Unpacking framework agreements

for the delivery and maintenance of infrastructure

Dr Ron Watermeyer
Member ICE-SA Division
SAICE 2004 President
watermeyer@ioptions.co.za

INTRODUCTION

ISO 10845-1 defines a framework agreement as *an agreement between an employer and one or more contractors, 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, where appropriate, the quantity envisaged*. Framework agreements enable an employer to procure engineering and construction works, goods and services on an instructed basis (call-off) over a term without any commitment to the quantum of work instructed in the absence of a fully developed scope of work (see Figure 1). This may be achieved by issuing a package, batch or task order in terms of a contract during the term of the contract, i.e. an instruction to provide works, to supply items of goods in a batch, or work within a service within a stated period of time.

Price in the context of a framework agreement may be considered to be a sum of money for which something is purchased, the actual cost of acquiring something calculated according to some specific measure, or an estimate of what the transaction is worth. Accordingly, framework contracts may contain prices for work to be executed over a term, cost parameters which enable costs to be determined once the scope of work has been determined, or any combination thereof.

Framework agreements reduce the employer's need to re-advertise and approach the market for goods, services or works falling within the scope of the agreement over the term of the agreement, and the number of relationships to be managed. They also provide employers with programming flexibility to manage expenditure relating to the delivery and maintenance of infrastructure over time, and enable collaborative relationships to develop in order to deliver better value and project outcomes,

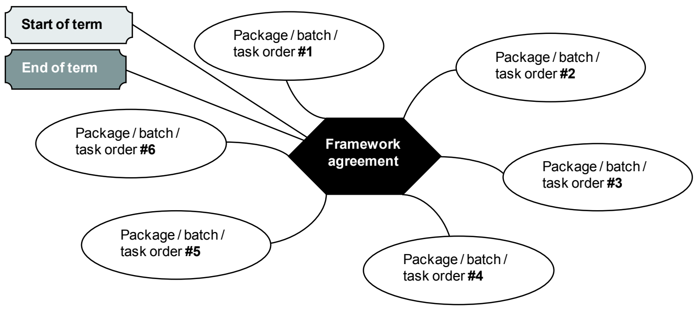

Figure 1: Call-offs over the term of a framework

particularly those relating to contractor development, community participation and skills development. They also provide an opportunity for contractors to improve their internal management systems, to develop their supply chains and improve their Broad-Based Black Economic Empowerment status during the term of the contract through continuity of work.

Framework agreements enable lessons learned in one package or task order to be taken to the next, and enable a team to work together on an integrated approach over a period of time. The promotion of secondary procurement objectives in this contracting arrangement is also very flexible and, unlike most other delivery models, allows the employer to change the deliverables associated with such a policy over time in response to emerging needs and changing circumstances. This enables meaningful development of local enterprises and labour to take place over the term of the contract.

It is also possible, with careful planning, for one organisation to make use of another organisation's framework agreement to satisfy its needs. This can be used to overcome public sector capacity constraints through the establishment of regional framework agreements.

FUNDAMENTAL PRINCIPLES

Framework agreements are only entered into with contractors (including suppliers and service providers) who have the resources and the capability to carry out work that is likely to be instructed. They may be entered into with contractors for a term not exceeding four years, by inviting tender offers to enter into a suitable contract for the term, and entering into one or a limited number of contracts based on the projected demand and geographic location for such goods or services.

