



## Framework Agreements: Practice and Pitfalls

### Introduction

#### What is a Framework Agreement?

1. The Framework agreement, often known as an umbrella agreement, is an agreement which is reached between two parties to cover a long-term collaborative arrangement. Framework agreements are used typically where an employer has a long term programme of work in mind and is looking to set up a process to govern the individual construction or supply packages that may be necessary during that framework term.<sup>1</sup> Framework agreements allow an employer to instruct another party to carry out works or provide services, by reference to pre-agreed terms, over a (usually) pre-agreed period of time.
2. The Framework is a two-party agreement between an employer and contractor, consultant or supplier. It provides a mechanism for awarding the project in a straightforward manner. However, it is not unusual for an employer to enter into a number of identical framework agreements with a number of different contractors or suppliers. Indeed, those contractors and suppliers may enter into their own framework agreements with subcontractors or others below.
3. Thus the framework agreement is not intended for use with a single stand-alone contract; it is designed for use where a number of similar sets of works or services may be required of the same provider. And here is the first word of caution; a Framework Agreement is likely to contain a number of requirements which could have a direct bearing upon those underlying contracts. You should remember that it should be the underlying contract which determines the rights and responsibilities of the parties to a particular project, just as with any traditional construction contract.
4. Whilst framework agreements are not new, and in particular have been used by many local authorities and government departments, there is a perception that they are becoming increasingly popular, something recognised by the fact that both the NEC and JCT have recently issued standard form framework agreements to supplement their respective contractual suites.
5. For example, the JCT Guide notes<sup>2</sup> that the JCT Framework Agreement has been set up to be used:

by anyone (including those in the public sector) who anticipates procuring a significant volume of construction/engineering work and/or services over a period of time and who wants to see a collaborative approach to such work and services and sustainable improvements in the way in which such work and services are performed.

6. The language of the framework agreement uses a number of words and phrases that may be unfamiliar. These include:
  - (i) Call-off: the act of awarding a contract awarded under the framework agreement itself. It does not need to be advertised and tendered;

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1. For example, BAA appointed nine contractors to a framework agreement that is said to provide up to £9.5bn of work over the next decade. The work on offer is said to include the construction of terminals at Heathrow and Stansted and other airport infrastructure and civils work. Building 18 January 2008 Paragraph 3 -  
2. Framework Agreement Guide 2007

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- (ii) Task: the particular work or service to be carried out;
  - (iii) Enquiry: an “invitation to tender” made by the employer to a prospective provider to carry out a task;
  - (iv) Pricing document: the returned pricing document;
  - (v) Provider: the contractor, consultant or supplier under the framework;
7. The key part of the framework agreement is how the call-off procedure works. Ideally this should be as follows:
- (i) The employer will issue an enquiry in accordance with the framework agreement. The enquiry will detail what the proposed Task is;
  - (ii) Like a tender, the enquiry will include drawings, specifications, scope, etc. in other words all the information necessary for the potential provider to price the job;
  - (iii) The enquiry also sets out the terms of the “underlying contract”;
  - (iv) The provider can then price the task in accordance with the information provided, albeit that the framework will have established the basic pricing mechanisms;
  - (v) The pricing and contract terms are then negotiated and a completed order will be issued or called off. The order will include the terms under which the provider will carry out the tasks.

## Why use Framework Agreements?

8. The first benefit is contractual certainty. A long, long time ago, we made a claim on behalf of a consultant that commenced:

By a Framework Agreement between the Plaintiff and the Defendant, it was agreed that, in consideration of the Plaintiff carrying out inception and feasibility work for the Defendant in relation to potential projects, the Defendant would engage the Plaintiff as consultants if and when the projects proceeded. The Defendant has obtained the benefit of that bargain, but has been in repudiatory breach of it by engaging other consultants for projects that have proceeded. The Plaintiff claims a quantum meruit, to be assessed by reference to the benefit obtained by the Defendant and the cost of the work to the Plaintiff, alternatively damages in respect of the fees that it would have earned had the Framework Agreement been honoured.

9. The Constructing Excellence website<sup>3</sup> says this:

When you are procuring over a period of time, a framework can deliver many benefits, such as:

- Reduced transaction costs;
- Continuous improvement within long-term relationships;
- Better value and greater community wealth;
- Solutions that delight customers.

10. Reduced transaction costs can be achieved by economies of scale. Referring again to the useful JCT Guide:<sup>4</sup>

it has to be said and recognised that in relation to single one-off projects, the frameworking arrangements are really only likely to pay dividends on larger, lengthier projects which give the project participants the opportunity and incentive to invest in people, processes and products and develop as a team.

