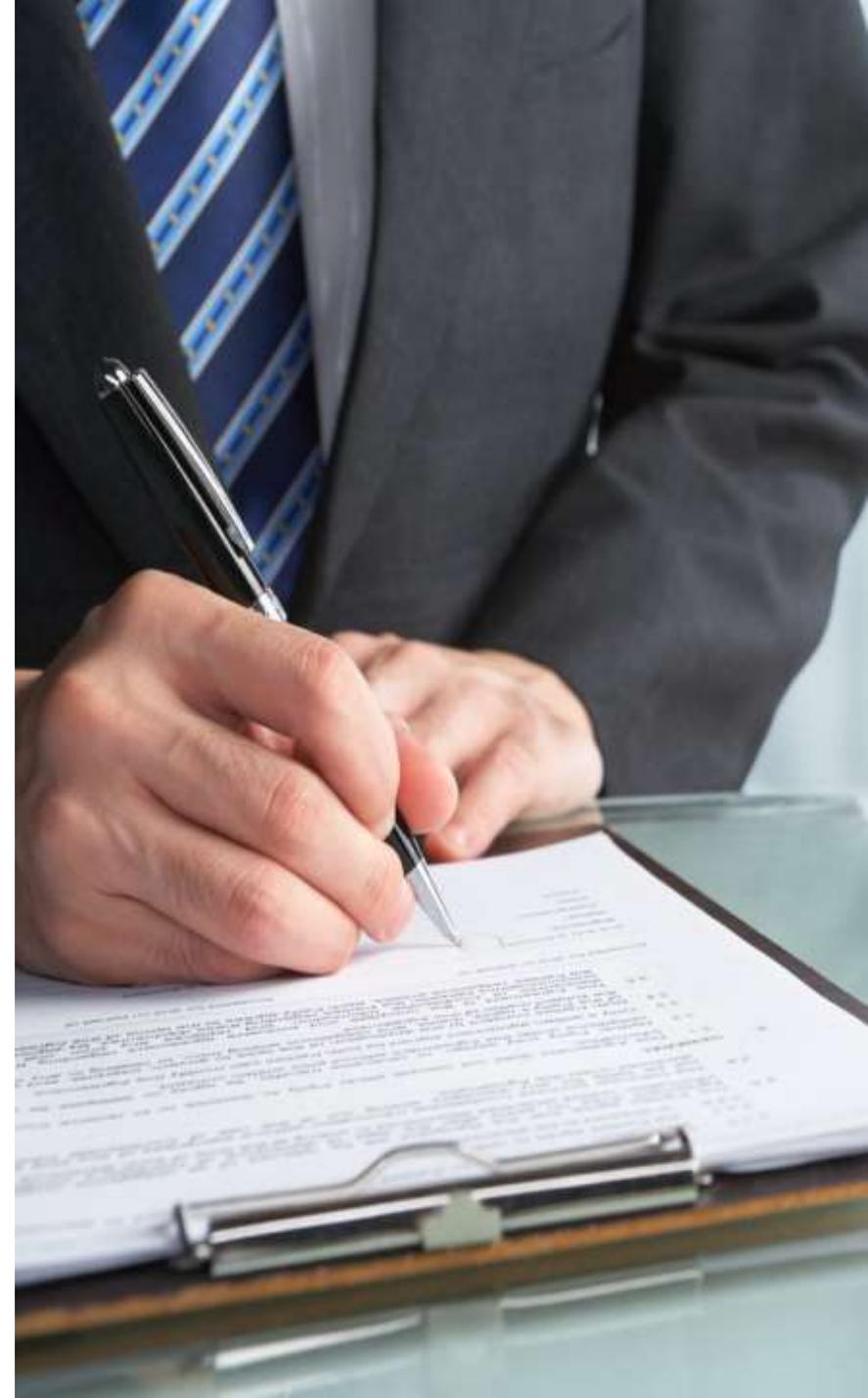


➤ **Procedural requirements**

➤ Notices

➤ Do not require an assessment summary

➤ No standstill required





Third party and centralised procurements

- Contracting authorities may only call off under a framework established by a contracting authority.
- This includes centralised procurement authorities (in the business of carrying out procurements for other contracting authorities eg CPD and CCS)
- Centralised procurement authorities are responsible for setting up the framework and contracting authorities responsible for the call-off
- Where contracting authorities are not a centralised procurement authority – ad hoc – contracting authority responsible for both the framework and the call-off
- Act doesn't regulate entities that are not contracting authorities – such parties must be acting as agent of the contracting authority, who is responsible for both the framework and the call-off



Checklist for using a framework set up by another contracting authority

- Is the framework established by another contracting authority?
- Have the appropriate notices been published?
- Does it cover the contracting authority seeking to call-off?
- Are the good, works or services to be call-off covered?
- Does the framework contain all the required ingredients?
- Has the maximum value been exceeded?
- Who has liability for setting up the framework?
- Ensure that the selection process is complied with.

Open Frameworks

- New concept provided for by section 49
- Section 49(1)

“An “open framework” is a scheme of frameworks that provides for the award of successive frameworks on substantially the same terms.”

- New suppliers can be added to the framework when it reopens – prevents suppliers being locked out and periodically increases competition
- Reopening rules :
 - No limit to how many times it is reopened but term of each must be set out in the framework – recommended that indicative terms set out at the outset.



- For multiple party frameworks
 - At least once in the first 3 years
 - At least once every 5 years thereafter
 - Final framework expires 8 years after first framework awarded

- For single party frameworks
 - Maximum term is 4 years from point a framework becomes a single supplier framework

- Reappointment of an existing supplier to new framework, on the supplier's election based on:
 - Reassessment of tender for an earlier award
 - Assessment of a new tender
 - If limited number of suppliers on framework or if no limit can be based upon 2 items above or simply added with no assessment.





Notices required

- Largely follow the general notice provisions but require additional details relating to the framework – see Procurement Regulations 2024 for full details

- **Establishing the framework**
 - Tender notice
 - Transparency notice (for direct award)
 - Contract details notice

- **Calling off a public contract**
 - Contract award notice

New Procurement Act 2023

Are you ready for the changes coming with the new Procurement Act 2023 in Northern Ireland?



Our services include:

- **Legal Consultation:** Expert advice to ensure your business complies with the new regulations.
- **Training Workshops:** Interactive sessions to educate your team on the key aspects of the new Act.
- **Documentation Review:** Thorough analysis of your procurement documents to ensure they meet the new standards.
- **Ongoing Support:** Continuous assistance to help you navigate the complexities of the new legislation.



Why choose us:

- **Expertise:** Our team of experienced legal professionals specialises in procurement law.
- **Tailored Solutions:** Customised services to meet the unique needs of your business.
- **Proactive Approach:** Stay ahead of the curve with our forward-thinking strategies.

Queries, comments or compliments!



Contact details



Lisa Boyd

Partner, Projects Construction & Procurement

T: +44 28 9526 2011

LisaBoyd@eversheds-sutherland.ie

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eversheds-sutherland.com

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