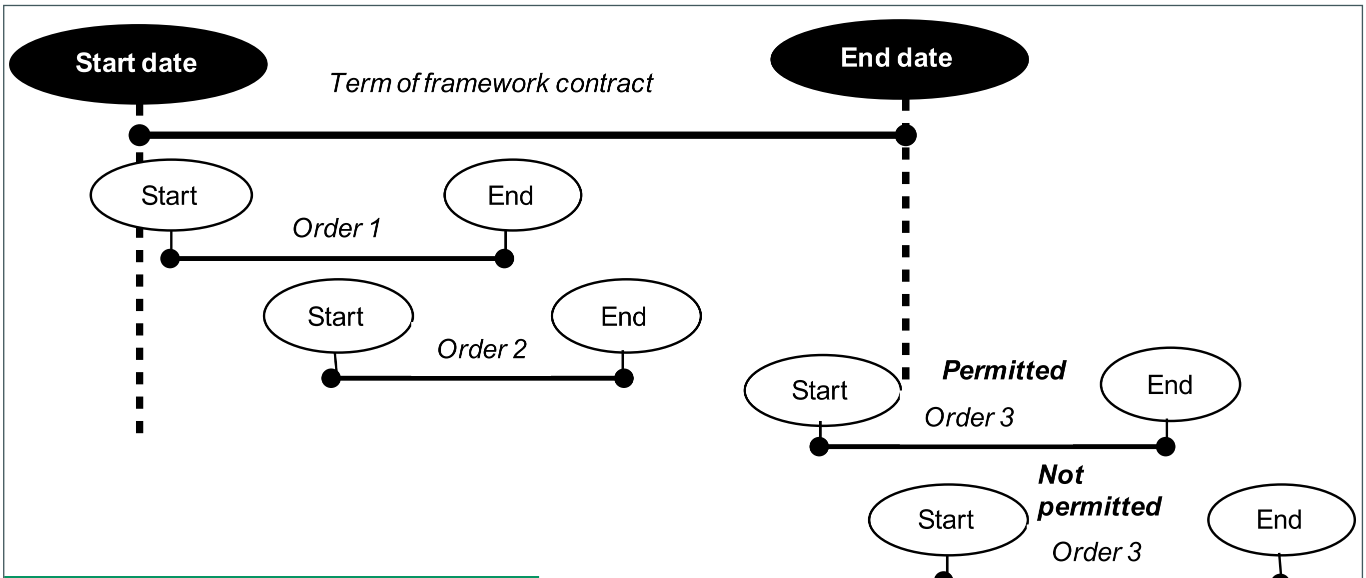

Figure 2: Timing of call-offs in a framework agreement

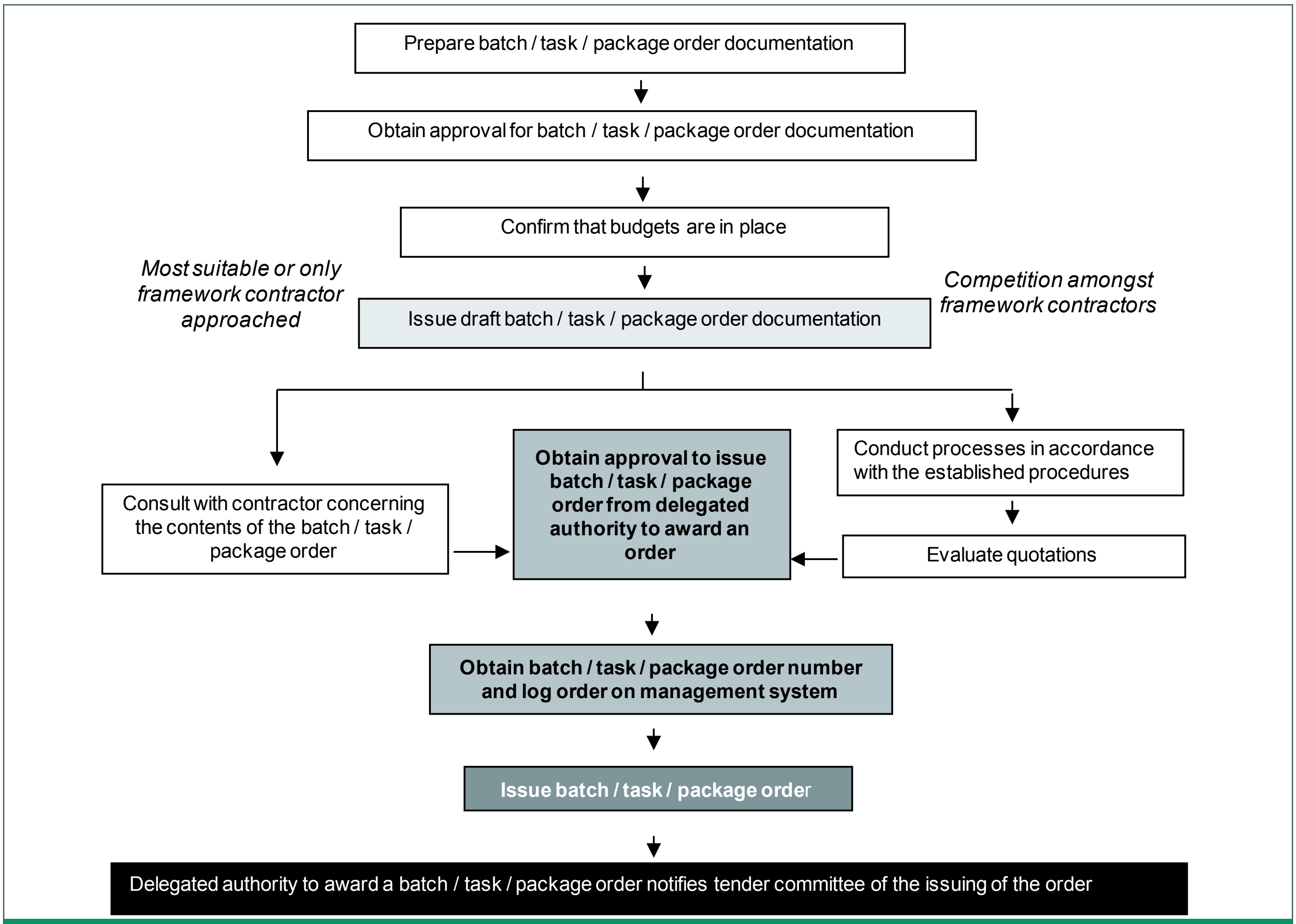

Figure 3: Activities associated with the issuing of a package / batch / task order within a framework agreement

Framework contracts need to contain terms which establish:

- the rights and obligations of the contracting parties and the agreed procedures for the administration of the contract and the issuing of orders;
- the term of the agreement during which an order may be issued;
- the scope of work which may be included in an order to enable decisions to be made as to what is covered in the agreement and what must be procured outside of the agreement;
- the basis by which contractors will be remunerated for work performed in terms of an order, if and when such an order is issued; and
- where a framework contract is entered into with more than one contractor, the manner in which competition amongst framework contractors for a package order is to be conducted.

An employer may not instruct a contractor to provide work outside the scope of work associated with a framework contract, or issue an order after the end date of the term of the framework agreement. Any work commenced before the end of the term of a framework contract may continue until the end date provided in the order (see Figure 2).

Contractors may not proceed with work associated with a batch, task or work package until such time that an order has been issued in terms of the contract. Framework contracts that are entered into shall not commit the employer to any quantum of work beyond the first order or bind the employer to make use of such agreements to meet its needs. The employer shall approach the market for goods, services and works whenever it considers that better value in terms of time, cost and quality may be obtained.

ORGANISATIONAL POLICY REQUIREMENTS

The process for putting in place a framework agreement is the same as that for any other contract, i.e. it follows the normal construction procurement procedures. The principal difference between a framework and a non-framework contract is that the contract at the time of the award either has no price attached to it or has a maximum total of prices for the sum of all call-offs over the term of the contract or a financial year.