3. [www.constructingexcellence.org.uk](http://www.constructingexcellence.org.uk)

4. Note to paragraph 3

11. The commercial advantages of a long-term commitment are clear. Where there are long-term relationships between a client and a contractor and/or consultant, the client has the benefit of securing a long-term commitment to the project from those contactors and consultants who in return have the benefit of securing long-term work from the client.
12. The framework agreement typically contains a mechanism for the instruction or “calling-off” of individual tasks which will then be subject to the pre-agreed terms of a construction or supply contract. This is another advantage of the framework agreement, namely the need for only a minimum of administration and further negotiation. There is a significant element of pre-agreement. Thus a properly organised framework agreement should also make provision for the agreement of standard project documents, including those related to price and quantity. This should make the negotiation of those contracts far easier and should also mean that an actual contract will be entered into.<sup>5</sup> That said, on each project-specific underlying contract, remember it will still be necessary to consider the scope of work and/or services, allocation of risk, completion date, price and payment particular to that project.
13. In addition, if the relationship works, another of the intended benefits is that there should be an improvement in efficiency. People and organisations get used to working with one another. They can build relationships. They get to know what makes things tick and happen. There is the benefit of early contractor involvement in a project. Everyone involved can take a long-term view. For example, if the parties have the comfort of being contractually bound in a long-term relationship, they may be prepared to invest in product development. This requires an element of trust which can only be developed over a period of time as framework agreements rarely proceed on the basis that work is guaranteed.

### Types of Framework Agreements: the standard forms

14. As noted above, the JCT and NEC have produced their own standard framework agreements. As you would expect, these are designed to fit in with their standard suites of contracts.

### Binding or non-binding?

15. There has been much discussion about whether framework agreements should be binding or non-binding. Some question whether signing up to a binding agreement truly accords with the principles of collaborative working. Others ask how easy it is to give long-term frameworks binding legal effect bearing in mind the imponderables involved in the construction process. How can a binding framework respond to the procurement of individual contracts or to the changing needs, and to changes in the construction environment itself?
16. This is why many prefer to adopt an over-arching framework agreement which takes the form of non-binding heads of terms setting out the manner in which the parties will intend to do business (possibly by way of a partnering charter), indicative forms of contract, and benchmarks for continuous improvement. Remember that the absence of binding obligations within it means that the agreement proceeds on trust.
17. The JCT 2007 Framework Agreement was published right at the end of 2007. This contract represented an admission by the JCT that the two Framework Agreements that it had launched in 2005 as part of the overall revision of its suite, had not fulfilled the needs of their users.<sup>6</sup>
18. The 2005 Framework Agreements were similar but came in binding and

5. The dangers of failing to enter into a contract are well known.

6. JCT Press Release November 2007

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non-binding versions. Clause 6 of the non-binding version said that:

Whilst both Parties hope to benefit from working together in the manner envisaged in this Framework Agreement it is not intended that this Framework Agreement should not in any way be legally or contractually binding or enforceable or of any other legal contractual effect or consequence...

6.1 Neither Party shall have any liability to the other Party ... for any failure to perform or breach of this Framework Agreement...

19. Clause 6 continued that:

6.3 No adjudicator, arbitrator or court of law seized of any dispute ... shall in any way be influenced in his or their judgment or the exercise of any discretion by the Parties' commitment and/or adherence to this Framework Agreement.

20. If that were the case, one might wonder what the point of the non-binding Framework Agreement was. Clause 6.3 was clearly designed to get round Judge LLOYD's comments in the case of *Birse Construction v St David Ltd*.<sup>7</sup> He had held that the terms of a Partnering Charter which was not and was never intended to be a binding contract, even though it had been signed by the parties:

Though clearly not legally binding, are important for they were clearly intended to provide the standard by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured.

21. The Judge accordingly considered the conduct of the parties in the context of the Partnering Charter in deciding when and whether a contract had been concluded.<sup>8</sup> Now there are a number of organisations that prefer some form of non-binding arrangement. If this is what is preferred then remember that, unless you adopt similar words to clause 6.3 of the JCT 2005 version, the parties are likely to be judged in the manner envisaged by Judge LLOYD if a dispute arises.

22. In the case of *Baird Textiles Holdings Limited v Marks and Spencer*<sup>9</sup> a claim was made by Baird arising out of the termination of its trading relationship. Baird had been one of the principal suppliers of clothes to M & S for 30 years when without warning M & S determined all supply arrangements between them with effect from the current production season. Baird claimed that Marks and Spencer could not do this without a reasonable notice of perhaps as long as three years. An M & S witness said:

M&S was developed by principle of partnership. This was not a partnership in the legal sense, but more in the spirit of cooperation. The people involved in managing M&S and the suppliers had known each other for a long time, seeing their companies grow together. As a result, they were able to trust each other, converse freely and work together for mutual benefit and both feed off each other and it was in the best interest of M&S for its suppliers to grow with it, thereby passing on greater economic scale to M&S and hence its customers...

