

New Cabinet Office review of frameworks

Andrew Croft and **Kevin Henderson** of **Beale & Company Solicitors LLP** cast their eye over the recently published Cabinet Office commissioned review of construction frameworks that advised how they could achieve a 'Gold Standard'. Employers might use it to push harder for an unfair risk-share with the project delivery team, they caution.

KEY POINTS

- The Cabinet Office has published an independent review into the use and efficiency of public framework procurements and provides 24 recommendations that form the basis of a "Gold Standard" for framework contracts.
- Key considerations include reducing bidding costs, encouraging the implementation of environmental and social objectives, and focussing on collaborative delivery to achieve client outcomes.
- The review criticises current procurement practices, including the use of significantly amended industry standard form framework and call-off contracts, and pushing an unfair risk-share onto the project delivery team.
- The review may be a missed opportunity by not addressing the current market conditions, such as the recent substantial inflation of materials and labour costs and the hardened insurance market.
- Bidders to public frameworks will need to wait and see to what extent the recommendations are adopted, and what mechanisms will be available for holding public clients to the Gold Standard.

On 16 December 2021 the Cabinet Office published an independent review which aims to create a new 'Gold Standard' in public sector construction frameworks. The 135-page review is available for download on the Government's website.

The review proposes a new Gold Standard which would be applied to the procurement of

public sector developments, such as schools and hospitals. The Gold Standard consists of 24 recommendations that substantially mirror the structure and requirements of the Cabinet Office's Construction Playbook (published in December 2020). It is envisaged that the Cabinet Office will play a key part in implementing the Gold Standard recommendations.

In this article, we have sought to summarise the key recommendations and themes set out in the review.

Risk management and allocation

One of the key positions in the review is "risk allocation is dealt with clearly and equitably in the JCT 2016, NEC3, NEC4 and PPC2000/TAC-1 suites of standard form project contracts, and there is rarely justification for changing this delicate balance". This is a stark departure from the norm that contractors and consultants bidding on public projects are familiar with. It is common to see schedules of amendments to any industry standard forms of framework and/or appointment that run into the tens, if not hundreds, of pages. Frequent amendments include, amongst others: restricting, if not deleting, variation and compensation event mechanisms; adding extensive carve-outs to financial caps in liability or removing the caps in full for unlimited liability; elevating the required standard of care; and inserting significant additional warranties relating to performance. Further, we frequently see a restricted procurement process being used, limiting the ability to propose amendments.

Some argue that extensive amendments are required to tailor the standard form contracts to each client and their project. In our experience, a

considerable amount of these amendments are made to simply transfer more risk onto the project parties, and many of the additional obligations would be better suited as scope items. This would allow for tailored requirements to be included in the contract whilst maintaining the balanced risk-share in the standard form contracts.

The review notes that suppliers are already deciding not to bid for public frameworks where clients require unreasonably high, or unlimited, levels of liability and excessive insurance cover. To address this, the review recommends that the levels of a supplier's liability and insurance should be proportionate to the size and complexity of the particular framework. Whilst this is a helpful assertion, and considerably better than the current contracting norms we are seeing, this, in our opinion, does not go far enough. The level of liability and corresponding insurance should ideally be proportionate to the value of the relevant call-off under each framework, as it may not be equitable that a supplier's liability for a single call-off be tied to the total value of the framework and/or project.

Flexibility, collaboration and informed decision making

There are a number of recommendations which focus on the importance of flexibility, collaboration and systems for managing framework relationships. These include the use of systems that support dispute avoidance and joint-decision making groups. Implementing these systems contractually will need to be considered carefully, as such arrangements could expose bidders to joint and several liability.

Consultants, as well as design and build contractors, should be aware that there is a heavy focus on achieving performance outcomes, particularly through the introduction of a binding "Gold Standard action plan" and specifications which focus on client outcomes. This will need to be monitored closely, as this could introduce fitness for purpose requirements. This may also give clients scope to introduce new (or at least further) penalties or liquidated damages for failing to meet the Gold Standard. These additional risks are typically outside of professional indemnity insurance arrangements.

