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White Paper Conference - Optimising Preliminary Market Engagement

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Agenda

- What is preliminary market engagement?
- Why do preliminary market engagement?
- Barriers to preliminary market engagement
- How to engage with suppliers
- The procurement process following preliminary market engagement
- Preliminary market engagement under the Procurement Act 2023

What is preliminary market engagement?

- The process of engaging with potential suppliers before a contracting authority begins a process of procuring goods or services – also known as “soft market testing”
- Enables contracting authorities to
 - Understand from the market what is possible
 - Open and transparently discuss “the problem” and possible solutions
 - Write clearer requirements
 - Encourage competition
 - Gain a better understanding of cost at an early stage
 - Explore opportunities for delivering aspects such as innovation, social value or Net Zero
- Expressly permitted under reg 40 PCR 2015/reg 58 UCR 2016 provided that equal treatment, non-discrimination etc maintained

Why do preliminary market engagement?

“Early market engagement provide the foundation for a successful procurement by helping buyers make fully informed decisions” (Crown Commercial Service - [How to carry out early market engagement successfully – Procurement Essentials - CCS \(crowncommercial.gov.uk\)](#), 15 April 2024)

“Preliminary market engagement is a particularly important tool for the achievement of value for money” (Cabinet Office - [Guidance: Preliminary Market Engagement \(HTML\) - GOV.UK \(www.gov.uk\)](#), 12 April 2024)

“Making the most of the opportunities available through competition starts from departments designing realistic requirements for goods and services and using these to inform their sourcing approach...Departments need to engage the market sufficiently by consulting potential suppliers and providing information to the market in a way that does not favour particular suppliers” ([Competition in public procurement: lessons learned - National Audit Office \(NAO\)](#), July 2023)

“All potential outsourcing projects should include an assessment of the market early on during the preparation and planning stage” (Cabinet Office - [Sourcing Playbook](#))

Barriers to preliminary market engagement

- Equal treatment of suppliers must be maintained, but it's not always clear how

“It's a myth that it's unethical to talk directly to suppliers about your requirements before launching a formal procurement process” (Crown Commercial Service - [How to carry out early market engagement successfully – Procurement Essentials - CCS \(crowncommercial.gov.uk\)](#), 15 April 2024)

“Cabinet Office guidance encourages [preliminary market engagement], but stakeholders told us that departments often take an overly cautious approach to engagement and are not always clear on what they can do. We have reported on cases where the benefits of competition have been reduced because this opportunity to prepare has been missed.” ([Competition in public procurement: lessons learned - National Audit Office \(NAO\)](#), July 2023, Summary para 11)

How to engage with suppliers (1)

Regulation 40 of the Public Contracts Regulations 2015:

“(1) Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, contracting authorities may, for example, seek or accept 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.”

How to engage with suppliers (2)

- No supplier must be given a competitive advantage
- Be open and transparent
- Maintain commercial confidentiality
- Keep a record of discussions
- Ensure fairness to all suppliers – information shared with one supplier must be shared with all
- Make suppliers aware that any resulting procurement will be conducted competitively

How to engage with suppliers (3)

- How to identify suppliers:
 - Advertisement e.g. PIN, website announcement?
 - Market/internet research?
 - Approved supplies on a framework?
- How many suppliers? Not too many but look for a good cross-section of the sector
- Articulate the purpose and intended outcome and communicate these to suppliers
- What's the format: face-to-face presentations, webinars, workshops, site visits, one-to-one meetings?
- Consider the market's resources in time and cost – be proportionate

The procurement process following PME

- Information obtained must not be used for/against any suppliers (such as SMEs) – for example by writing requirements in a way that unfairly excludes or favours a particular supplier
- Don't use information/requirements that have not been shared with all suppliers
- Be careful re commercial confidentiality
- Provide feedback

Preliminary market engagement under the PA 2023 (1)

- Preliminary market engagement permitted for specified purposes:
 - Developing the authority's requirements and approach to the procurement
 - Designing a procedure, conditions of participation or award criteria
 - Preparing the tender notice and associated tender documents
 - Identifying suppliers that may be able to supply the goods, services or works required
 - Identifying likely contractual terms
 - Building capacity among suppliers in relation to the contract being awarded
- Must not put suppliers at a competitive advantage or distort competition

Preliminary market engagement under the PA 2023 (2)

- Where preliminary market engagement is carried out, the contracting authority must:
 - Publish a preliminary market engagement notice (**PME Notice**), or
 - Explain in a tender notice why no PME Notice was published
- A PME Notice can be published after preliminary market engagement has taken place but before publication of a tender notice
- No obligation to carry out preliminary market engagement, nor any obligation to explain why no preliminary market engagement was carried out
- No obligation to proceed with a procurement where a PME Notice has been published and no obligation to publish a procurement termination notice

Preliminary market engagement under the PA 2023 (3)

- Content of the PME Notice:
 - Information about the contracting authority, contract subject-matter, date on which the preliminary market engagement closes or closed, and
 - a description of the process by which the CA intends to engage, or has engaged, with suppliers, for example location, date and time of events and any periods for the submission of expressions of interest and information by suppliers
- Conflicts of interest assessment
 - Requirement to take reasonable steps to identify and mitigate any conflicts of interest or potential conflicts of interest

Preliminary market engagement under the PA 2023 (4)

- Perhaps more actively encouraged under the PA 2023 than the present rules
- More upfront admin: PME Notice, need to explain process for engagement, conflicts assessment
- Same challenges re maintaining fairness and avoiding distortions of competition

Thank you for listening!