The activities, key actions, responsibilities and gates associated with the issuing of batch, task or package orders are outlined in Figure 3.

The use of framework agreements needs to be supported by an organ of state's procurement policies and procedures. Such policy needs, as a minimum, to cover the governance arrangements surrounding the issuing of call-offs (orders) and the criteria for re-opening competition amongst framework contractors where multiple contracts are entered into covering the same scope of work.

SUITABLE FORMS OF CONTRACTS

General considerations

The Construction Industry Development Board (CIDB) Standard for Uniformity in Construction Procurement permits the use of a limited range of standard forms of contract in the public sector covering a range of procurement types, service responsibilities and contracting and pricing strategies that are drafted to cater for a wide spectrum of objectives and methods for managing risks. This CIDB standard requires that these standard industry forms of contract be used *with minimal project specific variations and additions which do not change their intended usage.*

A key consideration in entering into a framework agreement is to decide on how contractors are to be paid for broadly defined work which is usually not sufficiently scoped to enable it to be priced at the time when the agreement is entered into. This requires the use of price lists with a transparent and auditable methodology to determine the price of items that are not included in the price list at the time of tender or cost-based pricing strategies. It should be noted that the FIDIC, JBCC and SAICE forms of contract for works do not make provision for cost-based pricing strategies and do not provide a transparent means for determining the price of items that are not included in the price list at the time of tender. The NEC3 family of contracts, published by the Institution of Civil Engineers, addresses both these requirements, and more.

