

FRAMEWORK AGREEMENTS AND EC DEVELOPMENTS

Introduction

The proposed new consolidated public sector Directive, which will replace the existing Directives covering public procurement of services, supplies and works, will include a provision on framework agreements for the first time. This note offers guidance to practitioners on the implications of that provision for the treatment of framework agreements.

The current EC public sector Directives do not refer to framework agreements although their use is well established and has been recognised by the Commission. (The separate utilities Directive already contains a provision on such agreements.) Much of the guidance below reflects the explicit provision for framework agreements in the proposed new consolidated EC public sector Directive, which is yet to be adopted and implemented (a copy of the relevant draft provision - Article 32 - is attached as an annex to this note). Those processes will take some time; adoption is not now envisaged before mid 2003, at the earliest, with UK implementation taking place a maximum of 21 months thereafter.

However, as the new Directive is, in this instance, simply making explicit what is already considered to be permissible under the existing EC rules, Departments do not have to await adoption or implementation of the new Directive before making use of this guidance note. The one change to current practice under the proposed consolidated Directive, is the restriction on the length of a framework agreement to four years (the period within which the last call-off must be awarded) unless there are duly justified exceptional circumstances. That restriction cannot be said to apply now, since as stated above the existing public sector Directives are silent on the use of frameworks, and the Utilities Directive does not require such a limit. However, given that there will be such a limit when the new public sector Directive is implemented, it would be prudent to move in that direction now for new frameworks. It is less likely that there will be complaints or queries about the use of frameworks in particular cases ahead of implementation of the new public sector Directive, if the basic principles set out in the draft provision and reflected below are adhered to for new frameworks.

The text of the new Directive may still be amended in the EC legislative process, as a result of the second reading of the European Parliament, but it is very unlikely that the draft provision on frameworks will be changed.

What is a Framework Agreement?

2. The current Utilities Directive, and the proposed consolidated public sector Directive, both define a framework agreement as an agreement with suppliers, 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 quantity. In other words, a framework agreement is a general term for agreements with suppliers which set out terms and conditions under which specific purchases (call-offs) can be made throughout the term of the agreement. The framework agreement may, itself, be a contract to which the EC procurement rules apply. This would be the case where the

agreement places an obligation, in writing, to purchase goods, works or services for pecuniary interest (or consideration in UK legal terminology). For this type of agreement, there is no particular problem under the EC rules, as it can be treated in the same way as any other contract.

3. However, the term is normally used to cover agreements which are not, themselves, covered by the definition of a contract to which the EC rules apply (though they may create certain contractually binding obligations). Such agreements set out the terms and conditions for subsequent call-offs but place no obligations, in themselves, on the procurers to buy anything. With this approach, contracts are formed, in EC Directive terms, only when goods, works and services are called off under the agreement. The benefit of this kind of agreement is that, because authorities are not tied to the agreements, they are free to use the frameworks when they provide value for money, but to go elsewhere if they do not.

4. It is this form of agreement, where the framework itself cannot be readily classifiable as a contract for the purposes of the current Directives, which has caused much difficulty in relation to the application of the EC procurement rules, and which is addressed explicitly in the text of the proposed new EC public sector Directive and in this note. But it should be stressed that the contractual status of a framework agreement, under the proposed new public sector Directive, should not cause undue concern; the key is that a means of awarding contracts under framework agreements is provided for without the need to re-advertise and re-apply the selection and award criteria from the outset.

Why has there been a problem?

5. The UK has always taken the view that the only sensible approach to such framework agreements is to treat them as if they are contracts in their own right for the purposes of the application of the EC rules. As such, the practice has been to advertise the framework itself, in the Official Journal of the European Communities (OJEC), and follow the EC rules for selection and award of the framework. This provides transparency for the whole requirement across the Community and it removes the need to advertise and apply the award procedures to each call-off under the agreement, on the basis that the framework establishes the fundamental terms on which subsequent contracts will be awarded.

6. The European Commission has, during recent years, expressed some concerns about this approach. The main concern has been that, in making call-offs under a framework agreement, there should be no scope for substantive amendments, through negotiation, to the terms established by the framework agreement itself.

