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law and the practice

2015 no 2

**UrT**

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REPRINT FROM PROCUREMENT LAW JOURNAL

# Framework agreements, EU procurement law and the practice\*

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## 1. Introduction

In 2004, the Public Sector Directive<sup>1</sup> introduced provisions on framework agreements, which are understood as ‘umbrella’ agreements for the provision of goods, works or services, for which the contracting authority has a repeated need.<sup>2</sup> Framework agreements may be conducted by one or more contracting authorities, with one or more economic operator. They establish terms and conditions under which subsequent contracts (call-offs) can be awarded within the duration of the framework agreement. Due to their efficiency, since their introduction they have gained popularity and importance in the public tender market.<sup>3</sup> It has been argued that framework agreements are more efficient than traditional procurement exercises, as they save time for both the purchaser and supplier, as well as resources and costs associated with negotiating terms and conditions every time an individual call-off is made.<sup>4</sup> The efficiency is particularly important, given that procurement represents 18 % of the GDP in Europe.<sup>5</sup>

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\* This article has undergone careful and rigorous scientific scrutiny through peer review.

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<sup>1</sup> 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (2004) OJ L34/114 (further: Public Sector Directive).

<sup>2</sup> Although this is the most common use of frameworks, in some cases they are used by multiple contracting authorities to aggregate their procurement requirements, due to their requirements for similar goods, works or services.

<sup>3</sup> In Denmark, a third of public procurement is done through framework agreements, see: PwC, “Public procurement in Europe Cost and effectiveness”, a study on procurement regulation prepared for the European Commission London 2011, available at: [www.ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/cost-effectiveness\\_en.pdf](http://www.ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf)

<sup>4</sup> Arrowsmith, “Framework purchasing and qualification lists under the European procurement Directives: Part 1” (1999) 3 *PPLR* p. 115.

<sup>5</sup> Poulsen, Jakobsen, Kalsmose-Hjelmborg, *Public Procurement Law – the EU directive on public contracts* (DJØF 2012) p. 400.

As framework agreements have been widely used,<sup>6</sup> and are considered an efficient procurement technique throughout Europe, the new Directive 2014/24/EU's<sup>7</sup> provisions on framework agreements have remained largely unchanged. However, it was noted by the EU legislator that certain aspects need to be clarified.<sup>8</sup> Unfortunately, some uncertainties regarding framework agreements are still present. Consequently, the aim of this article is to analyse the new provisions of Directive 2014/24/EU<sup>9</sup> on framework agreements and to assess the provided clarifications, while also identifying which challenges and uncertainties are still present and propose recommendations in order to introduce more clarity to the process in practice.

In order to achieve the aforementioned aims, it is necessary to first establish what framework agreements are. Focus will be given to different types of framework agreements, as well as to an assessment of their pros and cons. Secondly, the most common challenges and uncertainties, with which contracting authorities need to deal with when using framework agreements will be identified and analysed. Particular attention will be given to the challenges in: concluding framework agreements through central purchasing bodies; analysing whether framework agreements are public contracts; as well as identification and specification of framework agreements' subject matter. Also, the procedure for concluding a framework agreement and the subsequent award of call-offs will be analysed. Finally, the last section will provide concluding remarks.

## 2. Framework Agreements

Framework agreements are regulated in Article 33 of Directive 2014/24/EU<sup>10</sup>, where they are identified as:

*“A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to*

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<sup>6</sup> There has been a sharp increase in the use of framework agreements; between 2006 and 2009 the number of framework contracts has increased by almost fourfold. In 2009 over 25,000 framework contracts amounted to about one seventh of the value of all the contracts published in the OJEU. See: [www.ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/executive-summary\\_en.pdf](http://www.ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf).

<sup>7</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (further: Directive 2014/24/EU).

<sup>8</sup> Rec. 60 of Directive 2014/24/EU.

<sup>9</sup> Main focus of this article is on provisions of the Directive 2014/24/EU however when relevant provisions of Directive 2014/25/EU (the Utilities Directive) will be mentioned.

<sup>10</sup> Art. 51 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 respectively on procurement by entities operating in the water, energy, transport and postal service sectors and replacing Directive 2004/17/EC (further: Directive 2014/25/EU).

*establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.”*

In this definition, two phrases need to be emphasised: ‘in particular’ and ‘where appropriate’. These phrases are truly significant, as they mean that price and quantity are not the only terms that can be established by framework agreements, and that it is not always necessary to establish a precise quantity in framework agreement’s terms. Also, the reference to the fact that framework ‘agreements’ are agreements suggests that they differ from a standard procurement ‘contract’.<sup>11</sup>

Commonly, framework agreements are used to procure supplies/works/services, for which contracting authorities have a repeated need. A standard subject matter of a framework agreement may be cleaning services for universities in a particular region, office supplies for city councils or the construction of a particular part of a road. A contracting authority knows that it will have a need, as it has a repeated character, but at the time of establishing a framework agreement it is not able to provide specific information on how much, or when and where it will need the service/supply/work. Therefore, framework agreements are often characterised, as incomplete agreements, in which usually only general terms and conditions applicable to multiple call-offs will be established,<sup>12</sup> and the more specific issues will be agreed upon, when orders are placed.<sup>13</sup> However, there are other forms of framework agreements, which will be addressed below.

## 2.1 Time frame

As a general rule, framework agreements should not last longer than four years according to Directive 2014/24/EU, or according to Utilities Directive 2014/25/EU for no longer than eight years.<sup>14</sup> Nonetheless, in exceptional cases when duly justified, in particular by the subject of the framework agreements, their duration may be longer than four years. The question is, what may be accounted as duly justified exceptional cases? It seems that a justified reason for an extended duration of framework agreements would be situations in which an extended duration would be necessary for the economic operator to recover the investment costs. These could include cost invested to start the project, such as investment

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<sup>11</sup> See section III, 2 of this article.

<sup>12</sup> However, it is also possible to establish a framework agreement including all terms and conditions for the subsequent award of call-offs.

<sup>13</sup> Lichere and Richetto, “Framework agreements, dynamic purchasing systems and public e-procurement” in Lichere, Caranta, Treumer (eds.), *Modernising Public Procurement the New Directive* (DJØF Publishing 2014) p.216; Mouzas, Stefanos, and Ford. “Leveraging knowledge-based resources: The role of contracts.” (2012) *2 Journal of Business Research*, (67) p. 155.

<sup>14</sup> See: Art. 33 of Directive 2014/24/EU and Art. 51 of Directive 2014/25/EU.

in the establishment of an infrastructure, education or training of the staff, or employment of additional personnel.

