

18 February 2016

Framework agreement approval: guidance for framework operators

From 1 April 2016, Monitor and the NHS Trust Development Authority (TDA) will require all trusts in scope of the agency rules¹ to procure agency staff via Monitor/TDA approved framework agreements.

This guidance sets out how framework operators can apply for framework agreements to be approved by Monitor/TDA for use by trusts.

The table in Annex 1 outlines the planned timeline for this. Annex 2 sets out definitions and the scope of this guidance.

The rules on agency expenditure announced on 1 September 2015, 23 November 2015 and 18 February 2016 are collectively referred to as the ‘agency rules’, details of which can be found [here](#).

Rationale

1. Framework operators have an important role in helping trusts comply with the agency rules. Framework agreements can be a vehicle for enabling trusts to comply with the price cap policy. This is, of course, just half the picture, and trusts have a primary role in complying with the caps to achieve a sustained reduction in agency expenditure. Monitor/TDA will continue to take the appropriate regulatory action regarding trust compliance with the agency rules.
2. These new measures are designed to bring:
 - greater transparency on agency spend
 - control on cost of agency spend
 - greater assurance on quality of agency supply
 - compliance with the [price cap rules](#) published on 23 November 2015.

¹ Trusts in scope of the rules are: all NHS trusts; all NHS foundation trusts receiving interim support from the Department of Health; all NHS foundation trusts in breach of their licence for financial reasons.

The rules for trusts: mandatory use of approved framework agreements for procuring all agency staff

3. From 1 April 2016 all trusts in scope of the rules will have to procure agency staff (nurses, doctors, other clinical and other staff groups) via framework agreements that have been approved by Monitor/TDA.²
4. Any procurement off-framework or via unapproved framework agreements after 1 April 2016 will be treated as non-compliance with the framework rules and must be reported as overrides in the weekly override report to Monitor/TDA. Trusts may override the rules in exceptional patient safety circumstances only. All trusts, including those not in scope of the rules, must report overrides to Monitor/TDA.

What this means for framework operators

5. Framework operators are asked to seek approval from Monitor/TDA for all framework agreements that supply agency staff to the NHS.
6. Framework operators are strongly encouraged to apply by 3 March 2016, via the application form on the [website](#). Based on applications received by this date, we will publish a list of approved framework agreements in the week beginning 14 March 2016.
7. After 3 March 2016 we will review any applications on an ongoing basis as they are submitted, and communicate outcomes to framework operators and trusts including any updates to the list of approved framework agreements. We encourage applicants to apply at the earliest possible date. If framework operators apply on or before 1 April 2016, their frameworks can continue to be used pending Monitor/TDA's decision on their application.
8. Framework operators are required to seek approval for each of their framework agreements that provide agency staff to NHS trusts and foundation trusts. This includes all nursing framework agreements, as existing conditional approval for nursing frameworks will expire on 31 March 2016.

² Subject to any existing legally binding commitments, which trusts should use their best endeavours to renegotiate as soon as possible.

Conditions for approval

9. Framework agreements will be approved where, at the point of application, Monitor/TDA are satisfied that:
 - i. the framework agreement meets all the conditions in Table 1; and
 - ii. the framework operator commits to, and provides, a detailed plan which sets out how they intend to meet the conditions in Table 2 as soon as possible and by 1 April 2016 at the latest. This includes ensuring maximum compliance to the price caps to the extent the framework terms and conditions permit; and
 - iii. the framework operator commits to, and provides, a detailed plan which sets out how they intend to put in place a framework agreement that fully meets the conditions in Table 3 as soon as possible and by 1 November 2016 at the latest. This includes ensuring that maximum worker pay rates, at rates specified by Monitor/TDA, are contractually embedded into the framework agreement as well as any call-off terms under the framework agreement.
10. Tables 1 to 3 of this document set out the detailed conditions on which Monitor/TDA will approve framework agreements.
11. We may contact framework operators to discuss applications and request further information where necessary.
12. To be approved, framework agreements must meet all the conditions in Tables 1 to 3. However, in exceptional circumstances Monitor will exercise a discretion to approve agreements where they partly meet conditions and framework operators have a clear plan to meet them fully in an appropriate timescale.
13. To meet these conditions, framework operators may have to renegotiate with suppliers on their framework agreement, to the extent the framework agreement terms and conditions permit, or seek to retender framework agreements. This process, and timescales for how the framework operator plans to meet the conditions, will need to be clearly specified in any application to Monitor/TDA for approval.
14. Where framework operators intend to retender in order to meet the conditions in Table 3 (as soon as possible and by 1 November 2016 at the latest), they do not need to apply separately for their new framework agreement to be approved once it is live, provided they can evidence on request that they have delivered the plan in their initial application. We strongly encourage framework operators to share updates as the procurement/tendering process develops to ensure any new framework agreements meet the approval conditions.