7. Discussions with the Commission on complaints involving Northern Ireland framework agreements and the GCat and S-Cat electronic catalogues, however, have led to a better understanding within the Community of how these agreements can fit with the EC rules. Most importantly, the proposed new EC public sector Directive referred to above, agreed politically at the Internal Market Council on 21 May 2002, includes an explicit provision (Article 32) on the application of the EC rules to these agreements. That provision, which is reproduced as an annex to this guidance note, meets the UK's need for greater clarity in this area compatible with current practice.

Setting up a framework agreement

8. It will be important to consider whether a framework agreement, as defined above, is the right approach for the particular goods, works or services to be purchased. This will be a value for money judgement for the contracting authority or authorities concerned, taking account of the kinds of purchases involved and the ability to specify such purchases with sufficient precision upfront. In particular the framework should be capable of establishing a pricing mechanism. However, this does not mean actual prices should be fixed, but rather that there should be a mechanism that will be applied to pricing particular requirements during the period of the framework. It should also be possible to establish the scope and types of goods and/or services that will need to be called-off. There should not be any objection to upgrading the product or service required so long as it remains within the scope of the original specification.

9. If the framework approach is chosen, it will be necessary to advertise the framework itself in the OJEC, if its estimated maximum value over its lifetime exceeds the relevant EC threshold and the procurements in question are not covered by one of the exclusions set out in the Directives. If the framework itself is not advertised in OJEC, in cases where the procurements are subject to the EC rules, an OJEC notice may be required for individual call-offs. The need to do this will depend on the size of the call-offs and on whether the aggregation rules apply. It is far better, therefore, to advertise the framework itself, so that there is no need to consider the need for advertising as each call-off comes up.

10. Contracting authorities which act as central buying organisations may set up and advertise framework agreements on behalf of other contracting authorities. Where the EC rules have been followed by such central buying organisations, other contracting authorities may use the framework agreements as required so long as they have been covered in the OJEC notice (see the second indent of paragraph 11 below). The proposed new Directive explicitly recognises that contracting authorities may purchase through central buying organisations.

11. Under the proposed new Directive the OJEC notice must:

- make it clear that a framework agreement is being awarded;
- include the contracting authorities entitled to call-off under the terms of the framework agreement. The authorities can be named, or a generic description may be used – eg Government Departments, local authorities, utilities, or all UK contracting authorities. Although the individual circumstances will need to be considered, it is worth seeking to construct the framework so that it can have the maximum take-up across the public sector. However, if the framework is only relevant to, say, certain central Government Departments, that should be made clear;
- state the length of the framework agreement (under the proposed new Directive, it will be a maximum of four years unless there are justifiable exceptional circumstances – see attached text of proposed new Article 32);

- the estimated maximum quantity or value of the goods, works or services for which call-offs are to be placed. This is necessary in order for suppliers to be able to gauge the likely value of call-offs and to provide a figure which, as with other contracts, should not normally be exceeded without a new competition taking place.

12. Once the OJEC notice has been despatched, the authorities setting up the framework agreements should follow the rules and procedures for all phases of the procurement process covered by the Directives. This will include the use of the open, restricted and negotiated procedures as appropriate, as well as the provisions on specifications, selection of candidates and award. At the award stage, the suppliers to be included in the framework agreements should be chosen by applying the award criteria, to establish the most economically advantageous tender or tenders, in the normal way.

13. Framework agreements can be concluded with a single supplier or with several suppliers, for the same goods, works or services. In the latter case, there must be at least three suppliers, provided that there are sufficient candidates satisfying the selection criteria and which have submitted compliant bids meeting the award criteria. The agreement will establish the terms which will apply under the framework, including delivery timescales and daily or hourly rates. Figure 1 (at end of document) sets out the questions which need to be asked in order to establish how a framework agreement should be treated.

Call-offs

14. When awarding call-offs (individual contracts), under framework agreements, authorities do not have to go through the full procedural steps in the EC Directives again so long as the rules were followed appropriately in the setting up of the framework agreements themselves. However, the relevant EC Treaty provisions and Treaty-based principles, including non-discrimination, still apply at this stage, and authorities need to be careful to ensure that nothing is done which is discriminatory, improper or which distorts competition. See Figure 2 (at end of document).

15. The length of call-offs, under a framework agreement, is not specifically limited by the Directives. For example, call-offs for consultancy services might be for three, six or twelve months or longer. It may be the case, as a result, that individual call-offs extend beyond the four-year term of the framework itself. However, this should not be done in order to circumvent the EC rules. For example, it would be difficult to justify a 12 month call-off, right near the end of the life of the framework itself, where the normal pattern had been for such call-offs to last for just one month at a time. The length of call-offs, as with other contracts, should be appropriate to the purchases in question and should reflect value for money considerations.