This argumentation is in line with the recital of Directive 2014/24/EU, which provides that an ‘exceptional case’ where the duration of four years may be extended is:

*“where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement.”<sup>15</sup>*

Also, Directive 2014/24/EU includes a clarification regarding the old procurement regime. It confirms what was already allowed under Public Sector Directive, but what was not explicitly mentioned,<sup>16</sup> i.e. the possibility of awarding a call-off just before the expiry of the framework agreement, where the call-off will be implemented after the expiry of the framework agreement.<sup>17</sup> That line of argumentation possibly follows from the fact that the Directive 2014/24/EU does not limit how long a public contract should last. However, a limitation is provided for a framework agreement.

## 2.2 Types of framework agreements

Depending on a contracting authority’s needs, different types of framework agreements may be applied. The basic distinction of framework agreements is between framework agreements concluded with a single provider and framework agreements concluded with multiple providers. Another differentiation may be between framework agreements that are binding and those that are non-binding.

### 2.2.1 *Single provider framework agreements*<sup>18</sup>

Where a framework agreement is concluded with just one provider, call-offs under the agreement should be awarded within the terms laid down in the framework agreement. However, if the framework agreement is not precise enough this does not mean that the contracting authority has a right to automatically enter into a specific call-off. The provider may be asked in writing to supplement its tender, if necessary. The initiating power to introduce any changes to the framework is the responsibility of the contracting authority, not the economic operator, as it is the former who must ‘ask’ for supplementation of a tender. There is a scope for

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<sup>15</sup> Rec. 62 of Directive 2014/24/EU.

<sup>16</sup> The Commission’s Explanatory note on framework agreements, p. 5.

<sup>17</sup> Rec. 62 of Directive 2014/24/EU.

<sup>18</sup> Art. 33(3) of Directive 2014/24/EU.

introducing changes in the form of the supplementing tender, but it is limited by the provision of Article 72 of the Directive 2014/24/EU.<sup>19</sup>

The single provider framework is attractive, as it has a potential to maximise bulk purchase discounts due to the bargaining position of the contracting authority, as well as to secure the supply, if the provider is able to fulfil the total need of the contracting authority.<sup>20</sup> This type of framework agreement may also be particularly attractive for innovative projects, where the contracting authority and the provider collaborate in research and development.<sup>21</sup> In practice, single provider frameworks are seen as simpler and cheaper. It is also argued that a single provider framework allows for better control of decentralised procurement, and using the framework is less administratively burdensome for the contracting authority.<sup>22</sup>

At the same time, there are several challenges that the contracting authority must be aware of, and consider, at the beginning stage of establishing a single-provider framework agreement. Firstly, there is an issue with transparency of frameworks, and that is present in the cases of both single, and multi-provider frameworks. There is an extensive lack of transparency after the conclusion of a framework agreement, and it is impossible to know if call-offs are awarded within the terms laid down in the framework agreement.<sup>23</sup> Secondly, the question of how value for money shall be ensured in the single provider framework agreement is an issue, as there is no competition present after the conclusion of a framework. This is particularly relevant, if the framework agreement is for an extended period of time. In such a scenario, circumstances may change and the single provider may no longer be the best choice in regard to the price or quality of the provided service/supply/work. It is advisable for a contracting authority to reserve the right to go outside of the framework agreement to purchase any individual order.<sup>24</sup> Alternatively, the contracting authority may introduce a term in which it has a right to benchmark framework pricing against market prices

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<sup>19</sup> See section 4.3 of this article.

<sup>20</sup> Arrowsmith and Nicholas, "Regulating Framework Agreements under the UNCITRAL Model Law" Ch. 2. in Arrowsmith (ed) *Reform of the UNCITRAL model law on procurement: procurement regulation for the 21st century*, (West, 2009) p. 103; Nicholas, "A critical evaluation of the revised UNCITRAL Model Law provisions on regulating framework agreements" (2012) 2 *PPLR*, p. 31.

<sup>21</sup> *Ibidem*.

<sup>22</sup> This is suggested by the preliminary results of the study conducted by the author. The study comprises of 50 interviews with contracting authorities in the UK and in Denmark. The underlying materials and results of the study will be published later.

<sup>23</sup> On the issue of transparency in framework agreements see: Andrecka, "Framework Agreements: Transparency in the Call-off Award Process" paper presented at the Global Revolution VII Conference in Nottingham, June 2015.

<sup>24</sup> This is allowed on the basis of Rec. 61 of Directive 2014/24/EU.

with the obligation of the single provider to match the market prices, or offer a set discount against them.<sup>25</sup>

### 2.2.2 Multi-provider framework agreements<sup>26</sup>

Where a framework agreement is concluded with more than one provider, the framework agreement shall be performed by (a) a so-called direct award of call-offs – following the terms and conditions of the framework agreement without reopening competition, where all the terms and conditions for awarding the call-offs are set – or by (b) the application of a so – called mini-competition, where the framework agreement sets out the terms and conditions for a reopening of the competition amongst the providers of the framework agreement for the award of call-offs.

In regard to multi-provider framework agreements, Directive 2014/24/EU introduces important clarifications. It establishes that this type of framework agreement may include more than one type of procedure for the award of call-offs.<sup>27</sup> This means that part of the framework agreement call-offs may be directly awarded, and the other part may be granted on the basis of a mini-competition. The choice between the two mentioned call-off methods should be based on objective criteria, which must be set out in the procurement documents.<sup>28</sup> Such objective criteria are defined broadly and can relate to the quantity, value or characteristics of the works, supplies or services contracted. This includes the need for a higher degree of service, an increased security level, or to developments in price levels compared to a predetermined price index.<sup>29</sup> A practical example may be that below a certain value, the call-offs will be awarded through direct award and above a certain – previously established – value, call-offs will be awarded on the basis of a mini-competition.

Multi-provider frameworks are used more commonly than the single provider in central purchasing.<sup>30</sup> Multi-provider frameworks are particularly useful in cases, where it is not known who will be the best supplier at the stage of a call-off award. For example, in innovation projects where the changes happen very dynamically, it is quite common that the operator who offers the best technology

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<sup>25</sup> Semple, *A Practical Guide to Public Procurement* (Oxford University Press 2015) p.125.

<sup>26</sup> Art. 33(4) of Directive 2014/24/EU.

<sup>27</sup> See Danish case law on this issue: the Danish Complaints Board for Public Procurement's decision of January 11, 2011, *Kids Leg og Lær A/S v. K17 – indkøbsfællesskab for kommunerne i Region Sjælland* or decision of December 5, 2011, *Konica Minolta v. Erhvervsskolen Nordsjælland*; Swedish case law: Regeringsrättens årsbok RÅ 2010 ref. 97.

<sup>28</sup> Art. 33(4)(b) of Directive 2014/24/EU.

<sup>29</sup> Rec. 61 of Directive 2014/24/EU.

