



Oifig an Phríomh
Atur nae Stáit
Chief State
Solicitor's Office

Preliminary market engagement White Paper Conference

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27 September 2023



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- Topic for consideration
- 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?



Issues I will address today:

Legal basis

Potential Legal Issues

Means of engagement to ensure equal treatment

Example of a recent bespoke RFI to address a specific market concern

SMEs and preliminary market investigations

Social Enterprises and preliminary market investigations – some examples



Article/Regulation 40 of Directive 2014/24/EU and the Procurement Regulations

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

(2) For the purposes of paragraph (1), a contracting authority may seek or accept advice from independent experts or authorities or from market participants



(3) The advice referred to in paragraph (2) may be used in the planning and conduct of the procurement procedure, where the use of such advice does not—

- (a) have the effect of distorting competition, or
- (b) result in a violation of the principles of non-discrimination and transparency



Little or no case law at EU or national level on Article 40 of Directive 2014/24/EU

Decision of the Italian Council of State (ruling 6302 of 23 September 2019)
- preliminary market enquiry on future procurement of **electro-medical equipment maintenance services** – limiting participation to the manufacturer or its associates prevented participation in the market consultation of those who did not have a connection or commercial agreement with the equipment manufacturer

Fabricom case C-21/03 and C-34/03 3 March 2005 - Belgian law containing an absolute prohibition on involvement in the tender process for a party which has carried out preparatory works. The Court held that this was a disproportionate method of attaining the objective of equal treatment of tenderers.

Fabricom case law now codified in Article/Regulation 41



Potential Legal issues:

Excluding economic operators from the engagement through lack of transparency or otherwise

Using the engagement as a consultancy exercise to find a particular solution which the CA then adopts as its requirement in a subsequent RFT - breach of Article/Regulation 18(2) – design of competition with the intention of artificially narrowing competition/intention of unduly favouring or disadvantaging certain economic operators

Unequal levels of engagement with market participants

Agreeing to unsolicited meeting(s) with potential suppliers to consider its proposed product or service thereby raising the potential claim of undue supplier influence

Sharing confidential information or trade secrets

Failure to document meetings as part of Article/Regulation 84 Report



Less likelihood of a challenge based on Article 40/Regulation 40 as the preliminary market engagement is at a stage **before** the commencement of the procurement procedure

Legal issue can still arise and find their way into pleadings but usually with reference to breach of Article/Regulation 18 combined with other alleged breaches

Discovery by Applicants in JR proceedings tend to seek to discover issues at all stages of the procurement procedure and before its commencement particularly where they suspect or hope to find documentation which might demonstrate engagement with the market which lead to a distortion of competition or a violation of the principles of equal treatment or transparency and then seek to amend the Statement of Grounds



Methods of Engagement to ensure equal treatment – Article/Regulation 40 is permissive rather than prescriptive

CA is free to decide how and with whom to conduct preliminary market engagement provided that competition is not distorted and the principles of non-discrimination and transparency are respected

Not limited to market participants. CAs often consult with representative bodies of market participants, regulatory bodies, end consumers, academics etc.

Need for CA to carry out its own research first and also not to rely **only** on the market participant responses – analysis and conclusions to be documented

OGP and CAs sometimes have the information obtained independently verified.

A well conducted and documented market assessment can be useful in a subsequent legal challenge (**Copymore** [2016] IEHC 709 and **Word Perfect** [2022] IEHC 101)



PINs and RFIs published on eTenders are the preferred approach to alert/prepare suppliers and to receive information which will inform the procurement on matters such as turnover threshold, pricing, insurance levels, use of lots and insurances

Written requests for the same information ensures transparency and equal treatment but, where there are face to face meetings, any information provided by the CA should be made available to all potential tenderers in the RFT

Template RFIs have been developed and there will be some differences depending on the market involved **BUT** RFIs are not the only form of engagement.

