



Preliminary Market Engagement

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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?

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- Reg 40:

*“may conduct market consultations with a **view to preparing the procurement and informing economic operators of their procurement plans and requirements**”*

*“may, for example, **seek or accept advice from independent experts or authorities or from market participants**”*

*“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**”*

Context:

- Reg 41:

“take appropriate steps to ensure that competition is not distorted by the participation of that candidate or tenderer”

Includes:

- communication of relevant information
- fixing of adequate time limits

Only exclude if:

- no other means to ensure compliance with the duty to treat economic operators equally (and opportunity has been given to prove involvement is not capable of distorting competition)

Context:

- Reg 24

*“Contracting authorities shall take appropriate measures to effectively **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.”*



How not to do it?



Consultant Connect Limited v
NHS Bath ICB and Others (2022)

– undisclosed evaluation of
“demos” through PME

How do you ensure equal treatment and avoid undue supplier influence?



The basics:

- Be open and transparent
- Keep a detailed audit trail of all discussions
- Ensure a fair process
- Make everyone aware the resulting competition will be conducted competitively
- No “right” number of suppliers to engage with
- Share the same information with EVERYONE (but ensure that you maintain commercial confidentiality and respect IP rights)

How do you ensure equal treatment and avoid undue supplier influence?



- Equal Treatment - Fabricom SA v Belgium
- Same access and opportunity for all for all
- Don't rely on one view (or group of views)
- Do your own due diligence
- Take care in how you use the information gathered – Reg 18(2) and (3) and in designing your specification
- Consider different staff for each stage

How do you ensure equal treatment and avoid undue supplier influence?



- Incumbent provider?
 - Information sharing obligations
 - Exclusion is last resort
 - Take care specification is not biased

How do you encourage active participation from suppliers, including SMEs and social enterprises?



- Pre-plan and consider best means of engagement – know your audience
 - Keep it simple
 - Think about the wider picture
 - Be receptive to different views
 - Keep the market informed
 - Process should be a two way flow of information
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Any questions?

Thank You

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