23. It was Baird's case that, given the length and nature of the relationship, it was a long-term one which would only be terminable upon the giving of reasonable notice. Marks and Spencer were required to deal with Baird in good faith. However, the Court held that there were no contractual obligations between M&S and Baird because of a lack of certainty. There were no objective criteria by which the Court could assess what would be reasonable in relation to quantity or price. The lack of certainty confirmed the absence of any clear evidence of an intention to create legal relations. It could not be said that the conduct of the parties was consistent with the existence of the contract that Baird sought to imply.

7. [1999] BLR 194

8. This first instance decision was overturned on appeal, although the Court of Appeal did not deal with the comments made by the Judge on the charter itself.

9. [2001] EWCA Civ 274

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24. Whilst the parties had an extremely good long-term commercial relationship (based on partnering principles), it was not one which they ever sought to express or which the Court would ever seek to express in terms of long-term contractual obligations. In the case of Baird, this lack of certainty was identified at paragraph 28 of the Particulars of Claim:

Marks & Spencer deliberately abstained from concluding any express contract or contracts with BTH either to regulate the parties' on-going relationship or their respective rights and obligations season by season because it considered that it could thereby achieve much greater flexibility in its dealings with BTH than could be achieved under a detailed contract or contracts. The absence of such an express contract or contracts was accepted by BTH because, as Marks & Spencer knew and intended or ought to have known, BTH understood from the above pleaded conduct of Marks & Spencer that there existed a relationship between the two companies which was to continue long term and be terminable only on the giving of reasonable notice and under which the parties had the reciprocal rights and obligations pleaded in paragraph 9 above.

25. So, in short, some form of agreement is better than none, and there really is little point in agreeing that your agreement is to be non-binding unless you are prepared to accept that you have no redress if things go wrong. Today the relationship between Baird and M & S would be likely to be governed by a Framework Agreement.

### JCT Framework Agreement 2007

26. So the first big change to be found in the JCT 2007 edition was to drop the non-binding format.<sup>10</sup> There were two other main changes:

- (i) The 2005 version did not comply with the European procurement rules and so was not really suitable for use by public sector clients;
- (ii) The 2005 version did not set out the relationship with the underlying contracts. This made it similar to a partnering relationship, whereby the terms as to, for example, payment were left to be negotiated elsewhere on a contract by contract basis.

27. The 2007 version deals with both these concerns.<sup>11</sup> The 2007 Framework Agreement is designed to work with the underlying contracts. It does this by providing a pre-agreed mechanism that applies to tasks called off under the framework. The underlying contracts are to be set out in Framework Particulars. There is a preference for the JCT suite, but that is to be expected.

28. There is benefit in going through the JCT 2007 Framework Agreement in a little detail as it will promote discussion of the key aspects of framework agreements in general.

29. The JCT Framework Agreement lists at clause 5, eight Framework Objectives<sup>12</sup> which should result in a ninth namely the "enhancement of the Service Providers reputation and commercial opportunities". The remaining eight are as follows:

- (i) Zero health and safety incidents;
- (ii) Team working and consideration for others;
- (iii) Greater predictability of out-turn cost and programme;
- (iv) Improvements in quality, productivity and value for money;
- (v) Improvements in environmental performance and sustainability and reductions in environmental impact;

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10. Strictly it is still available, but the impression given by the relaunch of the binding version was that the non-binding version had been dropped.