Social, Economic and Environmental Concerns

The recommendations prioritise safety, achieving

net zero carbon targets, and providing rewards for faster, better and greener delivery of the projects. Suggestions for achieving these include having balanced evaluation criteria that identifies SME strengths, early project delivery team collaboration, and social value objectives with timescales and required outcomes. The practical application of these objectives will need to be monitored closely. Early efforts to implement similar objectives contractually have resulted in, amongst other risks, joint and several liability, extensive strict obligations, further fitness for purpose requirements and "time of the essence" clauses.

Further, the requirement for the project parties to identify SME strengths should also include a requirement to acknowledge that SMEs are operating in a hardened insurance market and are facing increased materials and labour costs. Strict requirements to flow-down onerous framework provisions to SME subcontractors and subconsultants may limit a SME's ability to price competitively, or even participate in the framework at all.

Consultants and contractors will be aware of the continuing theme to engage with environmental objectives in public procurement. For example, under the Government's policy note PPN 06/21, bidders to public contracts with a value above £5,000,000 are already required to demonstrate how they will act to reduce their carbon emissions. It may be that we start to see "green clauses", such as those being developed as part of the Chancery Lane Project (which Beale & Co and a number of others have contributed to), being included in framework agreements and call-off contracts. These green clauses seek to impose obligations relating to carbon emissions and other environmental considerations that could help show a bidder's alignment with the environmental aims of the Gold Standards, and PPN 06/21 requirements if applicable.

Cost and Payment Efficiency

Lowering the procurement costs associated with public frameworks is a key aim of the review. It acknowledges that bidding costs for frameworks are excessive, averaging over £247,000 for contractors and over £130,000 for consultants with some reports of up to £1,000,000 in each case.

One recommendation is to introduce payment and pricing mechanisms that maximise cost

certainty and a requirement for prompt payment obligations. This is in line with previous Cabinet Office guidance, such as their Procurement Policy Note 04/19 (PPN 04/19) which sets out how the payment approaches of bidders can be considered in the procurement of major public contracts. It is also worth noting that limiting amendments to industry standard form frameworks and appointments would further reduce bidding costs.

Procurement

In order to optimise competitive bids, framework providers are asked to provide clarity on the pipelines of work. We have seen examples of public authorities using a framework procurement, with no intention for multiple call-offs, as the contractual means of procuring services for a single project. This is an inefficient and onerous method of procurement when simple forms of contract can be used to procure the works, goods and professional services as appropriate.

The review also recommends the award of longer-term call-off contracts that allow for additional work to avoid inefficient and costly mini-competitions. This is a welcome recommendation, as there are limited legal safeguards for bidders to ensure mini-competitions under the public frameworks are fair.

Technology and innovation

The review recommends the use of pre-procurement framework consultation to explore emerging technologies and innovations, as well as the potential to utilise modern methods of construction and other offsite manufacturing technologies. The review also recommends the creation of a golden thread of asset information using BIM and other digital technologies in order to standardise data generation, classification, security and exchange. It will be important that

this is documented contractually (e.g. using the ISO 19650-2 and ISO19650-3 Information Protocols).

Insurance

Whilst the Government's clear intention is to support SME's, the review falls short of addressing one of the key considerations that prevent many SME's, and even larger suppliers, from being able to join the bidding process on construction frameworks: the continuously hardening insurance market.

As noted above, the recommendations in the Cabinet Office review hint that limits of liability, insurance and other securities should be proportionate to the framework and the project rather than the value of a specific call-off. We frequently see public sector frameworks with limits of liability (if any) which are high and are set to an "each and every claim" claim basis. The amount of insurance cover required to meet these risks is either no longer being offered, or is only available at such high premiums that purchasing such cover would result in significant increases in tender prices

Furthermore, insurance and liability provisions often do not reflect the fact that certain risks such as asbestos, pollution, fire safety and cladding are now common exclusions from what little professional indemnity insurance cover is available. If public sector clients are not willing to accept the reality of the current insurance market, only the largest suppliers with the ability to self-insure will continue to consistently bid. This is not helpful for competitive bidding or achieving the Government's aims of supporting SMEs.

Additional Comments

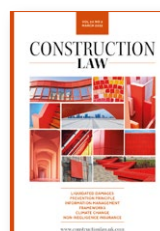
Public project framework agreements can be very procedural and require extensive resources to manage. **CL**



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