

Agency rules Framework agreement approval: guidance for framework operators

February 2017

From 1 April 2016, NHS Improvement mandated all trusts in scope of the agency rules¹ to procure agency staff via NHS Improvement-approved framework agreements.

This guidance sets out how framework operators can apply for framework agreements to be approved by NHS Improvement for use by trusts. Annex 1 sets out definitions and the scope of this guidance.

The rules on agency expenditure announced on 1 September 2015 and amended on 23 March 2016 can be found [here](#).

Rationale

1. Framework operators have an important role in helping trusts comply with the agency rules. Procuring via framework agreements is a way of enabling trusts to comply with the price cap policy. This is, of course, just half the picture: trusts' primary role in complying with the caps is to achieve a sustained reduction in agency expenditure. NHS Improvement will continue to take the appropriate regulatory action regarding trust compliance with the agency rules.

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.

2. These 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 agency [price cap rates](#).

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 have been required to procure agency staff (nurses, doctors, other clinical and other staff groups) via framework agreements that have been approved by NHS Improvement.²
4. Any procurement off-framework or via unapproved framework agreements after 1 April 2016 is regarded as not compliant with the framework rules and all shifts must be reported as overrides in the weekly override report to NHS Improvement. 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 NHS Improvement.

What this means for framework operators

5. Framework operators are asked to seek approval from NHS Improvement for all framework agreements that supply agency staff to the NHS.
6. NHS Improvement reviews applications as they are submitted and communicates outcomes to framework operators and trusts, including any updates to the list of approved framework agreements.
7. Framework operators are required to seek approval for each of their framework agreements that provide agency staff to NHS trusts and foundation trusts.

Conditions for approval

8. Framework agreements are approved where, at the point of application, NHS Improvement is satisfied that the framework agreement meets all the conditions in Tables 1 and 2.

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

9. Tables 1 and 2 of this document set out the evidence required for NHS Improvement to approve framework agreements.
10. We may contact framework operators to discuss applications and request further information where necessary.
11. To be approved, framework agreements must meet all the conditions in Tables 1 and 2. However, in exceptional circumstances, NHS Improvement will exercise discretion to approve agreements where they partly meet conditions and framework operators have a clear plan to meet them fully in an appropriate timescale.
12. As set out in the conditions for approval in Table 1, NHS Improvement 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. Agencies should seek these assurances to be eligible for a place on the framework agreement.
13. There is no formal exemption for trusts. NHS Improvement expects all trusts to move all agency procurement on to approved framework agreements. In exceptional circumstances, NHS Improvement may grant approval for a trust to use an agreement with an agency, but only 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.

Ongoing review

14. We will reconsider the approved status of framework agreements that do not meet the conditions in Tables 1 and 2, and they will risk having that status removed. If that happens, we will notify trusts 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.
15. We will support framework operators as much as possible to meet the conditions in these rules.

Please contact NHSI.agencyrules@nhs.net 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 Tables 1 and 2

Table 1: Requirements of the framework agreement

Condition	Requirement	Evidence required
Legal status	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')	A copy of the contract notice for live framework agreements and published contract award notice
Value for money	Transparent and value-for-money rates of pay to the worker and reasonable agency fee, with no hidden charges or fees, and with pay to worker identified separately	<p>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</p> <p>Demonstration that processes are in place to review rate cards against rates actually paid by trusts that call off services from the framework agreement</p> <p>A copy of:</p> <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
	Maximum worker pay rates, at rates specified by NHS Improvement, are contractually embedded into the framework agreements so that the framework agreement (and any call-off	Plan for how they will ensure that the maximum wage rates are embedded in the framework agreements, will be enforced, and that all prices paid for agency workers will

terms therein) do not permit any amount paid in excess of these maximum worker pay rates, 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 NHS Improvement 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 NHS Improvement caps to secure a worker on exceptional patient safety grounds. Such a mechanism must be on a shift basis. There should be no other means of escalation within the framework

be less than or equivalent to the agency price caps

Plan for how the framework agreement will permit overrides only on exceptional safety grounds

Quality and cost improvement and control

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

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

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 agencies

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 to pre-recruitment compliance checks of agency personnel, including referencing and identity checks (eg minimum requirement of NHS Employers' six check standards)

Sample audit findings and evidence of communications to the call-off customers (eg trusts) on the audit outcomes at framework level

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

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

Process for responding to adverse audit findings at framework level, including evidence of:

- 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

		<ul style="list-style-type: none"> - 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 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)
Other	<p>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. Agencies should seek these assurances to be eligible for a place on the framework agreement</p>	<p>Evidence of, or plan for, how frameworks will ensure that agencies are seeking these regular assurances from workers.</p>

Table 2: Requirements of framework operators

Condition	Requirement	Evidence required
Value for money	<p>Support trust negotiations with framework agencies and therefore play an important role in promoting trusts and agencies to meet NHS Improvement'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</p>	<p>Evidence of, or plan for, how frameworks will ensure maximum compliance under the framework agreement's existing conditions to the price caps</p>

	<p>Communicate to trusts the agencies whose standard rates are equal to or below the price caps set by NHS Improvement</p> <p>Development of agency comparison tables to ensure trusts can easily understand the rates payable on the framework with different agencies</p>	<p>Evidence of, or plan for, how framework operators will communicate to trusts:</p> <ul style="list-style-type: none"> - which agencies' framework rates are equal to or below the price caps set by NHS Improvement - regularly updated agency comparison tables to trusts, including which agencies are supplying to trusts in line with the price caps set by NHS Improvement
	<p>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)</p>	<p>Plan for how procedures and processes will hold agencies to account for meeting framework terms and conditions including framework rates</p>
Quality and cost improvement and control	<p>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</p>	<p>Provide a copy of the process for advertising for agencies to join frameworks at the point of tender</p>
	<p>Audits/review of invoicing, ensuring management information is high quality and fit for purpose, and separately identifies worker pay and agency fee</p> <p>Robust performance management and monitoring of agencies</p>	<p>Policy/process showing the audit/review of invoicing process</p> <p>Evidence/documentation of how agencies are monitored and managed, ie extract from contract on supplier management, example communications sent to agencies</p>
Other	<p>Framework operators are willing to work with NHS Improvement to improve transparency and the quality of data on compliance to the agency rules, for instance sharing management information where appropriate.</p>	<p>Declaration on form.</p>

Annex 1: Definitions and scope of this guidance

Framework

16. 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.
17. 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

18. Agency staff are defined as those who work for the 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).
19. As set out in the [agency rules in March 2016](#), when staff are paid through their own limited/personal services company the maximum payable is the maximum worker rate, plus an allowance for the holiday pay element of the Agency Worker Rules. The agency fee should be the same as for workers being paid through pay as you earn (PAYE) (see paragraph 8 of the [Agency Rules](#)).

Scope of the agency rules

20. The mandatory use of approved frameworks applies to:

- all NHS trusts
- NHS foundation trusts receiving interim support from DH
- NHS foundation trusts in breach of their licence for financial reasons.

21. 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. Agency spend and the proportion of temporary workers are measured in the Single Oversight Framework.

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