11. See paragraphs 56 below for discussion about the European Procurement Rules.

12. Paragraph 29 of the JCT Guide.

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- (vi) Right first time with zero defects;
  - (vii) The avoidance of disputes;
  - (viii) Employer satisfaction with product and service.
30. Those objectives should of course be common to all contracts. The manner in which they are to be achieved is hinted at, in section 3.1:
- The main aim of this Framework Agreement is to provide a mechanism for the Tasks to be called off and carried out and also to provide a supplemental and complementary framework of provisions designed to encourage the Parties to work with each other and with all other Project Participants in an open, cooperative and collaborative manner and in a spirit of mutual trust and respect with a view to achieving the Framework Objectives.
31. The collaborative style of proceeding is reinforced by clauses 9 and 20 which state:
- 9.1 The Parties will continually impress upon all personnel involved with the Tasks their keen desire to work with each other and with all other Project Participants in an open, cooperative and collaborative manner and in a spirit of mutual trust and respect with a view to achieving the Framework Objectives.
  - 9.2 To this end, the Employer and the Provider agree that they will each report to the other, and will welcome any reports from the other, of any instances where the other Party's personnel have been particularly helpful and/or collaborative and any instances in which the other Party's personnel have not acted, or it is perceived that personnel have not acted, in an entirely open, cooperative or collaborative manner and/or in a spirit of mutual trust and respect with a view to achieving the Framework Objectives.
  - 9.3 The parties will at all times endorse and support collaborative behaviour and address behaviour which is not collaborative...
  - 20.1 In the event of a technical and/or logistical problem with any Tasks, whatever the origins of the problem and whoever may be contractually responsible for the same, the Parties will work together and with the other Project Participants to try and find a solution to the problem which is safe and environmentally sensitive; minimises the effect on the out-turn cost and/or programme and/or the quality and/or performance of the Tasks; and is acceptable to the Employer.
32. Clause 4.1 is important because it makes it clear that unless specifically stated elsewhere there are no guarantees that the Employer will award any contracts to the Provider. This should serve to restrict the possibility of the Provider making a claim for lost opportunity and would have made our claim set out in the introduction of this paper difficult to maintain.
33. The remainder of clause 4 sets out what the Framework Agreement aims to achieve, namely to secure work. The procedure is a simple one:
- 4.3 When the Employer wants to "call off the provision of Tasks by the Provider", he will issue an Enquiry;
  - 4.4 The Provider will respond with a price and any other information requested within the period set out in the Framework Particulars;
  - 4.5 The pricing shall be calculated in accordance with the Pricing Documents;
  - 4.6 If the Employer decides to proceed, he will issue an Order instructing the Provider to carry out and complete the Task;
  - 4.7 The Provider will then return an executed copy of the Order and carry out the Task in accordance with the Framework Agreement, Order and Underlying Contract.
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34. The underlined passages demonstrate how the Framework operates to make the agreement of the contract easier than with a one-off contract. Time periods are pre-agreed, the way the order is priced is pre-agreed, the form of contract is pre-agreed. And if there is a change in circumstances then there is provision for these parameters to be changed. Clause 17 deals with value engineering. The Provider is encouraged to keep costs and time under review and suggest changes if these will lead to a saving. The carrot comes in clauses 17.3 and 17.4 which refer to the possibility of the Provider sharing in the benefits of those savings.
35. The notes provided by the JCT acknowledge the possibility of conflict. The JCT Guide<sup>13</sup> says that:
- It is hoped that the Parties will have full regard to the partner and principles set out in the Framework Agreement with a view to resolving that conflict or discrepancy.
36. By clause 6.1, if there is a conflict between the underlying contract and the Framework Agreement, then the terms of the underlying contract prevail. Notwithstanding this, one area where there is a degree of overlap relates to the early warning required by clause 19. Whilst recognising that there might be notice provisions in the underlying contracts, clause 19, presumably in accordance with the need to have regard to the partnering principles, imposes a requirement on the parties to warn the other “promptly” if they become aware of any matter which might affect the performance of a particular Task.
37. The Framework Agreement is intended to last for a lengthy period of time. Thus by clause 8, each party must send out to the other details of their organisation and management on an on-going basis. The reason for this is to ensure that when new Tasks are required, the necessary pre-contract exchanges can be carried out. Clause 12 complements this by setting out the need for a communications protocol. This is a common sense requirement. If the parties agree and/or understand a communal communications protocol, then this will promote clarity and the easy dissemination of information. You cannot simply rely on the general, some may say slightly “fluffy” collaborative approach when it comes to setting out the paths of communication. For example, from a practical point of view, in this electronic age, the adoption of common software is an imperative.
38. It is of paramount importance that the parties understand the organisational and management structures of the others involved, in particular roles and responsibilities. This means that if there are changes in those roles and responsibilities, this must be made clear.
39. There is value in setting up a core group or management team. This can encompass representatives from each of the principal participants who will be responsible for coordination of new projects, formation of joint management teams for individual projects, arranging partnering workshops, liaising with management teams, and maybe even forming a Disputes Resolution Panel. An important strand of collaborative working is not the absence of disputes but their swift and efficient resolution achieved without damage to the parties’ relationships.
40. The importance of being prepared is reinforced by clause 10 which requires that the Provider’s own supply chain is made to understand “the principles of collaborative working envisaged in this Framework Agreement”.
41. One of the potential drawbacks of this long-term arrangement is the
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question of the sharing of information and confidentiality. Sharing of information is encouraged or even required by clause 11 which demands that a party “promptly volunteer” any information that comes into their possession which would be of assistance to the other in the performance of the tasks. Save that, neither Party will be expected to volunteer or share:

- .1 trade secrets which are only known to that Party and upon which that Party’s business is essentially founded;
- .2 knowledge or information which a Party is legally and/or contractually prohibited from disclosing to the other Party and/or other Project Participants; or
- .3 knowledge or information which is privileged from disclosure.