16. Where a framework agreement is concluded with just one supplier or operator, call-offs under the agreement should be awarded within the terms laid down in the agreement, supplemented as necessary (see paragraph 19 for examples of how terms may be supplemented). It is the same principle as that applying to a normal contract, except that, with a framework agreement, there will be an interval between the

awarding of the framework itself and the calling-off of the goods, works or services under it. There can be no substantive change to the specification or the terms and conditions agreed at the time that the framework is awarded.

17. Where frameworks, for the same goods, works or services, are awarded to several suppliers, there are two possible options for awarding call-offs under the framework.

Option one: apply the terms of the framework agreement

18. First, where the terms laid down in the framework agreements are sufficiently precise to cover the particular call-off, the authority can simply award the call-off to the supplier who provides the most economically advantageous (vfm) offer based on the award criteria used at the time that the framework was established. For example, frameworks might be concluded with five suppliers for the delivery of individual photocopiers, fax machines and printers, separately priced, and for delivery within set timescales. If the authority simply wants to call-off some photocopiers, it would go to the supplier offering the most economically advantageous offer, using the original award criteria, for that item alone without reopening the competition. If that supplier for any reason could not supply the items required at that time, the authority would go to the supplier offering the next most economically advantageous offer, and so on.

Option two: hold a mini-competition

19. Second, where the terms laid down in the framework agreements are not precise enough for the particular call-off, a mini competition should be held with *all those suppliers within the frameworks capable of meeting the particular need*. This does not mean that basic terms can be renegotiated, or that the specification used in setting up the framework can be substantively changed. It is more a matter of supplementing or refining the basic terms to reflect particular circumstances in a way foreshadowed in the framework. Examples of such terms are:

- particular delivery timescales;
- particular invoicing arrangements and payment profiles;
- additional security needs;
- incidental charges;
- particular associated services, eg installation, maintenance and training;
- particular mixes of quality systems and rates;
- particular mixes of rates and quality;
- where the terms include a price mechanism;
- individual special terms (e.g. specific to the particular products/services that will be provided to meet a particular requirement under the framework).

20. Where a mini-competition is held for a particular call-off, the contracting authority should consult in writing (invite to tender) *the suppliers within the*

framework which are capable of meeting the particular need. This does not necessarily mean that every supplier in the framework must be included. The bids submitted when the framework was set up should indicate which suppliers are able to meet the specific requirement. Contracting authorities should fix a time limit which is sufficient to enable the selected suppliers to submit their bids for the particular call-off. This time limit should take account of the complexity of the call-off and the time needed for the different tenderers to submit their bids. Tenders should be submitted in writing, and they should remain confidential until the time limit has expired. The contracting authority should award the call-off to the supplier which has submitted the most economically advantageous tender on the basis of the award criteria set out in the framework itself focusing on the particular requirement.

Examples of framework agreements

21. Frameworks for supplies, services and works are allowed under the proposed new provision. Examples of each type are as follows (but it is important to read the detailed approaches set out in paragraphs 8-20 of this note):

- **supplies from a single supplier:** a framework agreement is required for desks by one authority and is awarded, following OJEC and selection, on the “most economically advantageous” basis to a single supplier. The authority calls-off its requirements for desks, during the period of the framework, on the basis of the terms agreed when the framework was set up;
- **supplies from several suppliers:** a framework agreement is required to cover a number of authorities’ paper needs over four years. Following the OJEC notice and the selection process, based on financial and economic standing and technical capacity, bids are evaluated on the “most economically advantageous” basis for entry into the framework. A number of suppliers are included in the framework to supply a variety of paper types – plain, lined, recycled, coloured etc – over the four-year period. The authority goes to the supplier within the framework whose offer is the “most economically advantageous”, based on the original award criteria, for each call-off required throughout the four years. As the terms do not need to be refined or supplemented in this case, the authority has no need to use the mini-competition option;
- **consultancy services:** a framework agreement is required for a range of consultancy services. An OJEC notice is issued and candidates for the framework are selected on the basis of financial and economic standing and technical capacity – including track record and ability. Bids are then evaluated on the “most economically advantageous” basis, including quality systems and fee rates. A number of companies are included in the framework, covering the range of consultancy services required. Hourly rates for different grades of staff form part of the agreed terms. When there is a need to call-off specific services, within the framework, the contracting authority holds a mini competition with all providers capable of meeting that need for the category of services required in order to establish which company provides the “most economically advantageous” (vfm) offer for the particular mix of grades/rates required;