<sup>30</sup> This is suggested by the preliminary results of the study conducted by the author. The study comprises of 50 interviews with contracting authorities in the UK and in Denmark. The underlying materials and results of the study will be published later.

today may not be a technological leader in a year or two, when the call-off will be awarded. Other reasons for choosing the multi-provider framework may occur in situations, where the contracting authority will need to deal with price fluctuation (the energy sector), when the nature of orders varies, or when the contracting authority wishes to divide its orders into smaller lots to enhance the participation of small and medium enterprises (SMEs) while retaining competitive tension.<sup>31</sup>

### *2.2.3 Binding and non-binding framework agreements*

Framework agreements cannot be used to purchase goods/services or works, which are not covered by the agreement.<sup>32</sup> In some instances, it is argued that it is not permitted to purchase the goods covered by the framework agreement from other suppliers, who are not part of the framework agreement.<sup>33</sup> However, the latter is not prohibited by Directive 2014/24/EU, it instead focuses on whether or not the framework agreement is binding. A binding framework agreement is an agreement, where the obligation exists to purchase particular products or services from specific suppliers when the need occurs during the time-frame of the framework. As Arrowsmith points out, one of the most advantageous characteristics of framework agreements is the retainment of a contracting authority's freedom to buy outside the framework agreement, if that should prove more favourable at the time a call-off is placed.<sup>34</sup> However, in some jurisdictions, for example in Sweden, until now it has been commonly interpreted that framework agreements by their nature are binding for both parties involved. It seems that this will change with the adoption of the new Directive 2014/24/EU. That is due to recital 61, which states:

*“Contracting authorities should not be obliged pursuant to this Directive to procure works, supplies or services that are covered by a framework agreement, under that framework agreement.”*

Both, single provider and multi-provider framework agreements may be binding for just a supplier or solely for a contracting authority, or both parties of the agreement. Binding framework agreements are still less common than non-binding agreements in the majority of the EU Member States. Typically, a binding

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<sup>31</sup> Promotion of SMEs is one of the main aims of Directive 2014/24/EU; see Rec. 2, 59, 62, 78 of Directive 2014/24/EU.

<sup>32</sup> Poulsen *et al*, *EU Procurement Law, The Public Sector Directive, The Utilities Directive*, (DJØF Publishing 2012) p. 402.

<sup>33</sup> See: Decision of the Danish Complaints Board for Public Procurement of 29 September 2003, *Unicomputer v Greve Kommune*.

<sup>34</sup> Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (vol.1, 3rd ed. Sweet & Maxwell 2014) pp. 1101-1105; Arrowsmith, “Framework purchasing and qualification lists under the European procurement Directives: Part 1” (1999) 3 *PPLR* p.118.



framework agreement will be established with the aim to secure the supply, i.e. in cases where the security and urgency is of utmost importance, for example in a framework agreement for the supply of specific medicine to public hospitals. Non-binding frameworks are the most common, as they allow the contracting authority the most flexibility in their purchasing. It is left in the contracting authority's hands to decide which solution will provide the best value for money. The contracting authority may choose to use the framework agreement, or it may choose to use a traditional procurement process to purchase goods, supply or services. The non-binding character of the framework agreement may result in a practical problem that occurs at times in the United Kingdom, namely framework agreements being established, but not used.

However, it is valuable to emphasise that in recent years, central purchasing bodies such as the SKI in Denmark, or the NPS in Wales have started to establish binding framework agreements for the contracting authorities that want to be part of their framework agreements.<sup>35</sup> In such cases, the contracting authorities need to bind themselves to use the framework. In Denmark, the idea of establishing binding framework agreements for the municipalities was inspired by similar framework agreements established for the ministries by Statens Indkøb.<sup>36</sup> The framework agreements established by Statens Indkøb have provided significant savings to the ministries. The savings – vis-à-vis framework agreements, which are not binding – are brought about, because the supplier (usually a single supplier) draws up even more competitive tenders knowing that he will enjoy the binding commitment of the ministries to acquire whatever is covered by that particular framework agreement. In 2011, the Danish government and KL (the association which represents all 98 municipalities in Denmark) agreed to establish 15-20 binding framework agreements by 2015. The SKI, which is co-owned by KL and the Ministry of Finance, was chosen to establish and operate the agreements on behalf of the municipalities. The SKI has now established twelve binding frameworks, and six more are in the making. Moreover, the government and KL have agreed that the programme of binding frameworks should be extended after 2015.

As binding framework agreements are becoming more common, it is necessary to consider what the difference is between a public contract, and a framework agreement. This issue is further analyzed in section III.

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<sup>35</sup> SKI is a central purchasing body of the Danish State and local government authorities. NPS is the National Procurement Service in Wales, which brings together the public sector purchasing power of over £1bn, representing 20 % to 30 % of the Welsh annual expenditure in common and repetitive spend.

<sup>36</sup> State Procurement & Modernisation Agency, see: [www.statensindkob.dk/ServiceMenu/In-English](http://www.statensindkob.dk/ServiceMenu/In-English).

### 2.3 Pros and cons of framework agreements

Using framework agreements has many advantages; amongst others, they save time and money. That is due to the fact that the procurement requirements regarding publishing contract notices and calling for competition only needs to be fulfilled once, when the framework agreement is established, rather than each time a call-off contract is to be awarded. In other words, when the time comes for the placement of a call-off, the contracting authority does not need to proceed with the whole procurement process each time. The time aspect is particularly valuable, as it allows contracting authorities to receive goods/services/works as soon as possible, without inconvenient delays relating to the administrative processes. Also, due to the fact that the subject matters of the framework agreements usually are large volumes of works/supply/services, it allows advantageous discounts in connection with bulk purchasing, enabling the contracting authority to save money.

Under framework agreements, as with ordinary public contracts, it is possible to divide particular orders into lots. Consequently, framework agreements have the potential to promote SMEs' participation in the procurement market, as they may allow the delivery of smaller scale projects.<sup>37</sup> Also, some commentators believe that framework agreements have the potential to enhance competition and transparency, as they cumulate small orders – such an aggregation potentially subjects them to EU public procurement rules.<sup>38</sup> From the opposite spectrum, quite often the same characteristics that are mentioned as pros of framework agreements are also pointed out as their cons, e.g. participation of SMEs, transparency and competition.<sup>39</sup> These elements are mentioned as risks and constraints of framework agreements, but just as often they are described as advantages of the framework agreements. In the author's view, whether the framework agreement will be pro or against competition or transparency will need to be assessed on a case-to-case basis, as it will depend on how the specific framework agreement

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<sup>37</sup> Division into lots is also possible and particularly encouraged in case of public contracts under Directive 2014/24/EU.

<sup>38</sup> Nicholas, "A critical evaluation of the revised UNCITRAL Model Law provisions on regulating framework agreements." (2012) 2 *PPLR*, p. 20.