The competition for the new search and rescue aviation service for the Irish Coast Guard concluded at the end of May 2023 was preceded by a PIN and a webinar some years previously where potential tenderers attended (on an anonymised basis) an event hosted remotely by the CA and written questions were answered during the webinar



A recent example of a **bespoke RFI** which involved a number of rounds of market engagement (**including face to face meetings**) prior to the publication in September 2023 of an RFT is the OGP Framework for Infrastructure as a Service (IaaS) which is an **open competition**

One of the biggest challenges Public Service Bodies (PSBs) have faced is the unwillingness of the Cloud Service Providers (CSPs) to sign up to the State's terms and conditions following the conclusion of a competition

At the conclusion of the competition, there is often a push by the tenderers to require the PSB to accept CSP terms and conditions as part of the solution. This could give rise to a breach of the Procurement Regulations and, as such, is usually resisted by PSBs



This can then lead to a situation where the successful tenderer is signing the State's contractual terms on the one hand and separately signing a CSP contract to host the system

These contracts would likely contain conflicting provisions particularly regarding issues like Data Protection and GDPR compliance

While the tenderer is taking the commercial risk in this scenario, and PSBs can satisfy their procurement obligations, it does still involve risk to PSBs in terms of GDPR compliance as the Data Controllers with ultimate responsibility in respect of any personal data which they choose to host in the cloud



In order to mitigate these concerns and reduce the risk for PSBs, the OGP hope to put in place a series of frameworks for cloud services, starting with IaaS: Infrastructure as a Service (purchase of computing resources e.g. hosting, storage, processing and compute power)

As a precursor to the publication of a Framework competition and in light of the specific challenges around terms and conditions, the OGP undertook a consultation process with the market on a draft services contract intended specifically for the cloud market

This process had many different features to the normal RFI where the OGP considers written responses to a number of relatively standard questions without further engagement



An initial draft IaaS contract was prepared by OGP together with the CSSO and a consultation process was launched to the market on the 12 December 2022 by Minister of State Ossian Smith and OGP/OGCIO

Extensive written feedback on the draft contract included in the bespoke RFI was received from a number of different IaaS providers

This feedback was reviewed carefully and revisions and updates were made to the draft contract to reflect the market realities while also protecting citizens' data and ensuring compliance with public procurement and GDPR obligations



Among the more significant revisions are:

- a. The inclusion of Cloud Service Providers' terms and conditions within the overall contract hierarchy subject to certain defined parameters
- b. The provision of clarity in relation to the responsibilities of both parties in line with the technical realities of how IaaS is delivered – the 'Shared Responsibility Model'
- c. The inclusion of a comprehensive set of data definitions including separate definitions for Client Data and User Data to enable the parties to better manage their respective data security and GDPR obligations



The contract as drafted is also consistent with similar central arrangements concluded in other jurisdictions to which the CSPs have signed up (e.g. Italy, Germany, the Netherlands, Digit/EU Institutions). The revised contract was published to the respondents (but not to the market generally) on 16 June 2023

Following publication, each respondent was offered an opportunity to meet with OGP to address any clarifications they might have. The OGP together with the CSSO met separately in face to face meetings with each of the respondents who requested a meeting

In order to ensure equal treatment the same issues were discussed with each respondent during meetings of equivalent duration and a note was kept of each meeting



Following the conclusion of this consultation process, the OGP incorporated the final draft contract into the Framework RFT which was published to the market on 8 September 2023 in an **open competition**.

The revised contractual terms and conditions are intended to represent a fair and equitable balance of risk which it is hoped will be sufficiently acceptable for a sufficient number of market participants to respond to the new central arrangement

While the revised contract is specific to IaaS, these contractual terms and conditions will also inform contracts for the future procurement of other types of cloud services including SaaS



SMEs

Legal Basis: SME participation is addressed in 8 Recitals and Article 46 of Directive 2014/24/EU and in Regulation 46 (division into lots)

D/PER Circular 5/2023 (which replaces D/PER Circular 10/2014) outlines ways in which SME's can be facilitated in public procurement competitions (lotting, consortium bids, open tendering, turnover, insurance)

But how can SMEs be encouraged to participate in preliminary market investigations?