- **minor works:** a framework is awarded to several contractors on a UK-wide basis, following OJEC, selection and award on the “most economically advantageous” basis. The contractors provide a range of services within categories, such as building, plumbing and electrical services. Hourly rates, call out charges and levels of quality are set under the framework agreement. When a call-off is required, the authority goes to the contractor providing the “most economically advantageous” offer, on the basis of the original award criteria, for the particular need. There is no need for a mini-competition in this case, as the terms do not need to be refined. An alternative approach might be to award a framework to a single contractor for each region; and
- **major works 1:** a framework is needed for units to be constructed as part of a major works programme. Following an OJEC notice and a selection process, based on financial and economic standing and technical capacity, a framework is awarded to a small number of prime contractors for units to be constructed as necessary throughout the period of the agreement. The kinds of units in question might include prison cells, categories of hospital beds (eg acute, accident and emergency etc) garages etc, where there is a standard size, design or requirement. The awards are made on the basis of the particular mix of quality/unitary prices to meet the need. At the call-off stage, a mini-competition is held and bids are invited from all contractors capable of meeting the requirement for the specific units, with the call-off awarded to the contractor providing the “most economically advantageous” bid for the units required.
- **major works 2:** a framework is required for the construction of standard building units or office space in various locations over a four-year period. Following OJEC and the selection process, based on financial and economic standing and technical capacity, a framework is awarded to a number of prime contractors on “the most economically advantageous tender” basis. Each of the prime contractors has the skills and supply chains necessary to undertake the different aspects of the construction work during the period of the framework. A decision is made, at each call-off, as to whether a mini-competition is needed – based on whether the terms need to be refined. If a mini-competition is necessary, bids are invited from all prime contractors capable of meeting the particular need. Call-offs under the framework, which may be awarded any time up to the end of the agreement itself, can continue beyond the period of the agreement until the work is completed

