

Framework agreement or contract - important denominators and criteria for designing the tender structure

Jens Munk Plum, partner, Kromann Reumert's
Procurement Group

Contract or framework agreement?

The Danish Procurement Act

Public contracts (S 24, no. 24)

Contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of service

Framework agreements (S 24, no. 30)

An agreement formed between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and the quantities envisaged



Why does it matter?

Contracts

Framework agreements

Pros

- Unlimited duration (somewhat?)
- Shorter deadline for filing complaints
- Non-binding specification of maximum value
- Minimum revenue for supplier (economies of scale)

- May be non-exclusive
- Flexible
- More possible suppliers
- Competition during the duration

Cons

- Entails a contractual legally binding obligation to procure
- Less flexible – maybe?
- Only one supplier per defined claim (“fordringsret”)
 - If not multiple contracts

- Lack of clarity of scope for supplier (missing economies of scale)
- Complaints within 6 months
- Specification of maximum value
- Limited duration – 4/7 years
- Lack of indication of maximum value – may it be used?
- Consequences by declaring a longer duration?
 - Special circumstances?
 - The misclassified framework agreement is at least valid for four years, cf. C-216,17 Autorita, para 42

Rulings from the Complaint Board (1/2)

Ruling of 8 May 2014, *Abena A/S vs Slagelse Kommune*

Abena's claim:

- It was a framework agreement and not a contract

Complaints Board for Public Procurement:

- 1) In the Tender Conditions section 12, it is directly said, that delivery happens on the basis of attached framework agreement draft, and that choice of supplier has not ended, until the framework agreement is signed by both parties.
 - 2) In the Tender Conditions section 15, it is also said, that the tenderer is not guaranteed any minimum revenue. The draft contract's section 2 also stated that "The listed information regarding historical and expected spending are estimates and that information regarding type and quantity are indicative and non-binding for the contracting authority
- **As such, the agreement was indicated based on estimates without binding effect, and only sets the general terms for contracts, that will later be entered into on the basis of the framework agreement**

Ruling of 28 September 2018, *Bayer A/S vs Banedanmark*

Bayer's claim:

- It was a framework agreement and not a contract

Specifications in the tender material

- Concern "all Banedanmarks railway tracks", *i.e.*, at a starting point 2,901 km
- Price is calculated per km track
- "Quantity regulation", cf. below

Complaints Board for Public Procurement:

- The contract concern spraying etc. of 2,901 km of railway for 4 spraying seasons with the possibility of extending the contract for 2 x 1 years

In the Tender Conditions was specified that "*as a starting point all 2,901 km railway track must be sprayed yearly, but the supplier must tolerate minor downward adjustment. This may be due to track or line section closures in connection with projects.*"

- **As such, there was not choice of liberty regarding the use and it sets the terms of the agreement, so the contract does not have the characteristics of a framework agreement**

NB! Previously, the contract had been awarded as a framework agreement

Rulings from the Complaint Board (2/2)

Ruling of 7 October 2020, *Remondis vs. Hedensted Kommune*



Number of uncertainties regarding collection of municipal waste

- Changes/variation in the number of delivery points and addresses were subject to change
- The container composition was based on the municipality's best estimate and the contractor must accept all fluctuations
- The municipality could not guarantee the amount or weight of the waste

Complaints Board for Public Procurement:

- “The selected supplier thus has, as the tender documents are designed, a guarantee that during the contract period it will have to collect household waste to the specified extent at the unit prices that the supplier has stated in its tender that the municipality must pay for this”
- The uncertainties were due to external factors, such as the citizens' choices and amendments in legislation, which the contractor would have to accept without change in price

Which demoninators are important

Contracts

- Contracts for pecuniary interest - *Quid pro quo*
- Quintessentially, a contract gives a legal right for the performance obligee to supply, procure or produce something/solve a task/deliver a service in exchange of a “guaranteed” amount of revenue
- Under general contract law, if the “procurement” is described sufficiently detailed to be enforceable before a court “fordringsret” and trigger damages if breach
- If so, the fact that it may have variations does not matter
 - NB! The guidance from the DCCA is open for minimum revenue in framework agreements
- Yearly fee or otherwise
- “Exclusive” in respect of a legally enforceable claim



Framework agreements

- Unknown/variable volume, service and/or fee
 - NB! Is the variable from external factors?
- Sets the framework and terms and conditions for future contract calls. As such, requires future contract formation
 - Type of standing offer
- The contracting authority has freedom of choice regarding the use of the contract unless otherwise agreed – can tender same “stuff” elsewhere and again
- Price per unit etc.
- Non-exclusive



Best of two worlds? A closer look at IT-projects

- Is the scope of the service defined at the time of the formation or at a later stage, both in terms of features and extent? Is there a minimum revenue? Exclusivity? Is any variables from external factors?
- Large IT-projects may sometimes have both contract and framework agreement elements, e.g. services regarding operating services, system performance and service transition, where only the scope of the operating services may be defined upfront

What then?

- Does the project consist of more than one contract/framework agreement?
- If not, one should consider what is the main purpose of the project, e.g., the operation of the services or the performance, and what is the value of each element?





Discussion



Jens Munk Plum
Partner, Copenhagen

Dir. +45 38 77 44 11
Mob. +45 21 21 00 222
jmp@kromannreumert.com