<sup>39</sup> On issues regarding framework agreements and competition see: Arden, "Legal regulation of multi-provider framework agreements and the potential for bid rigging: a perspective from the UK local government construction sector" (2013) 5 *PPLR*; Sanchez Graells and Herrera Anchustegui, "Impact of public procurement aggregation on competition. Risks, rationale and justification for the rules in Directive 2014/24" (2014) University of Leicester School of Law Research Paper no. 14-35, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2534496](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534496); Sanchez Graells, *Public Procurement and the EU Competition Rules*, (Hart Publishing 2011) p. 294.

is carried out by a contracting authority. However, the EU procurement law does not provide enough safeguards in regard to the transparency principle.<sup>40</sup>

When it comes to transparency and competition, it could be argued that these elements are less present in the framework agreement than in the traditional procurement process. Firstly, the framework agreements are closed agreements to which no one from outside can enter.<sup>41</sup> Therefore, framework agreements may hinder competition and create oligopolies, by sheltering several providers from the on-going competition and exclude potential new competitors.<sup>42</sup> Secondly, the procurement directives regulate the successive stage of the framework agreement – that is the process of awarding call-offs – in a limited manner. Such a regulation gives contracting authorities more flexibility in operating their framework agreements. However, flexibility often has its consequences in the limited transparency of the award process. Thirdly, it is arguable whether SMEs may be promoted in framework agreements. That is due to the large volume of works/supply/services involved in framework agreements, usually SMEs will not have the capacity to deliver the contracts, unless they are divided into smaller lots. Consequently, framework agreements may in fact hinder the access of SMEs to the procurement market. Finally, the big risk of framework agreements is that the contracting authority will not rely on them for their efficiency, but rather because they allow an escape from the administrative burden of procurement's standard procedural requirements.<sup>43</sup>

### 3 Uncertainties and challenges in framework agreements

The application of framework agreements is associated with some challenges and uncertainties following from law, as well as occurring in day-to-day procurement practice. Some have been clarified by the new Directive 2014/24/EU, while others are still present. These challenges and uncertainties, as well as newly provided clarifications will be identified and analysed in the upcoming sections.

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<sup>40</sup> On this topic see: Andrecka, "Framework Agreements: Transparency in the Call-off Award Process" paper presented at the Global Revolution VII Conference in Nottingham, June 2015

<sup>41</sup> Under UNCITRAL Model law on public procurement recognised is also open type of framework agreements. These under framework of the EU procurement directives will fulfil characteristics of dynamic purchasing system, see Art. 34 of Directive 2014/24/EU.

<sup>42</sup> Yukis, "Are IDIQs inefficient? Sharing lessons with European framework contracting" (2008) *Public Contract Law Journal*, (2008) Vol.37, No. 3, p. 557

<sup>43</sup> Yukis, "Are IDIQs inefficient? Sharing lessons with European framework contracting" (2008) *Public Contract Law Journal*, (2008) Vol.37, No. 3, p. 554.

### 3.1 Central purchasing and framework agreements

In practice, large volumes of framework agreements are delivered by central purchasing bodies, which act as agents for several contracting authorities, and usually conclude framework agreements of extended volume and value. Directive 2014/24/EU defines central purchasing bodies as contracting authorities, which conduct purchasing activities on a permanent basis, in one of the following forms: (a) the acquisition of supplies, works and/or services intended for contracting authorities, (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.<sup>44</sup>

#### 3.1.1 *Benefits and challenges of central purchasing*

Using framework agreements established by central purchasing bodies often seems beneficial for contracting authorities. This is due to the fact that thanks to aggregation of procurement, central purchasing bodies are able to achieve the most competitive deals on a market. Also, the central purchasing body takes away the procedural burden from contracting authority, as the contracting authority does not need to deal with the formalities of setting up the EU approved tender for the establishment of a framework agreement. This may be particularly advantageous in cases of more complex procurement, where a small contracting authority may lack in competencies, skills or appropriately trained staff to deal with such a task.

However, centralised framework agreements are associated with several challenges and risks that need to be considered, when a contracting authority is deciding whether to use a central purchasing bodies' framework agreements. Amongst others, central purchasing bodies' frameworks have been identified as less transparent, less fair and more bureaucratic than other public procurements.<sup>45</sup> This may first and foremost be due to the scale and volume of central purchasing. Quite often they will limit the accessibility to the framework agreements for SMEs, as SMEs will often lack in capacity to compete for participation in such central framework agreements.<sup>46</sup> This is confirmed to some extent by the empirical research so far, as it seems that it is artificial to argue that the advantages of aggregated procurement also applies to the supplier.<sup>47</sup>

Secondly, due to the fact that central framework agreements are designed not

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<sup>44</sup> See Art. 2 (14), (15), (16) of Directive 2004/24/EU.

<sup>45</sup> Europe Economic Market 2004/10/D, Evaluation of Public Procurement Directives §§5.7-5.28 (2006) available at [www.ec.europa.eu/internal\\_market/publicprocurement/studies\\_en.htm](http://www.ec.europa.eu/internal_market/publicprocurement/studies_en.htm).

<sup>46</sup> Risvig-Hammer, "Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies." (2014) 4 *PPLR*, p. 207.

<sup>47</sup> Tátrai, "Joint Procurement" (2015) *ERA Forum*, DOC 10.1007/s12027-015-0374-3, p.9.

only to cover a lot of activities, but also a lot of users, they are often unable to fulfil the entire needs of the contracting authorities. It can be said that central purchasers are frequently unaware of the exact needs of the contracting authorities. This is often due to the fact that the central purchasing bodies are under political pressure from central government, and also fail to communicate with the contracting authorities that will be the end users of the future framework to consult the scope of the framework beforehand. For example, the central purchaser concluded a framework agreement for stationary PCs, phones etc., but due to the specifics of its day-to-day work, some municipalities need laptops and mobile phones, which will allow the staff members to be mobile. Similar situations may occur in cases of operating systems for computers, where the municipality has iPads and Mac computers, and thus they may not be interested in a Microsoft operating system, but rather in iOS. In such cases, the importance of market consultation with the future framework users, before establishing frameworks must be emphasised.

Contracting authorities often will be under a pressure to implement local policies, such as activation of unemployed, provision of training of local youth entering into the job market and so on. These local policies are not usually included in the central framework agreements, as these frameworks need to stay generic to a large extent for two reasons: a) to be able to gain the best economic outcome – meaning to obtain the best price-quality ratio – and b) to be able to include a vast amount of contracting authorities as users in the framework agreements. The second reason may be of particular relevance, as the central purchasing bodies, at times may be driven by self-interest to establish a contract with the highest amount of users, as they often charge fees for using their framework agreements from their users.<sup>48</sup> This may cause overuse of framework agreements in situations, where they are not the most efficient or appropriate procurement tools. That may be due to the fact that the central purchasing bodies have an economic incentive in promoting the usage of framework agreements. Therefore, the approach of purchasing consortia may be not objective. Finally, extensive centralisation of purchasing may hinder the competition, and raises the question of who is liable for procurement law breaches?<sup>49</sup> The latter is discussed below.