The NEC3 family of contracts facilitates the implementation of sound project management principles and practices, as well as defining legal relationships. It is drafted on a relational contracting basis based on the belief that collaboration and teamwork across the whole supply chain optimises the likely project outcomes and is therefore based on "discussion at the time" rather than "argument later." It contains clear procedures with defined time limits for actions to be taken, and provides for effective control of change, speedy agreement of time, quality and cost impacts of change, improved forecasting of end costs and end dates. It also includes requirements for the parties to issue to each other early warnings of risks relating to time, cost and quality. It assesses compensation events (events for which the employer is at risk) which entitle the contractor to more money on the basis of cost, as defined in terms of the contract, uplifted by any percentages for overheads and profit or fees provided for in the contract for work already done, or a forecast for the work not yet done. The NEC3 family of contracts is accordingly well suited to framework agreements.

Entering into a framework agreement using the NEC3 framework contract

The NEC3 family of documents includes a Framework Contract which is intended for use for the appointment of one or more suppliers to carry out work on an instructed basis over a set term using any of the NEC3 contracts. It is used as a "head contract" and imposes an obligation on the employer to establish selection procedures where a framework agreement is entered into with more than one contractor; and the supplier to obey an instruction issued in terms of the contract and to attend meetings with the employer and others as stated in the Framework Information.

The Framework Contract makes provision for the obtaining of advice for a proposed Work Package by the supplier on a time charge basis if instructed to do so. It also requires the selected supplier to submit a quotation for the proposed Work Package and to provide the additional Contract Data that is specific to the Work Package. The employer may issue a Package Order if the quotation is accepted, an instruction to submit a revised quotation or a notification that the proposed Work Package will not be issued to the contractor. A supplier is not permitted to proceed with a Package Order without an instruction from the employer to do so. After the end date, the employer may not issue a Time Charge Order or Package Order, and the supplier is required to complete the Time Charge work and Work Packages ordered before the end date. Either Party may terminate their obligation under the contract at any time by notifying the other party. After termination the employer may not issue a Time Charge Order or a Package Order, and the Supplier is required to complete Time Charge work and Work Packages ordered before such notification.

An alternative approach to framework agreements using the NEC3 family of contracts

The NEC3 Supply Short Contract (SSC) and NEC3 Term Service Short Contract (TSSC) contain core clauses for Batch Orders and Task Orders respectively, while the NEC3 Term Service Contract (TSC) has a Secondary Option (X19) for Task Orders. The NEC3 Professional Service Contract (PSC) has a Main Option for a term contract (Option G) which makes provision for Task Orders.

These standard provisions for Task and Batch Orders enable call-offs to be made as they all require such orders to include:

- a detailed description of the work required;
- either a priced list of items and the total of prices or a forecast of the total of prices for the order based on the provisions of the contract;
- the starting and completion dates for a batch / task order; and
- the amount of delay damages for late completion.

A contractor is not permitted to start work on an order until the order is received, and is required to complete the work associated with an order before the completion date for an order. The employer is not permitted to issue an order after the end of the term of the contract. Provision for price escalation needs to be made either in terms of the standard secondary option clauses, if provided (i.e. Option X1 in the PSC and TSC), or in terms of a Z clause (i.e. additional conditions of contract).

Accordingly framework agreements can be entered into by simply making use of the Task or Batch Orders that are embedded in the NEC3 supply and service contracts. There is no need to enter into two contracts – an NEC3 framework contract and an NEC3 supply or services contract – as all the task- or batch-specific Contract Data is located in the order and the selection and quotation procedures for an order can be included in the scope of work.

