

Neutral Vendors

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The question

What is the legality of a "framework within a framework"/neutral vendor types of procurement?

They are proliferating, but are they legal?

Coverage

- What is a neutral vendor (NV)?
- The current law
- The Procurement Bill
- The answer / Q+A

What is an NV?

- Managed service providers facilitating contract award between CAs and pre-qualified providers for a wide range of (mainly) services
- Different rules for different NVs e.g below threshold only
- Designed to promote quick delivery
- Often allow direct award or mini-competition depending upon requirements

What is an NV?

A common structure:

- Procurement process appoints NV
- CA has a requirement and approaches NV
- CA generally chooses who delivers requirements via NV
- NV then awards contracts to end supplier
- Sometimes NV has approved lists
- Contract typically (not always) between CA and NV
- NV then awards contract

Current law

- **Public Contracts Regulations 2015 (PCR)**
- No specific provisions on NVs/ frameworks within a framework
- No current CPV code for neutral vendor services
- Regulation 33 allows for use of multi-supplier frameworks provided scope of requirements, contract terms and pricing all set out
- Regulation 18 basic principles must be upheld

- **Guidance**
- Old 2010 PPN warns CAs about using “frameworks set up by the private sector”
– now removed

What is safe?

- Public bodies buying for another (central purchasing) (reg 37 PCR)
- Ad hoc central purchasing (reg 38 PCR)
- Piggybacking on another's procurement if scope/documents allow (reg 72)
- Teckal and Hamburg collaborations (reg 12)

What is risky?

- Mechanisms which avoid PCR
- Frameworks within frameworks – inviting only a selection to bid for opportunities/using framework differently
- Direct award of public contract without procurement
- Private sector frameworks for CAs
- Material change to existing procurement outside of reg 72
- Above threshold contracts through NV if no market testing of supplier

How do neutral vendors fit in?

- An NV isn't:
- a framework agreement under reg 33 PCR
- a Dynamic Purchasing System under reg 34 PCR
- central purchasing under reg 37 PCR
- ad hoc central purchasing under reg 38 PCR
- NV essentially acting as the CA's "agent"?
- No market testing of capacity, quality or price of end supplier (see reg 33 and reg 37 – framework must set out all the terms, and be between supplier and CA)
- Actual suppliers aren't known sub contractors on set-up

How do neutral vendors fit in?

- Often no direct contractual link between CA and supplier
- NV carries the contractual risk
- Hard to show VFM if no price testing
- Difficult to estimate value accurately or lawfully in NV first advert
(see e.g *C-216/17 Autorita Garnate*)

The horizon

- Nothing on NVs in Procurement Bill
- Open frameworks envisage successive usage for same CAs and same scope of work
- No decided cases yet on NV use but current Good Law Project judicial review proceedings in *East of England Broadband Network*

“amounts, in substance, to a mechanism or device that has the effect or intention of circumventing the basic requirements of PCR2015”

Considerations for CAs

- Compliance risk with PCR sits with CA
- Any framework you seek to rely on must be available for your use
- What level of competition is applied by NVs?
- Is NV use in line with your internal policies?

The answer

- A fact specific assessment
- Lots of ways to purchase jointly
- Lack of case law on how PCR apply to neutral vendor frameworks – but scrutiny now seems likely
- Lower value services contracts more defensible?

Q&A

440

Partners

1,800

Lawyers

4,000

Total staff

2,500

Legal professionals

50+

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