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<sup>48</sup> Yukis, “Are IDIQs inefficient? Sharing lessons with European framework contracting” (2008) *Public Contract Law Journal*, Vol.37, No. 3, p. p. 566.

<sup>49</sup> Sanchez-Graells and Herrera Anchustegui, «Impact of Public Procurement Aggregation on Competition: Risks, Rationale and Justification for the Rules in Directive 2014/24» (December 5, 2014) University of Leicester School of Law Research Paper No. 14-35; Albano, “Demand aggregation and collusion prevention in public procurement”, in G M Racca and C R Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Brussels, Bruylant, 2014) pp. 155–70; Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Oxford, Hart, 2015) pp. 254-57.

### 3.1.2 *The new Directive's clarifications*

The new Directive 2014/24/EU brings some clarification in regard to issues concerning central purchasing and framework agreements. Firstly, it clarifies that the central purchasing body may also provide ancillary purchasing activities such as, activities that support purchasing e.g. a technical infrastructure enabling contracting authorities to conclude framework agreements; advice on the conduct or design of public procurement procedures; or preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned.<sup>50</sup> Therefore, the central purchasing body, which established a framework agreement may also provide an ancillary service on how to use the framework agreement for the contracting authorities which are part of the framework. Again, this may influence the subjectivity of using framework agreements by the central purchasing bodies, as they will have further economic incentives to promote framework agreements, i.e. the fee for ancillary services.

Secondly, Directive 2014/24/EU elaborates on who is responsible for compliance with procurement law, the contracting authority, or the central purchasing body. On the basis of the Public Sector Directive from 2004, the common interpretation was that the contracting authority was liable and responsible for the appropriate application of procurement law. Therefore, if the central purchasing body made a mistake, the contracting authority was responsible for identifying it. The new Directive 2014/24/EU clarifies that the contracting authority fulfils its obligations pursuant to this Directive, when it acquires works, supplies or services by using a framework agreement concluded by the central purchasing body offering the central purchasing activity.<sup>51</sup> However, the contracting authority concerned shall be responsible for fulfilling the obligations pursuant to this Directive in respect of the parts it conducts itself. For example, this may be reopening a competition under a framework agreement that has been concluded by a central purchasing body; or determining which of the economic operators party to the framework agreement shall perform a given task under a framework agreement that has been concluded by a central purchasing body. Hence, it could be argued that the contracting authority, which uses a central purchasing body's framework agreement will have complied with the procurement rules, regardless of whether the central purchasing body did or did not comply with the provisions.<sup>52</sup> However, the contracting authority will be responsible for the parts of the procurement, which it conducts itself. A central purchasing body

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<sup>50</sup> Art. 2(15) of Directive 2014/24/EU.

<sup>51</sup> Art. 37(2) of Directive 2014/24/EU.

<sup>52</sup> Risvig-Hammer, "Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies." (2014) 4 *PPLR* p. 208.

is liable and responsible for respecting procurement rules when establishing its framework agreements, and the contracting authority is responsible for a lawful award of orders under an established framework agreement.

### 3.2 Public contract or not?

There is a general confusion surrounding the scope of the rules on framework agreements. This confusion regards the distinction of the framework agreements and framework contracts, as well as the issue of whether the framework agreement is a type of public contract, or whether in some cases the framework agreement may be a public contract. The Commission's explanatory note defines:

*“Framework agreements that establish all the terms (framework contracts) [as] legal instruments under which the terms applicable to any orders under this type of framework agreement are set out in a binding manner for the parties to the framework agreement – in other words, the use of this type of framework agreement does not require a new agreement between the parties, e.g. through negotiations, new tenders etc.”*<sup>53</sup>

When it comes to framework agreements that do not include all terms and conditions, it is required that these are further specified and substituted when necessary at the stage of awarding call-offs.<sup>54</sup>

There are several similarities between public contracts and framework agreements. Namely, both cover works, services and supplies. The procurement rules apply equally to both in regard to the fact that there must be a cross border element, and the EU threshold value must be reached. Also, framework agreements are seen as contract within the meaning of the Remedies Directive, and rules regarding the modification of a contract in Article 72 of the Directive 2014/24/EU.<sup>55</sup> However, there are several differences. Amongst others, neither framework contracts, nor framework agreements indicate any form of obligation on any of the parties involved. This is contrary to the public contract, which constitutes an obligation to provide, receive and pay for works/services/supplies that are the subject matter of the contract.<sup>56</sup> Besides the obligation aspect, framework agreements differ from public contracts by lacking specific time, place and quantity of the supplier or service that is the subject matter of the framework agreement.

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<sup>53</sup> European Commission Explanatory Note “Framework Agreements – Classic Directive” (CC2005/03\_rev/ of 14.7.2005) at 3.

<sup>54</sup> *Ibidem*.

<sup>55</sup> Art. 1(1) of Remedies Directive.

<sup>56</sup> Procurement Lawyers Association, “The use of framework agreements in public procurement”, March 2012, p.10, available at: [www.procurementlawyers.org/pdf/PLA%20paper%20on%20Frameworkworks%20PDF%20Mar%202012.pdf](http://www.procurementlawyers.org/pdf/PLA%20paper%20on%20Frameworkworks%20PDF%20Mar%202012.pdf)

It could be argued that the flexible approach of framework agreements is an exception to the duty for contracting authorities to precisely define their needs.<sup>57</sup>

However, it is possible to establish a binding framework agreement or binding framework contract, an example was given in the previous section on SKI's current practice and the Swedish interpretation of the rules on framework agreements. Directive 2014/24/EU does not prohibit such a practice. Such a binding framework may oblige the contracting authority to purchase a specific amount of goods/services/works from a provider; may oblige the provider to make available and deliver on request specific goods/works/services; or it may oblige all parties involved to purchase and pay, as well as deliver the goods/services/works. As a general rule in the EU scale, binding frameworks are not as common as those which are non-binding, but may be useful where the contracting authority wants to secure the delivery of particular goods/services/works. It could be argued that in cases of binding framework agreements, they will fulfil the definition of public contracts, as even though the time, place and quantity are not specified, the obligation will be there, and it will be possible to identify the parties of the obligation. In the author's opinion this would be a 'conditional' public contract. For the contract to be enforceable, a specific condition would have to be imposed that the contracting authority's need is covered by the framework agreement. Consequently, a binding framework agreement will in fact be a form of public contract.<sup>58</sup>

### 3.3 Identification of parties

Another question is to what degree the parties of a framework agreement must be identified at the stage of its establishment. It is a valid question, as the body establishing a framework agreement may be interested in a broad description of the parties involved, as it would enable the party to include as many users of a framework agreement as possible, which may be a great advantage in receiving bigger discounts for bulk purchases. From Directive 2014/24/EU, it follows that the OJEU's notice must include the identities of all the contracting authorities, which are part of the framework agreement.<sup>59</sup> This is due to the fact that framework agreements are closed systems, to which both the new providers and the new contracting authorities are not permitted entry.<sup>60</sup> Such a requirement

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<sup>57</sup> Art. 42(1) of Directive 2014/24/EU; Lichere and Richetto, "Framework agreements, dynamic purchasing systems and public e-procurement" in Lichere, Caranta, Treumer (eds.), *Modernising Public Procurement the New Directive* (DJØF Publishing 2014) p.214.

