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White Paper Conference - Framework Difficulties

RUTH MCNAUGHT

HELLO

Framework difficulties:

**How do you control - and overcome -
difficulties with frameworks, including
exceeding estimated contract values?
How do you create opportunities and head
off potential challenges?**

WHAT'S THE DIFFICULTY?

- Exceeding estimated values; and
- Calling-off from a multi-supplier framework without conducting a mini competition – what are “*objective conditions*”?

1. EXCEEDING ESTIMATED FRAMEWORK VALUE

Regulation 6,
Public Contracts
(Scotland)
Regulations 2015



“calculate the estimated value of a contract by reference to the total amount payable under it...” (Reg 6(1))



“...at the moment at which the procurement is commenced.” (Reg 6(7))



“In the case of a framework agreement ... the estimated value shall be the total estimated value of all of the contracts envisaged pursuant to and for the total term of the agreement ...” (Reg 6(8))

*“In the case of a framework agreement, 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.”*

Contract Notice Information

(Regulation 50 / part C of Annex V to the Directive – see para 10(a))

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



Framework for the supply of probe kits



No estimated value / quantity in contract notice – optional or mandatory?



Equal treatment & transparency: contracting authority commits to a certain maximum



Once maximum is reached, framework has “exhausted” its effects

*EPIC Financial
Consulting
Ges.m.b.H. v
Republic of Austria,
Bundesbeschaffung
GmbH (C-274/21 and
C-275/21)*



Frameworks worth €3m for supply of antigen tests



Call-off for 2 million antigen tests for over €3m – unlawful direct award?



Contracting authority may no longer rely on a framework where the maximum value has been reached

Consultant Connect Ltd V NHS Bath and North East Somerset, Swindon And Wiltshire Integrated Care Board & Others ([2022] EWHC 2037 (TCC), 2022 WL 03028141)



Call-off to
Cinapsis
exceeded
estimated
framework value



Simonson & Weel: wrongly
decided or just
factually different?



“properly
reasoned”
...but...



Likely to be
persuasive in
Scotland

CONTROLLING AND OVERCOMING THE DIFFICULTY

- If the “estimated value” = the “maximum value”, based on the contracts which are envisaged to be called-off:
 - Estimate a realistic and proportionate maximum value / quantity
 - Monitor the level of spend that occurs
 - Be prepared to adapt the procurement timetable
 - Call-offs must not entail “substantial modifications to the framework” (Reg 34(5)) - apply “insubstantial modifications” safe harbour (Reg 72(1)(e) / Reg 72(8))

2. Lawfully calling-off from a multi-supplier framework without conducting a mini-competition

Regulation 34(7)(a),
Public Contracts
(Scotland) Regulations
2015



By “*following the terms and conditions of the framework agreement...*” (Reg 34(7)(a))



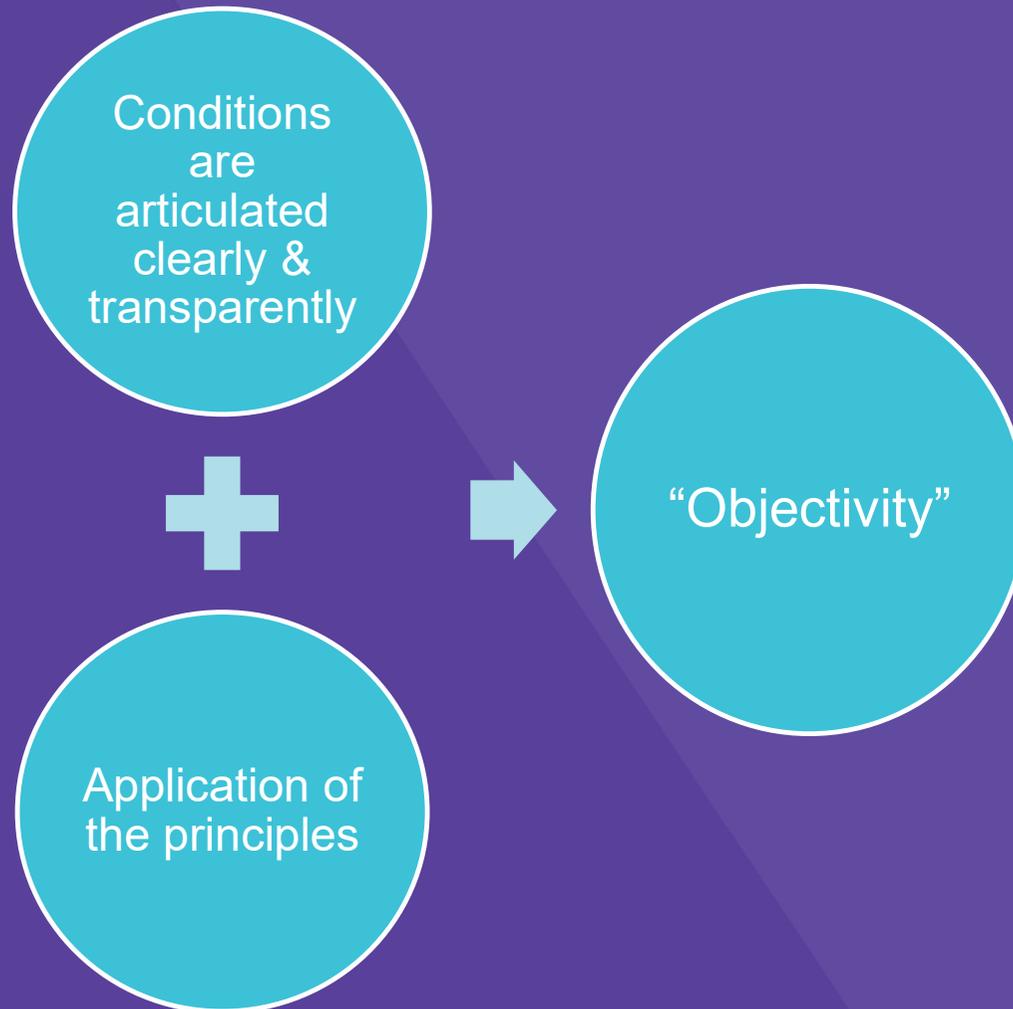
“*all the terms governing the provision of the works, supplies or services concerned*” must be set out in the framework agreement (Reg 34(7)(a)(i))



“**objective conditions** for determining which of the economic operators ... must perform those works, supplies or services...” must be set out in the framework agreement



“...which conditions must be indicated in the procurement documents for the framework agreement” (Reg 34(7)(a)(ii))



Controlling and overcoming the difficulty



Specify the criteria: e.g. price, timing, scale or some other predetermined factor



Observe the principles: equal treatment, non-discrimination, transparency and proportionality



Manage the risk of additional, undisclosed, considerations creeping in



Sense check the objective conditions against the original award criteria: make sure there is a significant overlap so that the MEAT is still the MEAT

Q&A

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