- 42. By clause 13, all project information must be kept confidential. This is another important consideration. Collaborative working and framework agreements are designed to encourage a certain degree of sharing information. It is important that participants agree the boundaries of what information is to be shared.
  - 43. Another example of collaborative working can be found in clause 14 which deals with the carrying out of risk assessments. Again this is a joint task and there is an emphasis on the periodical review, and review of the assessed risks.
  - 44. As befits a contract coming out in late 2007, clauses 15 and 16 deal with Health & Safety and Sustainable development. Health & Safety considerations take precedence over all other considerations.
  - 45. Clause 21 deals with performance monitoring and performance indicators. These are particularly important from an employer’s perspective. By the process of monitoring and appraisal, the employer will be able to assess the performance of the various project participants and thereby see who is best placed to deliver what is required. One way of doing this is to monitor performance against performance indicators. These must be agreed in advance. The JCT Guide and its notes refer to the DTI-funded Construction Best Practice Programme as a useful starting point. This includes the following:
    - (i) Client satisfaction on a scale of 1-10;
    - (ii) Defects on a scale of 1-10, with 8 being some defects with no significant impact on the client and 1 being totally defective;
    - (iii) Safety reportable accidents per 100,000 employees per year;
    - (iv) Predictability cost design/construction;
    - (v) Predictability of time design/construction;
    - (vi) Environmental performance indicators for example the amount of CO2 emissions;
    - (vii) Respect for people performance indicators including safety, diversity, training and staff turnover.
  - 46. Clause 22 deals with termination. No task with a duration of more than 12 months is to be instructed in the final 3 months before the framework end date. In other words the agreement gives the parties the chance to start building up a long-term relationship, but recognises the danger of being stuck in a relationship that benefits no one. Either party may terminate, after the first year, on one month’s notice. The termination of the
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framework agreement will not affect any Tasks that have already been called off.

47. Of course, notwithstanding the provisions of the framework agreement, disputes might still arise. There is nothing new in the dispute resolution procedures. Mediation is permitted but only as a suggestion. Given the principles of collaborative working and the current judicial mood in favour of mediation, one might have expected a stronger word than “suggest”. Also give some thought before adjudicating. A framework agreement by itself may well not be a contract for construction operations as required by section 105 of the Housing Grants, Construction and Regeneration Act 1996.
48. Finally, the JCT 2007 Framework Agreement ends with the all important particulars, i.e. details of the Tasks, Time Frames, Pricing Documents, Performance Indicators and Underlying Contracts. It is key that this section is properly filled out. In this respect the JCT form is similar to its NEC competitor.

### NEC3 Framework Agreement

49. However, that is perhaps the only similarity. Whilst the JCT Framework Agreement seems short, running to some 24 pages, its NEC3 equivalent comes with page 5 being the index. The NEC does not see the need to go into the detail of the collaborative working arrangements to be found on the JCT form. Instead, it relies on the (in)famous clause 10.1 to set out the principles of collaborative working:

The Employer and Supplier shall act as stated in this contract and in a spirit of mutual trust and co-operation.

50. The NEC form also relies heavily on the parties to provide all the additional information required to set up the framework agreement. Provided this is done, then the NEC3 approach can be viewed as a lean, “ronseal” approach to the framework agreement.
51. The Employer must:
- (i) 20.1 When he wants work to be carried out select a supplier;
  - (ii) 21.1 If he wants advice about a proposed Work Package, issue a Time Charge Order;
  - (iii) 22.1 Instruct the selected supplier to submit a quotation;
  - (iv) 22.2 Accept the quotation and instruct the supplier to proceed via a Package Order, or inform the supplier of the reasons why the quotation is rejected.
52. The Supplier must:
- (i) 20.2 Obey an instruction in accordance with the contract;
  - (ii) 20.3 Attend meetings with the Employer as stated in the contract information;
  - (iii) 22.2 Submit a quotation;
  - (iv) 22.4 Proceed once issued with a Package Order.
53. The Framework Agreement can be terminated at any time. There is no mention of any provisions for dispute resolution.
54. So the NEC3 demonstrates the potential advantages of simplicity. It is short
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and to the point, even minimalist. It is consistent with other NEC forms. However, the key to the contract is a full understanding of how the NEC3 scheme of contracts and how framework agreements work. The contracts may be, on the face of it, short and written in the present tense in plain English; however, unless all the correct particulars and additional information are provided they will not work. For example, for dispute resolution look to clauses W1 and W2.

55. For this reason alone, as a starting point at least if the concept of the Framework Agreement is unfamiliar to you, then the JCT Framework Agreement is the one to review first of all.
56. It is also unlikely that the NEC3 framework form of itself complies with the European procurement legislation, unless that is the correct additional provisions are included. With the JCT Form there are no such difficulties.