Figure 1

Framework Agreements

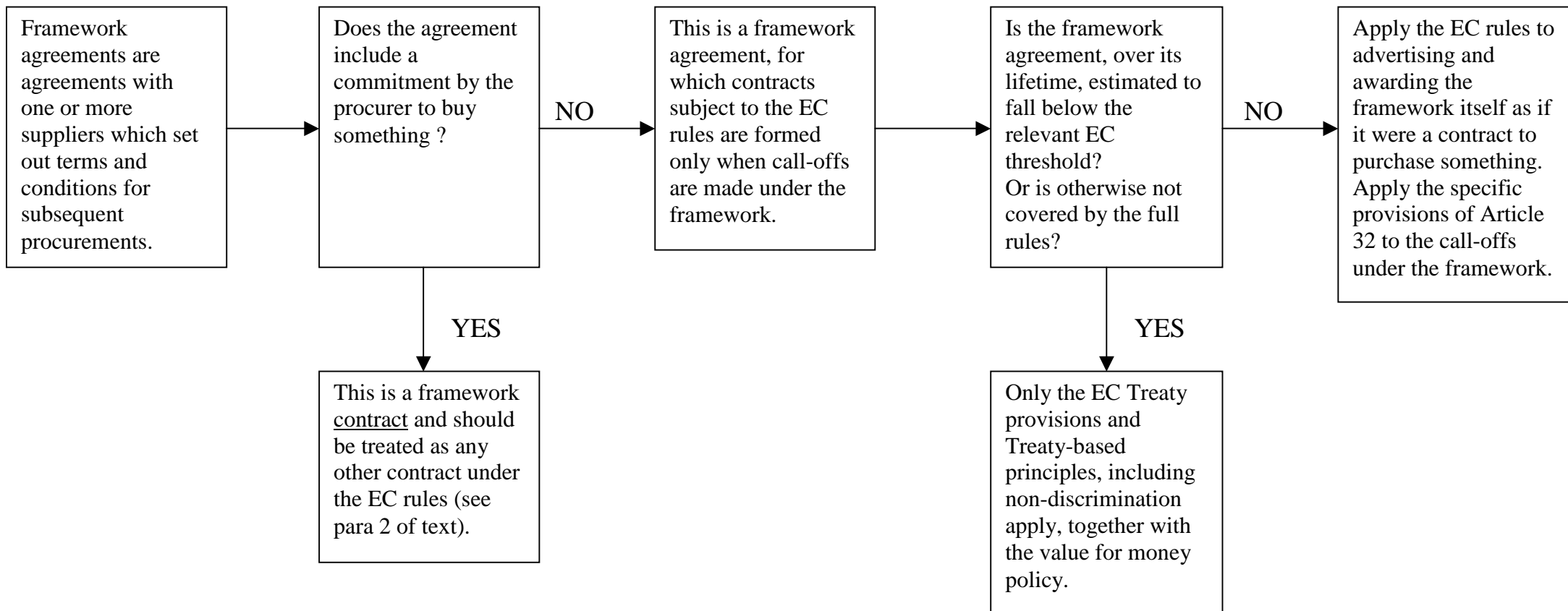
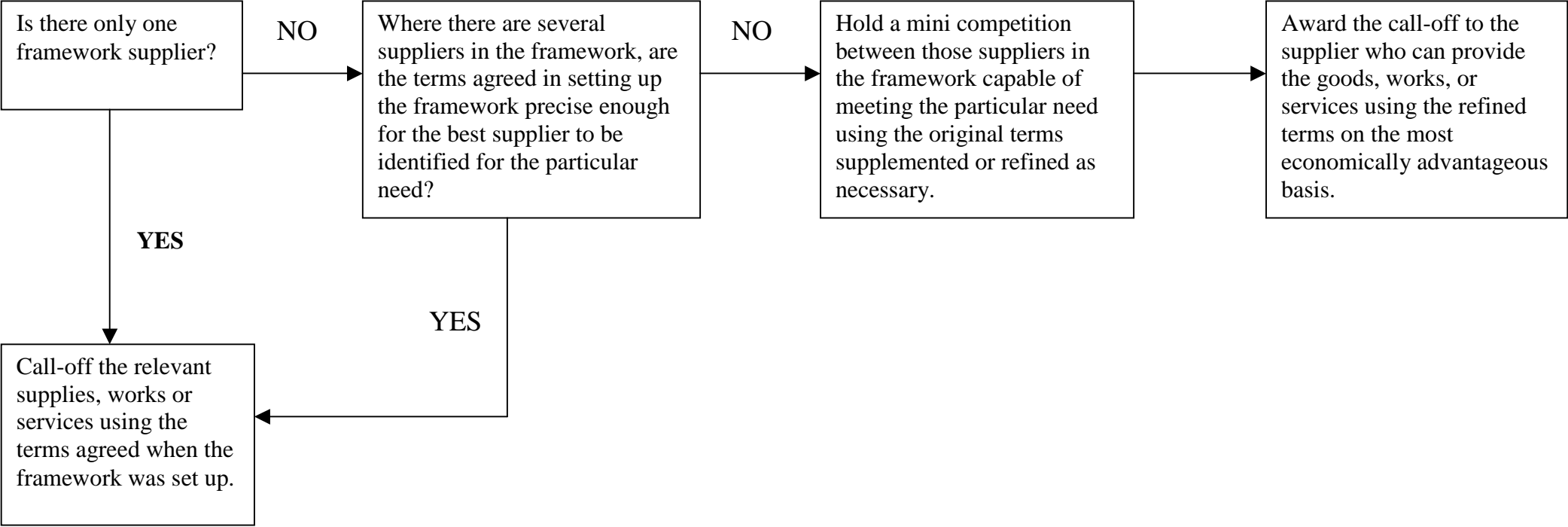


Figure 2

Call-off stage



Article 32

Framework agreements

1. Member States may stipulate that contracting authorities may conclude framework agreements .
2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that agreement. The parties to that agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantive amendments to the terms laid down in the agreement, *inter alia* in the case referred to in paragraph 3.

The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

Contracting authorities may not use framework agreements improperly or in such a way as to hinder, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the agreement.

For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its offer as necessary.

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible offers which meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

- by application of the terms laid down in the agreement without reopening competition, or
- where not all the terms are laid down in the agreement, when the parties are again in competition on the basis of the same and, if necessary, more

precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

- (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of executing the subject of the contract;
- (b) contracting authorities shall fix a time-limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject of the contract and the time needed to send in tenders;
- (c) tenders shall be submitted in writing, and their content shall remain confidential until the time-limit for reply has expired;
- (d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.