

Preliminary Market Engagement

WELCOME TO CLARITY

The Question

“When engaging in preliminary market engagement, how do you ensure equal treatment, avoid undue supplier influence, and encourage active participation from suppliers, including SMEs and social enterprises?”

Why do it?

Benefits

- Increase market awareness and generate interest
- Help understand what the market can deliver and scope the requirement
- Understand issues with deliverability and risk allocation
- Smoother procurement process

Drawbacks

- Risks of distorting competition
 - May put some suppliers off – perception of favouritism
 - May result in exclusion of those who have participated
 - Need to build extra time into the process
 - Potential for challenge
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What to consult on?

- Exclusion grounds such as minimum turnover and insurance thresholds, accreditations
 - Appropriateness of fixed pricing
 - Use of lots
 - Service Delivery
 - Horizon scanning – inform how to frame “clear, precise and unequivocal” review clauses to catch potential innovations
 - Contract Drafting – risk allocation, liability caps, permissibility of sub-contracting, intellectual property transfers
 - Deliverability of added value and community benefits – understand what the market will bear
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Legal Basis

Preliminary market consultation

41.—(1) Before commencing a procurement, a contracting authority **may** conduct market consultation with a view to **preparing the procurement and informing economic operators** of the authority's procurement plans and requirements.

(2) For this purpose, a contracting authority **may act as it considers appropriate**, including seeking or accepting advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it **does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.**

Regulation 41

- Permissive – you don't have to do it, but it is considered best practice (see Procurement Journey and UK Government Guidance)
 - Wide discretion to the authority – “may act as it considers appropriate”
 - Provided no distortive effect and no breach of equal treatment and transparency principles
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How do you ensure equal treatment?

Regulation 42(2)

- Must take appropriate measures to avoid distortion including:-
 - Sharing all relevant information exchanged or resulting from the process (although consider confidentiality obligations)
 - Fixing adequate time limits for tender submission – provide enough time for others to catch up during the tender process
 - Other measures:
 - script meetings with pre-determined list of questions
 - keep a record of all discussions
 - consider format: esp if 1:1 meetings are appropriate
 - advertise opportunity to participate
 - consider practicalities and accessibility (i.e. place and time of any supplier's day, electronic participation)
 - Audit – must record the measures taken in the Procurement Report
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Consultant Connect v NHS Bath etc HT-2021-000154

- Process was “unorthodox”.
 - Held not to be pre-market engagement at all, but rather an undisclosed step in the procurement process.
 - Even if it had been it would have had distortive effect.
 - *“Cinapsis was positioned as the front runner before the supposed testing of the market”*
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Possible Exclusion?

- Duties of equal treatment and transparency apply to all, including those involved in the process
 - Regulation 43(3): Must only exclude where “no other means” to ensure equal treatment and only after having given them an opportunity to prove that there would be no distortive effect
 - Codification of Fabricom
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Overlap with Conflict of Interest

- Regulation **25.**(1) A contracting authority must take appropriate measures to prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.
 - European Dynamics v EU Intellectual Property Office T556/11) – PWC UK and PWC Belgium had been engaged to prepare part of the specification for a tender ultimately won by PWC Spain. Held that appropriate investigations had been carried out and potential for conflict appropriately managed.
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How do you avoid undue supplier influence?

- How do you use the information gathered?
 - **Regulation 19(2)** - A contracting authority must not design a procurement with the intention of artificially narrowing competition (i.e. where designed with the intention of unduly favouring or disadvantaging any particular economic operator).
 - Consider having different personnel involved in the evaluation than those who have carried out PME - Consultant Connect again
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Scoping the Specification

What if a preferred option emerges?

- 43(9) Technical specifications must afford equal access of economic operators to the procurement procedure and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
 - Make sure all of the other rules of Regulation 43 are followed i.e. not specifying labels, output based specifications etc.
 - Carry out own research of the market and available solutions
 - Approach supplier proposed solutions sceptically and consider verifying findings with a 3rd party.
 - Cases:
 - Concordia Bus C513/99 – ok to specify an output that was known could only be provided by one supplier (buses powered by natural gas) as it was specific and objectively justifiable and linked to the subject matter of the contract
 - Eleкта v the Common Services Agency [2011]CSOH 107 (OH) – ok to specify compatibility with existing system
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How to Encourage Active Participation from Suppliers (inc SMEs and Social Enterprises)

- Suppliers need to be confident that the process is genuine and that feedback will be considered – not just lip service
 - Who to engage with?
 - Wider than just suppliers – reference in the Regs to independent experts and other authorities
 - No “right” number – a wide range and mix of suppliers to represent a reasonable sample of the sector
 - Proportionate – there is a cost to suppliers
 - Consider engaging a 3rd party to select invitees
 - Targeted events for SMEs or Social Enterprises
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Challenges

- Interesting questions as to when the 30 day clock starts ticking
 - Can help a later challenge to show that the authority took time to understand the market
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