## Framework Agreements and the EU

57. Those in the public sector need to remember that framework agreements must comply with the EU Procurement Rules.
  58. Arrangements for framework agreements and call-off contracts are governed by the detailed rules of the Public Contracts Regulations 2006 (SI 2006/05) which are designed to implement the Consolidated EU Directive 2004/18/EC. By Regulation 19 a framework agreement is defined as an agreement with suppliers, the purpose of which is to establish the terms (in particular terms as to price and, where appropriate, quality) governing contracts to be awarded during a given period. This definition covers agreements which are in themselves contracts, i.e. an agreement in writing, which places a binding obligation on the public authority to purchase works, goods or services for consideration. This type of framework agreement was covered by the pre-2006 Regulations as it could be treated in the same way as any other contract. However, the term “framework agreement” can also refer to an agreement that sets out the terms and conditions between the parties for the purchase of works, goods or services but where there is no binding obligation on the parties and in particular the Contracting Authority to purchase anything. The contract is only formed when (and if) the purchase is actually made at a later date. It is this type of framework agreement that previously caused difficulties as it could be classified as a contract under the pre-2006 Regulations, and it is this type of agreement that the 2006 Regulations explicitly address.
  59. If a Contracting Authority chooses to adopt a framework approach it will be necessary to advertise the proposed framework agreement, provided the estimated value of the works goods or services procured over the life of the framework exceeds the relevant EU threshold. The OJEU notice must:
    - (i) Make it clear that a framework agreement is being awarded;
    - (ii) Identify the contracting authorities who are entitled to make purchases or call-off under the framework agreement;
    - (iii) State the length of the framework agreement (the maximum length of a framework agreement is four years unless there are justifiable exceptional circumstances);
    - (iv) Set out the estimated maximum quantity or value of works, goods or services to be procured under the framework agreement, in other words set out the value and frequency of the call-offs.
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60. Framework agreements can be made with either one or more tenderer, but if there is more than one tenderer to be appointed then the minimum number should be three to ensure that when purchases are made there is still an element of competition.
  61. Once the framework agreement has been awarded it is not necessary for the Contracting Authority to go through the procurement procedures again when making purchases under the framework, but the Contracting Authority is required to invite all tenderers who are capable of performing the contract and invite them to submit a tender within a specified time. The Contracting Authority must award the contract to the best tenderer on the basis of the award criteria specified.<sup>14</sup>
  62. Where a framework agreement is concluded with one supplier then subsequent contracts under the agreement must be awarded within the terms laid down in the framework agreement. There can be no substantive change to the specification or the terms and conditions that have been agreed at the time the framework was awarded.
  63. The JCT Framework Agreement has been designed to comply with the EU public procurement rules. The EU consolidated directive (2004/18/EC) defines a framework agreement as an agreement with the suppliers, the purpose of which is to establish the terms governing contracts to be awarded during a given period, particularly with regard to price and quantity. If a framework agreement, as defined under the consolidated directive, is duly advertised and let in accordance with its provisions, every separate call-off contract awarded under the framework will not have to be advertised separately. For a framework to be brought within the directive, its estimated maximum value must exceed the threshold set out in the directive.
  64. Accordingly the JCT Framework Agreement acknowledges that where an employer is subject to the 2006 Public Contracts Regulations:
    - (i) By clause 3.2 the parties acknowledge they have entered into the Framework Agreement pursuant to a compliant tender process including the issuing of the OJEU notice.
    - (ii) By paragraph 11 of the JCT Guide, the Framework is capable of establishing a pricing mechanism which will be applied to particular pricing requirements during the period of the framework.<sup>15</sup>
    - (iii) Note 7 to the Framework Particulars establishes the terms that will apply for example set out the form of underlying contract which will apply to the separate call-offs.
    - (iv) Note 9 to the Framework Particulars and paragraph 12 of the JCT Guide, confirm that an agreement should not be concluded for a period that exceeds four years.

### Consequences of failing to comply with the European/ Public Procurement Rules

65. The courts can order interim or non-financial remedies by either suspending the award procedure or the implementation of a decision to award. Alternatively, a party who is able to show that there has been a breach of the procurement rules may be able to bring a claim for damages.
66. When considering whether to grant an injunction, the court will take the usual factors into account. These include whether there is a strong case to be tried and whether damages are an adequate remedy, for example the

14. These criteria must be transparent *Emm G. Lianakis AE v Alexandroupolis* - CILL May 2008

15. This does not always mean that the price should be fixed.

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failure to advertise a contract or the unlawful exclusion of a tenderer are instances where damages would probably not be adequate. However, the 2006 Regulations state quite clearly that interim relief may not be awarded by the court once the contract has actually concluded.<sup>16</sup> The courts must weigh up the damage resulting from the delay to the procurement against the other interests that may be prejudiced if no interim relief is given and the claim turns out to be well founded. This can vary considerably according to the nature of the project. The courts will need to take into account the interests of other firms involved in the award procedure who may also be prejudiced by the delay and, in particular, the interests of any firm that may have been awarded the contract.<sup>17</sup> Equally, the court has to consider whether there would be inconvenience to the Contracting Authority if there is a delay to the contract.

67. If a claim is to be brought, there are a number of preconditions. Before an aggrieved party can commence legal proceedings for damages, it must notify the Contracting Authority in writing of the breach or anticipated breach of duty complained of and notify the Authority of its intention to bring proceedings and seek damages under the 2006 Regulations pursuant to Regulation 47(7)(a).

68. There is also a strict time limit of three months in which to bring a claim from the date of the breach of the 2006 Regulations. The time limit of three months is not a guaranteed time period within which to bring proceedings, but a long-stop period. Regulation 47(7)(b) states that:

Proceedings under this Regulation must not be brought unless those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of those proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought. [emphasis added]

69. If a claim for damages is being brought, then there are primarily three legal bases upon which that claim can be made:

- (i) Breach of statutory duty;
- (ii) Breach of an implied contract; or
- (iii) Misfeasance in public office.