15. Framework operators should also consider the following when retendering/renegotiating framework agreements. The price caps set by Monitor/TDA currently apply to the total amount a trust can pay for an agency worker. From 1 April 2016 Monitor/TDA will also cap the maximum amount the agency worker receives. It is expected that these maximum wage rates³ will be set at a level similar to those of substantive staff but this remains at the discretion of Monitor/TDA. As set out in the conditions for approval in Table 3, new framework contracts are required to contractually embed 'NHS Improvement maximum wage rates' so that the framework agreements do not permit any amount in excess of Monitor/TDA maximum wage rates. Monitor/TDA reserve the right to vary the maximum rates and price caps.
16. As set out in the conditions for approval in Table 3, new contracts are required to contractually embed the gross maximum wage rates **and** ensure the total charge is less than or equivalent to the price caps for all staff groups. The maximum wage rates will be published on 1 April 2016 to support the tendering of new framework agreements.
17. As set out in the conditions for approval in Table 3, Monitor/TDA will grant approval where framework operators can provide evidence that agencies on the framework agreements are seeking regular assurances from workers that workers are complying with IR35 legislation when engaging with a trust via a personal service company (PSC). Agencies should seek these assurances to be eligible for a place on the framework agreement. As with all conditions in Table 3, at the point of application there should be a plan to make this the case as soon as possible and by 1 November 2016 at the latest.
18. There will be no formal exemption mechanism for trusts. Monitor/TDA expect all trusts to move all agency procurement on to approved framework agreements. In exceptional circumstances, Monitor/TDA may grant approval for a trust to use an agreement with an agency, but this will only be where a trust can demonstrate equivalent or better value for money than the approved framework agreements, including equivalent or lower prices, than the prevailing price caps (see [price cap reference tables](#)). Trusts would need to apply for these to be considered on a case-by-case basis. We expect these instances to be rare.

Ongoing review

19. We will engage with framework operators over the coming months to review whether they meet the conditions in Tables 1 to 3 by the relevant deadlines.

³ Wage caps will be set at substantive levels but include a small allowance in lieu of the benefits that substantive staff receive, eg holiday pay. Employer national insurance and employer pension contributions are not included in the wage cap but are included in the total price cap, along with any agency fee and framework fee. No other payments will be permitted to the worker.

20. We will reconsider the approved status of framework agreements that do not meet the conditions in Tables 1 to 3, and they will risk having that status removed. If that happens, we will notify trusts that they can no longer use that particular framework agreement and allow trusts a reasonable time, at our discretion, to adjust their arrangements to approved framework agreements.
21. We will support framework operators as much as possible to meet the conditions in these rules.

Please contact agencyrules@monitor.gov.uk with any questions about the application process.

Please complete the [application form](#) for approval.

At the point of application, **framework agreements** should meet the conditions set out in Table 1.