A Z clause, drafted along the lines of that contained in Option X19 of the TSC, can be added to the NEC3 Engineering and Construction Contract (ECC) or the NEC3 Engineering and Construction Short Works Contract (ECSC) to create framework contracts and obviate the need to enter into two contracts. The Contract Data that is entered into using an NEC3 ECC or NEC3 ECSC can then make references to Package Orders, e.g. the *key dates* and the *conditions* to be met are as stated in the Package Order. In this manner, Package Orders can be issued through the standard NEC3 Contract. Accordingly the NEC3 ECC or NEC3 ECSC becomes a framework contract which sets out the generic terms, conditions and works information for the call-offs over the term, and the Package Orders contain the package specific data and information. The "contract" for a Work Package is therefore the Package Order, read together with the contract that is entered into, based on the ECC or ECSC.

PRICING STRATEGIES

It is possible to base framework agreements on either price-based or cost-based pricing strategies. Table 1 identifies a number of pricing strategies that are contained in the NEC3 family of contracts which are commonly used in framework agreements. Price-based pricing strategies are best suited to situations where the work is relatively straightforward, is of a repetitive nature, imposes low risks to the parties, does not require sophisticated management techniques to manage and, where necessary, only basic site establishment activities. Cost-based strategies are more flexible than price-based strategies and can as such be used where the work is not repetitive and site establishment resources are complex and varied.

Price-based strategies make use of Price Lists, Price Schedules or Task Schedules which are priced prior to the formation of the contract. Each order issued in terms of the contract includes a list of items that are priced using the prices contained in these documents. Prices for items in an order which are not applicable in the specific circumstances, or for which there are no equivalent items in the contract, are dealt with as compensation events. Compensation events are assessed on the basis of cost as defined in the contract, uplifted by the agreed fee percentages. It is for this reason that tenderers are required to tender parameters associated with overheads and profit or, in the case of professional services, time changes.

Cost-based strategies make use of target contracts or management contracts. It should be noted in this regard that:

- A target contract is a cost reimbursable contract in which a target cost is estimated, and on completion of the works, the difference between the target cost and the actual cost is apportioned between the employer and contractor on an agreed basis.

A contractor is not permitted to start work on an order until the order is received, and is required to complete the work associated with an order before the completion date for an order. The employer is not permitted to issue an order after the end of the term of the contract. Provision for price escalation needs to be made either in terms of the standard secondary option clauses, if provided, or in terms of a Z clause

Table 1 Pricing strategies embedded within NEC3 contracts that are commonly used to put framework agreements in place

Contract type	Pricing strategy	Tendered parameters
ECC	Option C – target contract with activity schedule	▪ The lump sum prices for each of the activities on the activity schedule, if required at tender stage ▪ Direct fee percentage and the subcontract fee percentage ▪ The percentage for people overheads ▪ The percentage for adjustment for equipment in the published list ▪ Rates for various types and categories of equipment ▪ Hourly rates for defined cost of design outside the working areas ▪ The percentage for design overheads ▪ The percentage for working areas overheads ▪ The hourly rates for defined cost of manufacture and fabrication outside the working areas ▪ The percentage for manufacture and fabrication overheads
	Option F – management contract	▪ The prices for work done by the contractor himself ▪ Direct fee percentage and the subcontract fee percentage
ECSC and TSSC	Price list	▪ Lump sums and rates in the price list ▪ Percentage for overheads and profit added to the defined cost for people, and other defined cost
PSC	Option G – term service contract	▪ Lump sums for tasks in task schedule, if any ▪ Time charges for different categories of staff in the form of hourly rates or parameters required to calculate hourly rates
TSSC	Option A – priced contract with price list	▪ Lump sums and rates in the price list ▪ Direct fee percentage and the subcontract fee percentage
	Option C – target contract with price list	▪ Lump sums and rates in the price list if required at tender stage ▪ Direct fee percentage and the subcontract fee percentage
SSC	Price schedule	▪ Lump sums and rates in the price schedule ▪ Percentage for overheads and profit added to the defined cost

- A management contract is a contract under which a contractor provides consultation during the design phase and is responsible for planning and managing all post-contract activities, and for the performance of the whole of the contract.

