The Law and Economics of Framework Agreements

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Exploiting the Potential of Framework Agreements

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The views expressed in this presentation are those of the author only
Roadmap

- How not to be misled by the babel of (public procurement) idioms
- Why do Framework Agreements look so “attractive”?  
- “It’s the economy, stupid!”
- Framework Agreements and e-Catalogues
- Competition **for** and **in** Framework Agreements
- Sensitive dimensions and savvy buyers’ temptations
Why Are Frameworks an Important Legal Topic?
Different labels hide the same idea

- IDIQ contracts
- MAS program
- Framework Agreements (EU)
- Price Registration System (BR)
- Panel contracts (AU)
- …

…but…
A two-stage procedure:

- **first stage**, where all or part of the terms of the contracts to be awarded are defined (*master contract, framework agreement*)
- **second stage**, where the actual contracts are awarded (*specific contracts, task-order contracts, call-off contracts, marchés subséquents*)

This idea may result useful in quite a few different situations:
- repeated purchases by a single buyer (or procuring entity)
- purchases by different buyers (centralized procurement through a dedicated organization; joint procurement; buyers consortia; cooperative purchases through a leading entity)

Main goal: To streamline the procurement process for repeated purchases of similar, albeit not identical, supplies/services/civil works.

The just-in-time feature of framework agreements is enhanced when supply chains work smoothly
The main pros

- Higher administrative efficiency
- Higher buyer’s bargaining power through demand aggregation
- Low-value contracts more “visible”
- Balance between contract standardization and tailoring
The main cons

- Potential barrier to entry for smaller vendors
- Risk of mismatch between vendors’ proposals and buyers’ needs
- Risk of anticompetitive behavior both at the award and at the call-off stage
“It’s the economy, stupid!”

- **Transaction costs** ("getting what you need as fast as possible")
- **Efficiency** ("getting the good guys aboard")
- **Matching** ("pairing the buyer’s need with the best-fit solution")
- **Economies of scale** ("buying in bulk may allow vendors to produce at a lower unit cost, which may result in lower bids/prices")
- **Competition** ("a race among firms either at the first or at the second or at both stages of a FA may deliver better value for money")
Should Interagency Contracting Have Legal Constraints?
Framework Agreements and (e-)Catalogues

Product / service meta-categories

- Furniture
- IT goods
- Office equipment
- Solutions for schools
- Stationery
- Smart mobility

- Fuel, lubricating oils
- Renewable energy and energy efficiency
- Electric materials
- Hygiene and sanitation goods / Waste disposal equipment
- Equipment for maintenance and repair
- Foodstuff

Scope of work

- Maintenance services of elevators
- Maintenance of fire-fighting systems
- Services for events and communication
- Urban Facility Management
- Cleaning services
- Maintenance of heating systems

- Maintenance of electrical systems
- News services
- Logistics
- Postal services
- Training
- Professional services

Relevant market
A joyful “Lego” approach to Framework Agreements
Using “Lego-like” bricks to build (and better understand) Framework Agreements

<table>
<thead>
<tr>
<th>Relevant features</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Processor (speed)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>USB ports (number &amp; types)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Screen (size)</td>
<td></td>
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<td></td>
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<tr>
<td>Energy efficiency (≈energy consumption)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Price</td>
<td></td>
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</tbody>
</table>
Should there be legal constraints on modifications?
Travelling through the galaxy of Framework Agreements

E-commerce-platform-type
- Minimal technical standards only
- Multi-award
- Ceiling prices
- Free choice by each procuring entity
- Virtually no constraints on quantities

Centralized procurement (most extreme form)
- Minimal technical standards
- Single-award
- Quality and Price competition
- No discretion allowed to each procuring entity
- Constraints on quantities

Transaction costs (low)
Efficiency (low)
Matching (high)
Economies of scale (low)
Competition (low)
Discretion (high)

quite a few intermediate solutions

Transaction costs (low)
Efficiency (high)
Matching (low)
Economies of scale (high)
Competition (high)
Discretion (low)
Main families of Framework Agreements (admittedly EU-flavored…)

<table>
<thead>
<tr>
<th>Number of Awardees</th>
<th>Completeness of the Agreement (=master contract)</th>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Complete</td>
<td>Incomplete</td>
</tr>
<tr>
<td></td>
<td>All conditions laid down</td>
<td>Not all conditions laid down</td>
</tr>
<tr>
<td>1 Awardee</td>
<td>«Frame Contracts»</td>
<td>Single-award incomplete</td>
</tr>
<tr>
<td></td>
<td>Call-off: purchasing orders («click-and-buy orders)</td>
<td>Call-off: Some conditions need to be further specified/completed (and, possibly, criteria that define how conditions will be completed)</td>
</tr>
<tr>
<td>N ≥ 2 Awardees</td>
<td>Multi-award complete</td>
<td>&quot;Hybrid&quot;</td>
</tr>
<tr>
<td></td>
<td>- Call-off: Criteria for awarding contracts are to be defined and made public (in the EU, criteria need to be objective)</td>
<td>- Criteria are to be foreseen to determine:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>□ Which call-off contracts can be awarded without a further round of competition</td>
</tr>
<tr>
<td></td>
<td></td>
<td>□ Which call-off contracts need a further round of competition</td>
</tr>
<tr>
<td></td>
<td>Multi-award incomplete</td>
<td>Multi-award incomplete</td>
</tr>
<tr>
<td></td>
<td>(FA «strictu sensu» in the EU)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Call-off contracts to be awarded only by using a further round of competition</td>
<td></td>
</tr>
</tbody>
</table>
Should additional customers be allowed to join a standing agreement?
The nature of competition

Competition for Framework Agreements

Competition for and in Framework Agreements
Should there be a quantity cap on orders under an existing agreement?
Competition for Framework Agreements

- Procuring entities’ similar needs or easily identifiable
- Burdensome administrative procedures
- Few (possibly big) guys in the relevant market
- Limited supply specialization

Competition for the market

Contractor selection should be consistent with the first-stage award criteria

Bid-rigging more likely at the first stage
Master agreements: should the legal competition requirements differ from normal contract awards?
Should multiple awards of master agreements be presumed?
Competition for and in Framework Agreements

- Procuring entities’ similar heterogeneous and/or “volatile” over time
- Administrative procedures easy to handle (thanks also to e-tools)
- SMEs as well as Big firms in the relevant market(s)
- Specialized supply

Competition for and in the market

First- and second-stage award criteria tailored to the specific degree of incompleteness of the master contract

Bid-rigging more likely at the call-off stage
Fine-tuning competition

Demand
High
Low

Supply
Low
High

heterogeneity

Complete master contract
Competition relevant at the first stage

Incomplete master contract
Competition relevant at the second stage

specialization
fragmentation

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Which agency should be responsible for legal issues regarding (1) master agreements, and (2) second-stage orders/contracts?
Sensitive dimensions and savvy buyers’ temptations

When should we worry about Framework Agreements?

If the conditions below are *simultaneously* satisfied

- Highly incomplete master contract
- Loose selection of economic operators at the first stage
- No competition to award call-off contracts
- “Life-long” duration

- Closed “suppliers list”
- Risk of lack of integrity (“Why did buyer A choose firm Y?”)
- Difficulty to properly assess different procuring entities’ performance in terms of achieved value for money
Should “call-off” (orders/contracts) be subject to normal competition & transparency requirements?
Should “call-off” (orders/contracts) be protestable?
Should “piggy-backs” be allowed?
Main reference*  

Up next!

Ethics
11:00am – 12:00pm