Controlling costs under framework agreements

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26th February 2015

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Overview

- Why I love framework agreements
- Problems with framework agreements
- Initial competition and subsequent contracts
- Controlling costs in multi and single-operator frameworks
- Critique: how is value for money measured?
- Questions & Discussion

Why I love framework agreements

- Flexibility *Not all requirements must be fully anticipated at time of establishment; timing and nature of contracts may vary; usually no commitment for contracting authority to purchase specific volume*

- Rules on modifications to contracts *Legal risk attaches to contract changes under Art. 72 of Directive 2014/24/EU*

- Supplier motivation *Potential for future business to be awarded under the framework keeps them keen; volume discounts possible*

- Efficiency *Administrative burden associated with procurement is minimised, especially where someone else sets up the framework*

Others agree: 25% by value of procurement advertised in the OJEU in 2011 took the form of framework agreements

Problems with framework agreements

- Flexibility *…means certain decisions are put off until after framework is established, and so subject to less transparency and competition*

- Rules on modifications to contracts *…also apply to frameworks under Art. 72 of Directive 2014/24/EU!*

- Supplier motivation *…is not always enhanced, especially under multi-operator frameworks. Often there is a trade-off between flexibility and value, e.g. from volume discounts*

- Efficiency *…relying on a framework which does not meet needs exactly may not be more efficient in the longer term.*

Others agree: 75% by value of procurement advertised in the OJEU in 2011 **did not** take the form of framework agreements

Setting up frameworks

- Different approaches taken, but clear from text of Directives:

i. There must be an initial competition involving tenders; and

ii. Terms of any subsequent contracts may not entail 'substantial modifications' to terms of the framework itself. (Art. 33 - cf. Art. 72)

- But not clear which 'terms' this refers to…as by definition the price and delivery terms for contracts may vary substantially AND multiple authorities may use the framework

- Depending on how FA is drafted, it may just provide the process for awarding contracts, not contain substantive terms. No pecuniary interest = not a public contract

- Remedies Directives still apply to framework agreement itself

Awarding contracts under frameworks

- Clear that contracts must fall within the general scope of FA as advertised, but not clear whether e.g. different award criteria can be used for individual contracts
- Case C-299/08 on French *marchés de définition/attribution*
- Under 2014 directives, greater emphasis on transparency re: how future contracts will be awarded, with obligation to state how discretion will be exercised
- This may create problems for multi-authority frameworks
- Can Art. 72 be used to justify changes to the mechanism for awarding subsequent contracts, even if this contravenes Art. 33?

Controlling costs: multi-operator frameworks

- In principle, mini-competitions should allow for control of costs for individual contracts

But

- This is a limited field of competition, with greater scope for collusion; minimum of three operators no longer applies (!)

- Less likely that volume discounts will be available, and transaction costs will generally be higher than in a single-operator framework

- Difficult to collect data on the outcome of mini-competitions

- What about where ‘preferred contractor’ or ‘cascade’ methodologies are used instead of mini-competitions?

Controlling costs: single-operator frameworks

- Fix pricing for all anticipated requirements as part of initial competition, with indexation clause (risk pricing by operator?)
- Benchmark prices against sector standards (who carries out the benchmarking? Can prices go up as well as down?)
- Reserve right to purchase outside of framework at any time (but transaction cost savings will evaporate)
- Agree shared incentives/volume discounts – for example the main contracting authority may receive discounts where other authorities use the framework (who manages this?)
- Use of contractual variants in initial competition can help to market test these various options and choose best approach

Critique: how do we measure value for money?

Does this include:

- Objective assessment of quality
- Whole-life costs and externalities
- Social value
- Longer-term impacts on competition within the sector
- Transaction costs including legal challenges
- Transfer or loss of skills/expertise
- Efficiency of reallocation of savings

Frameworks appear to have a higher return on investment than other forms of aggregated procurement, such as joint purchasing (See *PwC, London Economics, and Ecorys* (2011) *Public Procurement in Europe: Cost and Effectiveness*)

Thank you.

Questions/Discussion

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