The target cost (total of prices based on a price list or activity schedule) needs to be established for each order before the order is issued. Tenderers competing for framework contracts need to tender parameters associated with overheads and profits and parameters associated with the determination of what constitutes cost. They may also be called upon to tender the total of prices for the first package order.

PROCUREMENT STRATEGY

Framework agreements need to be put in place following a competitive procurement procedure. A starting point in developing a procurement strategy is to consider the pricing strategy that is to be adopted and the profile of the contractors who are capable of executing the orders issued in terms of the contract. Stringent eligibility criteria need to be applied to screen tenderers to ensure that an award is made only to those contractors who have the capabilities and capacity to execute orders.

A number of procurement procedures may be used to solicit tender offers. The most commonly used procedures are indicated in Table 2. Tenders are usually evaluated in terms of financial offer, preference and quality in order to determine a best-value-for-money proposition. Tender assessment schedules need to be prepared to enable comparative offers to be compared on a balance between tendered price and tendered parameters.

The NEC3 contracts require that any additions or omissions to the contract and compensation events be based on the effect of the addition, omission or event on cost as defined in the contract, which is always uplifted by a percentage for profit and overheads or a fee. In target contracts, the tendered parameters, other than those relating to the fees and prices in the Activity Schedules and Price Lists, form the basis of the payments made to contractors during the execution of the contract. It is therefore important to assess the potential impact of these parameters on the final price of the contract and to encourage tenderers to tender realistic parameters. This is best achieved by performing a sensitivity analysis through a tender assessment schedule when comparing tenders. Such a schedule needs to set out the basis for the comparison, e.g. the impact of the percentages for overheads and profit on compensation events amounting to say 20% of the total of prices are added to the total of prices in order to arrive at a comparative offer.

In professional service contracts based solely on time charges, the tender assessment schedule should enable a weighted average rate to be calculated for comparative purposes, based on the tendered rates and rates derived from tendered parameters (e.g. cents per hour / R100 of total annual cost of employment). In target contracts where tenderers are not required to price the first order, the tender assessment schedule should, based on assumed values of the various cost components and the tendered parameters, enable a comparative value to be calculated.

SATISFYING REQUIREMENTS FOR CIDB CONTRACTOR GRADING DESIGNATIONS

An issue which needs to be addressed when putting in place a framework agreement for construction works is the CIDB Contractor Grading requirements, particularly where the scope of work, and hence price, of the contract is not known at the time that the framework contract is entered into. It should be noted in this regard that Regulation 25 (1b) of the Construction Industry Development Regulations permits the value of a contract, which is used to determine a contractor's CIDB contractor grading designation for a particular contract, to be based on its annual value where a contract involves construction works over an agreed number of years. This is permitted where the work is on an "as and when required" basis, of a routine nature, or grouped into identifiable and similar components where an instruction to proceed to the construction of the next component is conditional on the successful completion of the previous component.

There are three ways in which this can be achieved:

Method 1: Issue a call for expressions of interest and specify a CIDB contractor grading designation based on the estimated annual value of the contract in accordance with the Regulations.

Method 2: Invite tenders based on a price list that is representative of the annual value of work which is likely to be executed and use the total of prices for the price list to determine the required contractor grading designation.

Method 3: State the maximum value of the contract in any one year in the Form of Offer and Acceptance and use this value to determine the contractor grading designations. □

Table 2 Procurement procedures that are commonly used to put framework agreements in place

Description of procedure	Typical usage
Open procedure whereby tenderers submit tender offers in response to an advertisement to do so.	Use where eligibility criteria and, if necessary, the evaluation of quality in one process is sufficient to identify suitable framework contractors.
Qualified procedure whereby a call for expressions of interest is advertised, and thereafter only those tenderers who have expressed interest, satisfy objective criteria and who are selected to submit tender offers, are invited to do so.	Use where respondents are prequalified to submit tenders on the basis of company experience and company systems.
Restricted competitive negotiations whereby a qualified procedure is followed to invite tenderers to submit tender offers, and the three most competitive tenders received are invited to a round of negotiations after which they are requested to submit their best and final offer.	Use where tenderers are required to price the first order (bills of quantities can be used to obtain first round prices in engineering and construction works contracts; best and final offers can then be based on an activity schedule following a round of competitive negotiations).