Table 1: Conditions required at point of application

Condition	Requirement on framework agreement	Evidence required
Legal status	<ul style="list-style-type: none"> Framework agreements must be live and procured in accordance with the EU public contracts directives as implemented by the Public Contracts Regulations 2006 or the Public Contracts Regulations 2015 (the 'Regulations') 	<ul style="list-style-type: none"> A copy of the contract notice for live framework agreements and published contract award notice
Value for money	<ul style="list-style-type: none"> Transparent and value for money rates of pay to the worker and agency fee, with no hidden charges or fees, and with pay to worker identified separately 	<ul style="list-style-type: none"> Rate cards outlining all details in relation to charge rate including a breakdown of worker pay, national insurance, pension, any Agency Worker Regulation requirements, agency fees and framework fees Demonstrate that processes are in place to review rate cards against rates actually paid by trusts that call off services from the framework agreement A copy of: <ul style="list-style-type: none"> the framework agreement the Invitation to Tender (ITT) an example contract between the framework and an agency awarded a place on the framework
Quality and cost improvement and control	<ul style="list-style-type: none"> Transparency of agencies on the framework, including key subcontractors Assurance on quality of supply under the framework agreement and control on cost of agency supply under the framework agreement 	<ul style="list-style-type: none"> A list of the awarded agencies (ie framework suppliers) and key subcontractors (ie those directly relevant in the provision of the services), where subcontracting is permitted under the terms and conditions of the framework agreement. Details on the framework's processes for ensuring that key subcontractors adhere to the same core conditions as the

	<p>agencies</p> <ul style="list-style-type: none"> • Agencies have capability to supply high quality, trained and fully vetted temporary staff and effective framework processes to ensure they maintain NHS-required standards for workers
	<ul style="list-style-type: none"> • Scoring criteria for awarding agencies a place on the framework agreement (including quality/price ratio) • An explanation of the process for the framework operator to conduct audits of the framework suppliers' performance under the framework agreement. This should include evidence of the framework operator's ability to obtain through the audit details of standards applied by the agencies, in respect of pre-recruitment compliance checks of agency personnel, including referencing and identity checks (eg minimum requirement of NHS Employers' six check standards) • Details of the audit and compliance process to audit agencies (framework suppliers), clearly outlining the escalation process, what would be considered a serious breach and what action can be taken (see below) • Sample audit findings and evidence of communications to the call-off customers (eg trusts) on the audit outcomes at framework level • Process for responding to adverse audit findings at framework level, including evidence of: <ul style="list-style-type: none"> ○ clear guidelines on the process and timescales for informing trusts of failures and remedial action relating to the agencies they use ○ circumstances which would result in the framework authority taking action against the agencies ○ escalation process and timescales for agencies found in breach of the framework agreement as a result of an audit, eg evidence that the framework authority can conduct an

		<p>investigation, instruct the agency to withdraw an unsuitable worker or address other contractual failings, carry out re-inspections, suspend/remove unsuitable agencies from the framework)</p> <ul style="list-style-type: none"> • The number of adverse findings over the last 12 months, how these were responded to at the time, the status of any unresolved issues and whether the affected agencies received support to return to compliance • Policy/process showing the audit/review of invoicing process <p>• Evidence/documentation of how agencies are monitored and managed, ie extract from contract on supplier management, example communications sent to agencies</p>
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In addition to the conditions set out in Table 1, the **framework operator** also needs to commit to and provide a plan to meet the conditions in Table 2 as soon as possible and by 1 April 2016 at the latest.

Table 2: Conditions required by 1 April 2016 at the latest

Condition	Requirement on framework operator	Evidence required
Value for money	<ul style="list-style-type: none">• Support trust negotiations with framework agencies and therefore play an important role in promoting trusts and agencies to meet Monitor/TDA's caps as far as possible within the terms and conditions of the framework and more widely, helping trusts deliver actual savings on their agency expenditure• Communicate to trusts the agencies whose standard rates are equal to or below the price caps set by Monitor/TDA• Development of agency comparison tables to ensure trusts can easily understand the rates payable on the framework with different agencies	<ul style="list-style-type: none">• Evidence of, or plan for, how frameworks will ensure maximum compliance under the framework agreement's existing conditions to the price caps• Evidence of, or plan for, how framework operators will communicate to trusts:<ul style="list-style-type: none">○ which agencies' framework rates are equal to or below the price caps set by Monitor/TDA○ regularly updated agency comparison tables to trusts, including which agencies are supplying to trusts in line with the price caps set by Monitor/TDA

Framework operators also need to commit to and provide a detailed plan on how they intend to meet the conditions in Table 3 as soon as possible and by 1 November 2016 at the latest.

