

Procurement Policy Note - Need to ensure that bodies permitted to use frameworks are adequately identified and clarification is issued if necessary.

Action Note 16/10 08 September 2010

Issue

1. Framework agreements open to other contracting authorities in addition to the framework “owner” should clearly specify the permissible users in the OJEU contract notice. Terms such as “any contracting authority” must not be used.
2. Where the identification of permissible users of an existing framework agreement is currently insufficiently precise, the owner of the framework agreement should issue clarification to relevant suppliers and potential users. Clarification must be undertaken carefully to avoid any extension of the scope of a framework.

Dissemination

3. Please circulate this Procurement Policy Note (PPN) within your organisation, agencies, non-departmental public bodies, and any other bodies for which you are responsible, drawing particular attention to those with a purchasing role.

Contact

4. Enquiries about this paper should be addressed to the OGC Service Desk 0845 000 4999 servicedesk@ogc.gsi.gov.uk.

Background

Identifying framework users in the contract notice and contract documents

5. Existing OGC guidance on frameworks makes clear that contracting authorities which procure collaboratively and put in place framework agreements open to other contracting authorities to use, are required to clearly identify the permitted bodies who may access the framework in the contract notice advertising the intended framework. See:
http://www.ogc.gov.uk/documents/OGC_Guidance_on_Framework_AgreementsSept_08.pdf
6. The European Commission has expressed concerns about a number of frameworks which do not clearly identify the permitted users. OGC is therefore issuing this additional note.
7. In brief; the permissible users must be clearly identified in the contract notice, either

by specifically naming them individually, and / or by providing a link to an appropriate list of users, and / or by identifying a specific class or group of permitted users. If a “class” is used, it must be sufficiently well defined and precise that a contracting authority can be immediately identified as a member (or not) of that class.

8. These requirements are discussed further in the following paragraphs.
9. Based on OGC’s experience, where the intended users of a framework agreement have been inadequately or ambiguously identified during the procurement of the framework agreement, then subsequent call-off contracts made under that framework agreement are likely to be regarded by the Commission as illegal direct awards, and attract infraction proceedings if they come to the Commission’s attention.
10. It is therefore essential that permissible framework users are clearly and effectively identified in the contract notice and contract documents in order to avoid such issues.
11. A general descriptor of potential framework users such as “any contracting authority”, or “all public bodies” must not be used. This does not allow interested parties to immediately understand which bodies are, or are not, eligible and is thus inconsistent with the principle of transparency. Such wording also renders it difficult to ensure that a framework is restricted to “*contracting authorities and the economic operators originally party to the framework agreement*” as required by the public procurement Directive¹ (the “Directive”).
12. Framework owners should also avoid circular or contingent identification. For example, it will not be sufficiently transparent to simply open a framework to bodies which undertake a particular function or activity. There must be adequate information to enable unambiguous identification of the bodies which undertake that function or activity.

Identifying users by class

13. European Commission guidance on frameworks² indicates that classes of contracting authority are to be defined in a manner that enables “immediate identification of the contracting authorities concerned”.
14. The contracting authorities permitted to use a framework can be individually named in the contract notice and other contract documents, or a recognisable “class” of contracting authority may be used – e.g. “Central Government Departments” or “all county and district councils in Norfolk and Suffolk”. If the class description is not sufficient in itself to immediately identify whether a given authority is a member of that class, a list or lists should be provided.
15. If the members of a class are set out in a list maintained by the contracting authority or some other body, the identity of the list owner and the means of obtaining that list, should be specified in the contract notice. Where possible, a web-link to the list

¹ Directive 2004/18 EC as implemented in the UK by the Public Contracts Regulations 2006 (as amended) and corresponding regulations in Scotland

² http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf

should be provided.

Changes to class membership

16. As noted above the Directive requires that a framework is only open to contracting authorities and economic operators originally party to the agreement. Hence in order to comply with the requirements of the Directive, the framework should therefore be limited to those bodies which are already identified as members of the "class" at the time of the procurement.
17. It is possible, however, that during the lifetime of a framework the identity of members of a class may change and evolve, owing to bona fide changes of function, reorganisation and restructuring. Such changes could be consistent with legal requirements, provided that the scale and scope of the framework is not materially altered, and details of these changes are made available to interested parties. In addition changes to the identity of class membership must not extend the size of scope of the user base beyond that originally existing at the time the framework was put in place. Most importantly, however, it should be emphasised that any bodies which purport to join a framework as a result of such a reorganisation must be able to demonstrate a direct continuation of scope and functions from their predecessor body/bodies which had been rightful beneficiaries of the framework and therefore entitled to use it. If not, these new bodies they should not be allowed to use the framework.
18. If the members of a "class" change during the course of a framework, this information should be kept up to date (for example by updating any lists held by the framework owner or a third party) and made available to interested parties. The date from which a given body becomes eligible to use the framework should also be stated. If a list is maintained by a third party, the framework owner should liaise with the list-holder to ensure it is accurate and up to date. If any bodies cease to become eligible for any reason, that should also be made clear, including the date.