Encourage to register on eTenders to receive email alerts. Contact also through intermediary organisations and regional development organisations that have a good knowledge of the SME market players in a given sector or through targeted “**Meet the Buyer**” events which is discussed below under construction contracts



Social Enterprises – Poor Relations in Procurement

Definition from the Department of Rural and Community Affairs

“An Enterprise whose objective is to achieve a social, societal or environmental impact, rather than maximising profit for its owners or shareholders”

It pursues its objectives by trading on an ongoing basis through the provision of goods and/or services and by re-investing surpluses into achieving social objectives

It frequently works to support disadvantaged groups such as the long-term unemployed, people with disabilities, Travellers and marginalised groups or to address issue such as food poverty, social housing or environmental issues

Social Enterprises may often be best placed to deliver certain types of contract, for example, services to deprived sections of the community so there is a need to involve them in preliminary market investigations



Social Enterprises face difficulties in public procurement competitions given their scale and their focus and might not regularly participate in preliminary market enquiries or above threshold procurement competitions

Social Enterprises are often more involved in receiving grants under various schemes at local levels (SICAP, LEADER) or in competing for reserved contracts

There is an emerging policy on social enterprise run by the Department of Rural and Community Affairs which is a whole of Government policy. The main aim of the National Social Enterprise Policy for Ireland 2019-2022 is to help Social Enterprises to grow in scale, support jobs and make a positive impact on individuals and communities in rural and urban areas. This is to be updated in November 2023. Promoting enabling participation in public procurement is part of this initiative

The Department of Justice and Equality has its own Social Employment Strategy 2021 – 2023 which is a strategy co-designed with Pobal to increase the employment progression prospects of people with criminal convictions through various methods including the use of targeted recruitment and training clauses



Some Irish Prison Service Initiatives

In 2021: – trialled inclusion of social clause in below threshold contract for the removal and recycling of prison mattresses through the Request for Quote process which was won by a social enterprise who employs ex prisoners and members of the travelling community

2022: Reserved contract (Article/Regulation 20) seeking a Social Enterprise operator for their canteen facility in their Headquarters in Longford

2023: The OGP is running a Shift to Sustainable Procurement (including social clauses) across all Care & Rehabilitation contracts in the IPS – contract performance clause inserted as a special condition to report on level of training and employment of persons with criminal convictions

2023: Supply of Barista equipment & training contract across prisons– **prisoners included in training** and received jobs as Baristas on their release



Social Enterprises and Construction contracts:

Preliminary market engagement with Social Enterprises specifically in mind was first pioneered in large scale construction contracts in the State

The procurement competition for the construction of the new children's hospital recognises the importance of Social Enterprises in the vicinity of the site

As part of premarket engagement a Community Benefit Programme was established to maximise benefit to the local community in terms of construction jobs as well as longer term jobs in the hospital

The contractor was requested to host a Meet the Buyer market consultation event where many Social Enterprises/SMEs attended and to assist suppliers in obtaining standards or needs required to enter the supply chain and to trial small volumes of work with micro-enterprises

SMEs and Social Enterprises in the vicinity of the construction site were identified and while there was no requirement to work with the identified companies, the clause states that the contractor *“shall engage positively with potential suppliers and subcontractors identified at the Meet the Buyer event”*



Conclusion:

It is ironic but refreshing that I am ending this presentation with a good news story concerning the construction of the children's hospital

What that story demonstrates is that a well planned and conducted preliminary market engagement can have positive outcomes for SMEs and Social Enterprises in any event leaving aside other noted difficulties

On the flip side a preliminary market engagement which is poorly conducted and analysed has the potential to lay traps for a possible challenge to a future procurement competition

Fear of litigation should not, however, be a bar to CAs engaging in preliminary market engagement and, in particular, the further consideration and use of social clauses involving targeted recruitment and training



Sources:

Information on Social Enterprise aspects of the construction contract for the children's hospital was obtained from a report by Dr Deirdre Halloran in 2020 for the Community Action Network

Information of the Italian Council of State Case was obtained from a report by CircPro Intereg Europe entitled "Preliminary Market Consultations as a way to involve business in public procurement"

Information on Social Enterprises was taken from the Department of Rural and Community Affairs website

Information on Department of Justice initiatives for Social Enterprises was obtained from a presentation entitled "Sustainable Procurement Practices and the Irish Prison Service 2023" by Edel Higgins Principal Officer and a presentation entitled "Social Enterprise and Employment Strategy 2021-2023 – purchasing wisely –maximising social impact through sustainable procurement practices" by Siobhán Cafferty

Office of Government Procurement Information Notice entitled "Incorporating social considerations into public procurement"

Insights and information was also provided by colleagues in the CSSO, officials in the OGP and Government Departments with a special thanks to Siobhán Cafferty Social Project Manager with Pobal and the Criminal Justice Sector of the Department of Justice