70. Regulation 47(1) places an obligation on the Contracting Authority to comply with the relevant provisions of the Regulations and with any directly effective Community obligation under the Procurement Directives. Thus any Contracting Authority that is entering into a contract under the 2006 Regulations has a statutory duty owed to any actual or potential tenderer who could or would have been awarded the contract. The court is given the following powers by Regulation 47(6):

A breach of the duty owed in accordance with paragraph (i) or (ii) is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage and those proceedings shall be brought in the High Court.

71. In the case of *Harmon CFEM Facades v Corporate Officer of the House of Commons*,<sup>18</sup> Judge LLOYD QC noted that:

As a matter of general approach, I consider that where compensation is sought by a tenderer for being deprived of an opportunity to be awarded the contract, the approach should be to award damages on a “contractual” basis rather than on a “tortious” basis, although the remedy is a statutory remedy and usually the assessment damages for breach of a statutory duty is akin to those for a

16. Regulation 47(9)

17. *Boroughs Machines v Oxford Area Health Authority*

18. [1999] EWHC TCC 195

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comparable tort.

72. The Judge also acknowledged that:

I consider that it is now clear in English Law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.

73. The terms of the implied contract included the principles of fairness and equality. The judgment in *Harmon* therefore establishes the existence of an independent cause of action in contract covering similar matters as that claimed under the Regulation. At the time, this aspect of the decision in *Harmon* was criticised by a number of commentators but this common law approach of implying an agreement to act fairly during the tender process has developed vigorously in various Commonwealth countries as well as in more recent times in the UK.<sup>19</sup>

74. The remedy of misfeasance had been open to litigants before the Regulations came into existence and it remains available to aggrieved tenderers. Misfeasance in public office involves an element of “bad faith” and arises when a Public Officer exercising his power specifically intended to injure the claimant, or where he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge, or with reckless indifference to, the probability of causing injury to the claimant or a class of claimant. If successful in proving a breach of the duty of care that the Public Officer owed, then the losses that are recoverable are only those losses which were foreseeable by the Public Officer concerned, as a probable consequence of his act. In *Harmon*, this claim failed because the Judge felt that the other remedies which were available to the claimant were effective.

75. Of course, establishing a breach does not automatically translate into an award of damages. A claimant must also prove that it has suffered a loss as a result of that breach. Claims for damages following a breach of the Regulations or, for that matter, an implied contract, will inevitably contain a claim for the tender costs incurred. If such a claim is to be successful, the claimant has to show that it would not have tendered at all had it known the Regulations would be breached or that the Contracting Authority would breach its obligations to treat it fairly under the implied contract. Would the tenderer have tendered for the contract in any event irrespective of the Contracting Authority’s actions?

76. The other element of a claim for damages is the loss of profit or overheads that the tenderer would have obtained or the chance of doing so had the tenderer been awarded the contract. The ability to make claims for loss of chance or loss of receiving a future benefit is well established. The leading case is *Allied Maples v Simmons & Simmons*.<sup>20</sup> The claimant must establish on the balance of probability that there is some link between the defendant’s negligence and the claimant’s loss. Where the quantification of the claimant’s loss depends on future uncertain events, the loss has to be determined on the court’s assessment of that risk materialising. Where the breach consists of an omission, then the link depends on answering the hypothetical question as to what the claimant would have done if the defendant had not been guilty of the omission. Provided that there was more than a speculative chance, the court will assess the loss of chance on a percentage basis and award a corresponding percentage of the overall damages claimed.

77. In *Harmon*, the court considered that it was “virtually certain” that *Harmon* would have been awarded the contract if the defendant had not

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19. See for example, *Aquatron Marine v Strathclyde Fire Brigade* [2007] CSOH 185  
20. [1995] 1WLR 1602

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breached its obligations and as a consequence Harmon succeeded in recovering its tender costs. However, in relation to Harmon's claim for loss of profits, the Judge distinguished between the evaluation of "success" and the probability that the whole net profit would be recovered. The recovery of profit would clearly have been subject to the number of uncertainties, and on the facts the Judge assessed the overall percentage of probability of profit being earned as 35% which means that Harmon would be entitled to 35% of whatever profit it could establish it would have made had it been awarded the contract.

78. It is likely that claims for breach of the Procurement Rules will increase. There is an increasing awareness within the construction industry and legal firms of the ability to commence claims under procurement regulations. Other factors which may provide some encouragement to tenderers are the Freedom of Information Act and also the internet. Local authorities in particular post on the internet the minutes of various committee meetings. It is therefore possible to obtain information as to what has been discussed and decisions taken as to why contracts have been awarded.
79. There have been some reported cases of claims under framework agreements;<sup>21</sup> undoubtedly more will follow. In complex projects, the failure or substantial amendment of the project can cause tenderers to lose many millions of pounds in wasted tender costs. These losses are real, as opposed to loss of future profit, and in these circumstances tenderers have and will pursue claims to recover those losses.