<sup>58</sup> European Commission Explanatory Note "Framework Agreements – Classic Directive" (CC2005/03\_rev/ of 14.7.2005) p.3.

<sup>59</sup> Rec. 60 of Directive 2014/24/EU.

<sup>60</sup> There are exceptions to this rule, see Art. 72 of Directive 2014/24/EU.



is established to secure transparency and equality of framework agreements. However, it is debatable whether the aim of transparency is achieved.

Directive 2014/24/EU states that contracting authorities may be individually named, or they may be named by the recognisable class of contracting authorities such as Central Government Departments, local authorities in region X, province Y.<sup>61</sup> It must be possible to immediately identify the contracting authority concerned.<sup>62</sup> Consequently, reference to new schools or hospitals is not sufficient, as in simple words contracting authorities such as ‘new schools’ do not exist.<sup>63</sup> In a situation where the class description does not allow the immediate identification of the authority concerned, the information should be included in the notice, where further information may be found. Reference may be given to a separate document, web page, list etc. At times, the centralised framework agreements are established without consultation with the end users-contracting authorities. Therefore, in some cases a contracting authority will not even know that it is part of a framework agreement, or the framework agreement will not fit the needs of the contracting authority, as it was not consulted when the framework was established. The consequence of this will be a lack of transparency within the framework agreement, as the contracting authority identified in it will not use or plan to use the framework.

The new regime brings some changes which impact the parties of the framework agreements. The first change is in regard to the withdrawal of the requirement of at least three providers (if there is a sufficient number of qualified candidates) to establish a multi-provider framework to two providers, even if other admissible tenders have been submitted.<sup>64</sup> The second change is in regard to the provision clarifying whether it is possible to replace a supplier of a framework agreement. Until now it has been unclear whether such an option has been available, as the main characteristic of framework agreements is that it is a closed system. However, Directive 2014/24/EU clarifies the situation by explicitly providing exceptions, and allowing for a change of the framework agreements’ members in specific situations.<sup>65</sup> The members may be changed without the requirement of starting a new procurement procedure, if such an option has been provided for in the initial procurement documents in clear, precise and unequivocal review

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<sup>61</sup> Rec. 60 of Directive 2014/24/EU.

<sup>62</sup> European Commission Explanatory Note “Framework Agreements – Classic Directive” (CC2005/03\_rev/ of 14.7.2005).

<sup>63</sup> Risvig-Hammer, “Chapter II: Techniques and instruments for electronic and aggregated procurement” in Steinicke and Vesterdorf (eds), *Commentary on EU Public Procurement Law* (Nomos, primo 2015).

<sup>64</sup> Risvig-Hammer, “Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies.” (2014) 4 *PPLR* p. 204.

<sup>65</sup> Art. 72 of Directive 2014/24/EU.

clauses.<sup>66</sup> Nevertheless, such a change should not alter the overall nature of the framework agreement. The members of a framework agreement may also be changed in a situation of universal or partial succession, following corporate restructuring (including takeover, merger, acquisition or insolvency)<sup>67</sup>. However, a potential new member of a framework agreement must fulfil the criteria for qualitative selection initially established and provided that this does not entail other substantial modifications to the framework agreement, and is not aimed at circumventing the application of Directive 2014/24/EU.<sup>68</sup> These possibilities shall not be seen as exceptions to the closed character of framework agreements, as the rules allow the substitution of a member of a framework agreement, not to open up the access to the framework agreements.

### 3.4 Identification of a subject matter

The subject matter of framework agreements is work/supply/service, or a combination of these. However, as framework agreements are established for repeating needs and usually include a form of aggregated purchasing, challenges regarding the subject matter often occur.<sup>69</sup> The issues which often occur in practice relate to the uncertainties of how detailed the subject matter must be identified and described, and question whether substitution of products or services is allowed, and if yes, to what extent. These uncertainties are particularly important within framework contracts, where all terms and conditions for awarding call-offs are established at the stage of concluding a framework. As a scope for change is limited in comparison with framework agreements, where a mini-competition or further specification of terms will be applicable.

#### 3.4.1 *Large volumes and substitution of products*

In practice, the problem of identifying the subject matter of the call-offs will occur particularly often in cases where the contracting authority deals with a large portfolio of products, or when new products are launched into the market.<sup>70</sup>

In the first scenario, when a contracting authority deals with a large portfolio

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<sup>66</sup> Art. 72(1)(a) of Directive 2014/24/EU.

<sup>67</sup> Art. 72(1)(d) of Directive 2014/24/EU.

<sup>68</sup> *Ibidem*.

<sup>69</sup> In France, specific circumstances have to occur for a contracting authority to be able to use framework agreements. See: Lichere and Richetto, "Framework agreements, dynamic purchasing systems and public e-procurement" in Lichere, Caranta, Treumer (eds.), *Modernising Public Procurement the New Directive* (DJØF Publishing 2014) p.214.