Other areas of ambiguity to avoid

19. When preparing contract notices and contract documents for framework agreements contracting authorities should also consider carefully whether any other wording may create uncertainty or ambiguity as to the intended scope of the framework.
20. Some examples of ambiguity in contract notices which should be avoided include:
 - inserting a specific geographical area at section II.1.1 of the notice "Title attributed by the contracting authority" when the framework is intended to be used more widely;
 - using a NUTS Code (section II.1.2 of the notice) which relates to a specific area when the framework is intended to be available more widely;
 - using loose language to describe the users of the framework agreement, such as "partner organisations" and "neighbouring authorities" which make it difficult for interested suppliers to determine the potential customer base; and
 - inconsistencies in describing users of the framework, for example, if a specific description of users is given in one part of the notice and then elsewhere in the notice a wider or different description of users is referred to.

Clarification of users of existing frameworks

21. As noted above, generic terms which do not allow immediate identification of permissible framework users are insufficient. However, OGC is aware that certain existing frameworks currently contain generic terms which do not allow for the immediate identification of users. This could leave the framework owner open to challenge from the European Commission. Where framework owners have used such generic terminology OGC recommends that they should now consider issuing clarification containing more detailed description of the contracting authorities which may use the framework. OGC cannot guarantee that this will eliminate the possibility of the Commission raising concerns, but we consider it may help to reduce the risk of challenge and increase clarity for all stakeholders. Each contract notice will need to be considered on a case by case basis and it will be a question of fact and degree as to whether retrospective clarification will assist.
22. Clarification should be drawn to the attention of all suppliers on the framework, so they can be clear whether potential customers are permitted to use the framework. Clarification should also be included in any relevant documents issued to actual or potential users of the framework, other interested parties, and/or made available on a website. Framework owners should also ensure that the relevant staff within their own organisation are informed of any clarification and the reason for its issue. This may be particularly relevant to staff who may advise potential customers about their admissibility or otherwise as framework users.

Restrictions on clarification

23. It is important that any clarification is in fact consistent with the original advert and contract documents as a whole. Before issuing clarification, the framework owner should carefully consider which contracting authorities or classes would have been expected as framework users by suppliers or other interested parties reading the contract notice and documents as a whole. Any clarification of scope should be restricted to those bodies which could genuinely have been expected. The onus will be on the contracting authority to clearly justify the scope and nature of any clarification if challenged by the Commission or other interested party.
24. Commission guidance also makes clear that a framework may not at a later date admit new organisations or “classes” of organisation not originally included. It is therefore important that any clarification must not be used as cover to widen the customer base beyond those originally intended to be included.
25. Clarification must also not be used to increase the total advertised estimated value of the contracts awarded under a framework agreement beyond that indicated in the contract notice.
26. Any other original limitations or restrictions on the permissible customer base must be respected in any clarification. For example, if a framework agreement was originally intended to be restricted to a specific class of user, such as local authorities, this restriction must be maintained. Equally, geographical limitations must be maintained, for example, any original limitations by region.

27. Where a very wide description such as “open to all / any contracting authority/ public body”, was used contracting authorities should consider carefully the nature and scope of the clarification. Such wording is inherently imprecise, and could be seen as being open to abuse.
28. If terms such as “open to all contracting authorities” were used, OGC recommends framework owners should carefully review the original contract notice as a whole, plus the other information provided to interested parties, before issuing any clarification. Authorities are recommended to carefully consider the following questions:
- A. Were the rest of the contract notice, and the other information, consistent with the framework being used by a whole range of contracting authorities?
 - B. Therefore, based on the contract information as whole, would suppliers have reasonably expected the framework in fact to be used by a whole range of authorities?
 - C. Alternatively, even if the contract notice contained a term such as “open to all contracting authorities”, did the contract notice and contract documents as a whole, in fact suggest that the framework was intended for a limited group of contracting authorities, (or indeed, intended only for the framework owner)?
29. If a careful review of the contract notice and contract documents indicate that the contract was genuinely and clearly intended to be used by a wide range of bodies, the framework owner may be justified in issuing a clarification covering a wide range of authorities.
30. However, if a review of the contract notice and contract documents indicates that “C” above applies, the framework owner should ensure any clarification is restricted to those bodies which could be genuinely expected to use the framework, based on the original contract notice and contract documents as a whole.
31. Where a contract notice or documents, had ambiguities or inconsistencies as to the scope or extent of permissible customers for a framework agreement, OGC recommends that the framework owner should adopt a conservative approach to the clarification; the clarification should restrict the permissible users to those who can clearly be identified as intended users throughout the contract notice and documents.