## Conclusions

80. What do you need? Every project needs a clear set of contractual requirements and obligations so that all the participants know where they stand. Remember that a contract should set out:
- (i) what each party must do;
  - (ii) what each party receives;
  - (iii) time for performance;
  - (iv) (sometimes) consequences of failure; and fundamentally
  - (v) where risk is to fall.
81. The key to this with framework agreements is the ability to work together in an efficient, collaborative manner. Therefore you need to look to the following three objectives:
- (i) The Framework Agreement itself
- An overarching framework agreement will set out, in general terms, how the parties intend to conduct their relationship over a significant period. The available research suggests that where parties have such a long-term relationship the benefits that accrue from collaboration increase very significantly: the parties have the benchmark of previous contracts against which to measure continuous improvement and, more importantly, can afford to be flexible as to how they exercise their rights, knowing that any ground given on one project in the interests of good will can be made up on future projects. The continued turnover available for the one, and efficiency gains for the other, will in the long run more than compensate for any short-term deficit.
- (ii) The underlying contracts and subcontracts

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21. For example Henry Brothers (Magherafelt) Ltd & Others v Department of Education For Northern Ireland -

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In respect of the individual project the main contract, design contracts, and all subcontract and supply contracts, must be set up so as to facilitate collaboration.

For this purpose, the use of a cost-reimbursable structure is often desirable. That approach assists transparency of pricing. It also lends itself to the incorporation of such mechanisms as target costs, GMPs and bonus sharing provisions. Further, it is compatible with prime contracting (should that be considered desirable) where responsibility for design development, procurement and construction in accordance with the client's requirements, are assumed more or less in totality by the contractor. The contract can also be designed to accommodate other important partnering mechanisms such as benchmarking and KPIs, and financial rewards for innovations that reduce time and cost. Yet again, imaginative methods of dispute resolution can minimise damage to the parties' relationship, such as the provision of a dispute resolution board. Much of this methodology will be carried down the supply chain as it will be essential to ensure that each project is served by a consistent suite of contracts and subcontracts.

(iii) The relationship between the parties

Whilst there may be some difficulties in turning relationship-based obligations into binding contractual terms, the promotion of the relationship will nevertheless need to be given a very high degree of prominence in the collaborative structure. Many of the mechanisms to be found in the various partnering contracts can be applied with good effect outside the ambit of a formal contract and also deployed throughout the supply chain. Good examples include the institution of a core management group, sharing of information and risk management. However, ideally even such provisions as these will require a degree of legally binding regulation, in particular to determine who is to pay for each initiative, or in what proportion. This is even though their purpose will be to facilitate the efficient operation of the contract rather than constituting an integral part of it.

82. What matters is the effective operation of an integrated framework. What you must aim to achieve is a solid framework for establishing the parties' legitimate entitlements in the event of failure. The fact that it does so will not in any way make such a failure more likely, but it will reduce the likelihood of disputes arising that cannot be settled. It will also provide the certainty that will be required by funders in respect of any project that is dependent upon finance.

83. However, against the background of an overarching framework agreement, and integration of soft, relationship-based obligations at the level of the individual project, a degree of trust, cooperation and enthusiasm can be generated that can achieve levels of efficiency far beyond the reach of traditional contracting. Thus, a party may have a particular legal entitlement but, in the interests of the continuing relationship, may elect not to exercise it. For example, if a contractor can demonstrate that he has inadvertently heavily underpriced a project he may be allowed to increase his prices; and the knowledge that he is likely to be allowed to do so will enable him to reduce his estimates and margins on future projects everybody wins. Those who promote collaborative working say that as relationships lengthen and deepen, levels of trust will increase enabling such an approach to become the norm.

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84. In the 2007 JCT Povey Lecture,<sup>22</sup> Bob White of Mace noted that regular users of the industry, in both the public and private sectors, had accepted that one of the most successful ways of harnessing the power of collaboration through partnering or integrated team working was through the adoption of frameworks, albeit of a variety of shapes, sizes and duration. He then went on to outline eight reasons why framework agreements promote higher performance and innovation:
- (i) Clients can use them as significant drivers of change;
  - (ii) They result in reduced competitive bidding/long-term relationships;
  - (iii) Innovations and cost savings can be delivered through supply chain relationships;
  - (iv) They will deliver continuous improvement agendas;
  - (v) Long-term collaboration on capital programmes and long-term service revenues boost margins;
  - (vi) They help to spread the overhead over a larger workload and produce fewer loss-making projects (less risk, less volatility);
  - (vii) They can improve performance-based reward mechanisms; and
  - (viii) They encourage deeper relationships between clients/contractors/supply chain, demanding new upstream and downstream skills.
85. These are all reasons which suggest that the use of framework agreements will continue to rise.

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