<sup>70</sup> See Decisions of the Danish Complaints Board for Public Procurement regarding a large portfolio of products and the difficulties in structuring and assessing the offers, especially based on the price, in the following cases: 16<sup>th</sup> June 2009 *Todin*; 3<sup>rd</sup> September 2007 *SP Medical*; 29<sup>th</sup> September 2009 *Lekolar*; 27<sup>th</sup> March 2008 *AV Form*; 29<sup>th</sup> August 2007 *Sectra*; 12<sup>th</sup> March 2009 *Lyreco*.

of products – for example 10,000 types of office supplies or food products – the question arises, whether all these products must be identified and considered at the award stage in the framework agreement, and to what extent they need to be described. It seems to be reasonable to describe the subject matter in a broad manner, for example “an assortment of different pens that will fulfil the needs of the contracting authority” or as a group/type of products “variety of teas, yoghurts etc.” Furthermore, referring to a web page or a separate annex including a full catalogue of products.<sup>71</sup> Such an approach gives the flexibility needed both when concluding a framework agreement and when using it. There is nothing in the Directive prohibiting such a general description of a subject matter. The only aspect that needs to be kept in mind is that framework agreements should not be used with the aim to be used improperly or in such a way as to prevent, restrict or distort competition.<sup>72</sup>

The second scenario occurs, when new products are launched to the market. This may include a new version of a smart phone, or a new type of detergent. In such a situation a contracting authority may deal with two issues, a) when the product *per se* is the same, but upgraded (for example a new version of a mobile phone) and b) when a new product is launched, which if present at the time of concluding a framework agreement would be included in it (for example new brand/ type of product). Some of these issues may be resolved by including a clear, precise and unequivocal review clause in the framework agreement, in which it is predicted that a substitution of products is allowed.<sup>73</sup> Such review clauses shall state the scope and nature of possible modifications or options, as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the framework agreement.<sup>74</sup> What needs to be considered in drafting the review clauses is, whether the allowed substitution regards a change of a product for a new one, but with the terms of keeping the agreed price, or whether the substitution will allow an upgrade of a product connected with a price increase.

The question regarding an introduction of newly launched products from the same category of products is more complex. As a general rule, framework agreements are closed structures, which cannot be changed substantially<sup>75</sup>. Therefore, it is crucial to define the subject matter broadly enough to escape such an issue or include such a clause in the framework agreement. The practical challenge may occur when assessing how to price such a product, as it was not exposed to the open competition in a public tender. It could be argued that the standard

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<sup>71</sup> This could be done via an online catalogue/ online shop.

<sup>72</sup> Rec. 60 of Directive 2014/24/EU.

<sup>73</sup> Art 72 (1)(a) of Directive 2014/24/EU.

<sup>74</sup> Art. 72 of Directive 2014/24/EU.

<sup>75</sup> Art 72.(2) of Directive 2014/24/EU.

pricing minus the agreed general discounts could be applied. Here, standard pricing should be understood as the standard pricing that the supplier has for the particular product on the market, minus discount percentage for the rest of the similar supplies. For example, in the case of a new chemical cleanser for hospitals, its standard price on the market minus 20 % would be considered, as such a rebate is given to the contracting authority for the rest of the chemical supplies included in the framework. However, it needs to be noted that many companies have different lists of standard pricing for different customers, which may be problematic in practice.

In a case where the review clauses are not in place, or they are drafted in an unsatisfactory manner, it is worth analysing what changes are allowed to the scope of the subject matter of the framework agreement.

### *3.4.2 Modification of the framework agreement's scope*

According to Article 72 of Directive 2014/24/EU, the modification of the framework agreement is allowed, when additional products, services or works “have become necessary” and when the change of a contractor would be connected with excessive inconvenience, or it would be impossible due to technical or economic reasons.<sup>76</sup> Though in such a case, any individual price increase should not exceed 50 % of the original contract's overall value. Also, a substitution of products or addition of new ones is allowed in case of *force majeure*, or when the modification does not alter the overall nature of the framework.<sup>77</sup> Furthermore, the introduction of new products, or substitution of products connected with price increases is allowed, as long as the price increase is not higher than 50 % of the value of the original framework agreement. If there are several successive modifications, then that limitation shall apply to the value of each modification. It needs to be stressed that such consecutive modifications shall not be aimed at circumventing the Directive. Article 72(1)(e) sets out grounds for modifications of any value provided they are not substantial. Finally, the so-called *de minimis* changes are allowed i.e. changes of a small economic value. This small economic value cannot be higher than 10 % of the initial framework agreement value for service and supply, and 15 % for works.<sup>78</sup> To summarise, it seems that the introduction of new products to the framework is possible, if it does not change the nature and the value of the framework substantially. When it comes to substitution of a product, it seems to clarify that not only is substitution allowed, but it may also be accompanied by a price increase as long as it is within the limits dictated by the provisions. However, it should be emphasised that the CJEU rulings on which

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<sup>76</sup> Art. 72(1)(b) of Directive 2014/24/EU.

<sup>77</sup> Art. 72(1)(c) of Directive 2014/24/EU.

<sup>78</sup> Art. 72(2) of Directive 2014/24/EU.

the introduction of Article 72 is based were solely related to public contracts, not framework agreements. The practical problem may occur if the price is not defined specifically enough at the time of setting a framework agreement, but for example a price range is provided. In such a situation, it may be a difficult task to assess whether the modification is below or above 10 %, 15 % or 50 % of the original contract value. It could be argued that Article 72 should be interpreted more strictly in the context of framework agreements. This is particularly due to the fact that at the stage when the framework agreement is established, no public contract is yet awarded. Therefore, the contracting authority still has the time and opportunity to change its decision and be more proactive. This is particularly applicable in the context of a multi-provider framework agreement, as it may be said that the suppliers are still at the competing stage for the contract award.

### 3.5 Procedures

Framework agreements are not a procedure, they are a type of technique and instrument for aggregated procurement.<sup>79</sup> When it comes to the procedures and their requirements, two different stages need to be considered. These are the procedures used for establishing a framework agreement and procedures used for the subsequent award of call-offs. For the establishment of a framework agreement, open and restricted procedures are applied in practice.<sup>80</sup> However, contracting authorities are free to choose other procedures, if they are able to fulfil the special requirements for the use of competitive dialogue, competitive procedure with negotiations, or the innovation partnership. Until recently, usage of other procedures, including negotiations (such as the negotiated procedure with prior notice in Public Sector Directive) has been limited to extraordinary circumstances.<sup>81</sup> However, Directive 2014/24/EU introduces a more flexible approach to the usage of procurement procedures, and consequently, the competitive procedure with negotiation is now more widely available.<sup>82</sup> Thus, if the subject matter of a framework agreement is more complex, for example if it includes the application of new technologies, and the framework cannot be awarded without prior negotiations, it will now be possible to apply the competitive procedure with negotiations.<sup>83</sup>

The Directive's provisions on the subsequent process of awarding call-offs

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<sup>79</sup> Risvig-Hammer, "Chapter II: Techniques and instruments for electronic and aggregated procurement" in Steinicke and Vesterdorf (eds), *Commentary on EU Public Procurement Law* (Nomos, primo 2015).

<sup>80</sup> Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (vol.1, 3rd ed. Sweet & Maxwell 2014) p. 1118.

<sup>81</sup> See Art. 30 of Directive 2004/18/EC

<sup>82</sup> See Art. 26 of Directive 2014/24/EU.

<sup>83</sup> *Ibidem*.

are fairly limited. The provisions set that in case of single-provider framework agreement call-offs shall be awarded within the limits of the terms laid down in the framework agreement. If necessary, the contracting authorities may consult the single provider in writing, requesting it to supplement its tender. In the case of multi-provider frameworks, call-offs may be awarded by direct award, mini-competition or a combination of both.