Table 3: Conditions required by 1 November 2016 at the latest

Condition	Requirement on framework agreement	Requirement on framework operator	Evidence required
Value for money	<ul style="list-style-type: none"> • Maximum worker pay rates, at rates specified by Monitor/TDA, are contractually embedded into the framework agreements so that the framework agreement (and any call-off terms therein) do not permit any amount paid in excess of these maximum worker pay rates (which are to be published on 1 April 2016), other than through the override process – see point * below • Framework agreements must also ensure that the total trust charge for an agency worker per hour is no more than the corresponding Monitor/TDA price caps throughout the life of the framework. This requirement should also be contractually embedded in the framework agreement (and any call-off terms therein) • * Framework agreements need to include a mechanism for trusts to stay on framework where trusts have to override the Monitor/TDA caps to secure a worker on exceptional 		<ul style="list-style-type: none"> • Plan for how they will ensure that the maximum wage rates are embedded into the framework agreements, will be enforced, and that all prices paid for agency workers will be less than or equivalent to the agency price caps • Plan on how the framework agreement will permit overrides only on exceptional safety grounds

	<p>patient safety grounds. Such a mechanism must be on a shift basis. There should be no other means of escalation within the framework</p>	<ul style="list-style-type: none"> Framework operators need to hold agencies to account if they are not meeting the framework rates (which, will be the price caps and maximum wage rates) 	<ul style="list-style-type: none"> Plan for how procedures and processes will hold agencies to account for meeting framework terms and conditions including framework rates
Quality and cost improvement and control		<ul style="list-style-type: none"> Framework operators should have processes for ensuring accessibility, and provide fair and open competition for agencies that wish to join the framework at the point of tender 	<ul style="list-style-type: none"> Reference to the process for advertising for agencies to join frameworks at the point of tender
Other	<ul style="list-style-type: none"> Framework operators must ensure that agencies on the framework agreements are seeking regular assurances from workers that workers are complying with IR35 legislation when engaging with a trust via a personal service company (PSC). Agencies should seek these assurances to be eligible for a place on the framework agreement 	<ul style="list-style-type: none"> Framework operators are willing to work with NHS Improvement to improve transparency and data quality on compliance to the agency rules, for instance sharing management information where appropriate 	<ul style="list-style-type: none"> Plan for how procedures and processes will ensure agencies are seeking these regular assurances from workers

Annex 1 – Milestones for framework operators

Date	Milestone
18 February	Publication of guidance for framework operators
3 March	Initial deadline for framework operators to apply for approval. However applications will be considered on an ongoing basis
Week beginning 14 March	Announce approved framework agreements based on applications received by 3 March
1 April	New rules on mandatory use of approved frameworks for trusts take effect
1 November	The latest date that approved frameworks and pricing structures must fully reflect conditions in this guidance

Annex 2 - Definitions and scope

Framework

22. All framework agreements must be procured in accordance with the EU public contracts directives as implemented by the Public Contracts Regulations 2006 or the Public Contracts Regulations 2015.
23. The Regulations define a framework agreement as: “an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies”.

Agency staff

24. Agency staff are defined as those who work for an NHS but who, for the purposes of the transaction, are not on the payroll of the NHS organisation offering employment.

Procurement should be classified as agency expenditure where:

- an in-house bank is unable to fill a shift directly and sources the shift from a third-party agency
 - an outsourced bank (including but not limited to NHS Professionals) is unable to fill a shift directly and sources the shift from a third-party agency
 - an agency fills a shift directly
 - an agency finds a worker to fill a shift, but the trust pays the worker directly for that shift and pays the agency a finder's fee (all this expenditure, including payment to the worker and on-costs, should be classified as agency expenditure).
25. As set out in the price cap rules published on 23 November 2015, price caps apply when staff are paid through their own limited/personal services company (see para 4.6 of the [price cap rules](#)).

Scope of the agency rules

26. The mandatory use of approved frameworks will apply to:
 - all NHS trusts
 - NHS foundation trusts receiving interim support from DH
 - NHS foundation trusts in breach of their licence for financial reasons.
27. There is a strong expectation that all other NHS foundation trusts will comply. It is a condition for receipt of funding from the Sustainability and Transformation Fund that trusts comply with all the agency rules.