### 3.5.1 *Direct award of call-offs*

In the case of multi-provider framework contracts, the call-offs shall be awarded following the terms and conditions of the framework agreement, without reopening competition, where the framework sets out all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the framework agreement's members, shall perform them.<sup>84</sup> The latter conditions shall be indicated in the procurement documents for the framework agreement. One way of awarding call-offs is through the 'cascade' method. That means, firstly contacting the supplier whose tender for the award of a framework contract was considered the best, and turning to the second one if the first one is not capable of or not interested in providing the goods, services or works in question.<sup>85</sup>

Other methods of direct award of call-offs in framework contracts include 'cab-rank' (acceptance of any given order); rotation between suppliers; percentage allocation; alphabetical rotation, or random selection.<sup>86</sup> However, when the Commission referred to the 'cascade' method in its explanatory note, it did not elaborate on the other methods.<sup>87</sup> There is no case law to confirm the availability or prohibition of using the aforementioned methods. It seems that some of these methods, for example cab rank, could be sustained provided that the award criteria are objective, transparent and non-discriminatory. While other methods, such as random selection or rotation, would be challenging to uphold in the court. This is due to the fact that the purpose of the procurement process is to identify the best tender, which also provides the best value for money. Consequently, it would be difficult to argue that using the random selection method in the call-off

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<sup>84</sup> Art. 33(4)(a) of Directive 2014/24/EU; see also Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (vol.1, 3rd ed. Sweet & Maxwell 2014) pp. 1141-1146.

<sup>85</sup> European Commission Explanatory Note "Framework Agreements – Classic Directive" (CC2005/03\_rev/ of 14.7.2005) at 3.2.

<sup>86</sup> Procurement Lawyers Association, "The use of framework agreements in public procurement", March 2012, p. 35, available at: [www.procurementlawyers.org/pdf/PLA%20paper%20on%20Frameworks%20PDF%20Mar%2012.pdf](http://www.procurementlawyers.org/pdf/PLA%20paper%20on%20Frameworks%20PDF%20Mar%2012.pdf); Lichere and Richetto, "Framework agreements, dynamic purchasing systems and public e-procurement" in Lichere, Caranta, Treumer (eds.), *Modernising Public Procurement the New Directive* (DJØF Publishing 2014) p.216.

<sup>87</sup> European Commission Explanatory Note "Framework Agreements – Classic Directive" (CC2005/03\_rev/ of 14.7.2005) at 3.2.

award allows the achievement of this aim. The contradictory argument could be that the best tenders were identified at the stage of establishing the framework agreement, therefore the subsequent award of call-offs may be chosen on the basis of different criteria, and a broader understanding of the best tender or even randomly. Though the author is not convinced with such an argumentation, as it seems to go against the idea of competitive award, achieving the best value for money, and is contradictory to procurement law policy.

### 3.5.2 *Mini-competition*

In the case of multi-provider framework agreements where not all terms and conditions are specified at the outset, the method of designing the mini-competition is largely left to the discretion of the contracting authority, even though some rules are provided by the Directive. In practice, the procedure for a call-off award will to some extent look similar to the procedures established in the procurement directives. However, usually it will be less formalistic and more flexible. Also, at the stage of mini-competition no substantial changes to any terms, which were agreed at the stage of establishing a framework agreement, can be introduced.<sup>88</sup>

The mini-competition shall be based on the same terms applied for the award of the framework agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the procurement documents for the framework agreement.<sup>89</sup> All members of the framework agreement who are capable of performing the call-off shall be invited in writing to participate in a mini-competition.<sup>90</sup> Contracting authorities shall fix a time limit, which is sufficiently long to allow tenders for each specific call-off to be submitted, taking into account factors such as the complexity of the subject-matter of the call-off and the time needed to send in tenders.<sup>91</sup> Tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired.<sup>92</sup> Finally, contracting authorities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement.<sup>93</sup> Available award criteria for framework agreements is the most economically advantageous tender that shall be identified on the basis of the price or cost, using a cost-effectiveness

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<sup>88</sup> See Art. 33(2) and 72 of Directive 2014/24/EU and Case C-454/06 *Pressetext Nachrichtenagentur GmbH v. Republik Österreich* [2008] ECR I-4401.

<sup>89</sup> Art 33(4) (c) of Directive 2014/24/EU. See also: Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (vol.1, 3rd ed. Sweet & Maxwell 2014) pp. 1146-1153.

<sup>90</sup> Art 33 (5)(a) of Directive 2014/24/EU.

<sup>91</sup> Art 33 (5)(b) of Directive 2014/24/EU.

<sup>92</sup> Art 33 (5)(c) of Directive 2014/24/EU.

<sup>93</sup> Art 33 (5)(d) of Directive 2014/24/EU.

approach, such as life-cycle costing.<sup>94</sup> It is established that the award criteria for an award of call-offs may be different, but they need to be established in the framework agreement. The author believes that the criteria for awarding call-offs are required to identify the most economically advantageous tender. Consequently, the methods used during the award stage of call-offs must support this aim.<sup>95</sup>

## 4 Conclusion

Directive 2014/24/EU introduces several relevant clarifications in the context of framework agreements. Firstly, it confirms that in one framework agreement direct award of call-offs, as well as mini-competition may be applied, as long as the usage of both is provided for by the framework, and the choice between them is based on objective criteria. Secondly, the Directive clarifies that the time frame for performance of a call-off may exceed the time frame of the framework agreement. Thirdly, it explains that under particular enumerated exemptions, it is possible to substitute a member of a framework agreement without reopening competition. Finally, a guideline is given to the distribution of responsibilities between the central purchasing body and the contracting authority, when the former establishes the framework agreement. All these clarifications should be considered as positive additions to existing legislation. Newly introduced Article 72 of Directive 2014/24/EU provides help in solving existing practical challenges of how to introduce amendments to the subject matter of a framework agreement, and it provides guideline as to which changes can be made, and when these changes can be made.

However, some challenges and uncertainties in the application of framework agreements are still present. For example, the Directive only regulates the procedure of awarding call-offs in a limited manner. Consequently it is still unclear, whether methods such as ‘cab rank’; rotation between suppliers; percentage allocation; or random selection would be upheld in a court - the author is sceptical. Further, guidelines on these matters from the CJEU and the Commission would be appreciated. However, it is possible that these matters have been intentionally left vague, because the Commission knows that the different Member States use different practices, and provided they comply with the rules regarding the establishment of frameworks and the objective criteria for choosing how contracts are awarded under them, they accept the use of different mini-tender/call-off techniques.

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<sup>94</sup> Art. 67 of Directive 2014/24/EU.

<sup>95</sup> This excludes the applicability of using methods such as random selection.