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**Public Procurement**

# Market Analysis, Preliminary Market Consultations, and Prior Involvement of Candidates/Tenderers

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## Introduction

Market analysis, in the context of public procurement, is a process undertaken by, or on behalf of, a contracting authority to collect information that can assist the contracting authority in defining its procurement requirements, selecting the most appropriate tender method, analysing and evaluating bids, and determining more effectively the outcome of the most economically advantageous tender.

Other terms commonly used for all or part of a market analysis process are as follows: “market study”, “market assessment”, “market research” and “market soundings”.

**Reasons for conducting a market analysis:** A thorough and well-conducted market analysis provides valuable information to the contracting authority about economic operators that would be capable of meeting its requirements and about market activity. A contracting authority can use the information obtained from a market analysis to make informed choices as to how it will conduct the procurement. A market analysis can contribute significantly to the effective management of a procurement process and to positive delivery outcomes.

**The OECD’s Procurement Toolbox indicates that the advantages of a market analysis (referred to in the Toolbox as a “market study”) are as follows:**

- “To increase awareness of the characteristics of the market and recent market developments or trends that may affect competition for the tender or that may make collusion more likely (e.g. small number of suppliers, standardised or simple products, little or no entry, etc.);
- To collect information on suppliers, their products, prices and cost structures. If possible, a comparison of prices offered in business-to-business procurement is recommended;
- To collect information about recent price changes. This will help procurement practitioners to be informed about prices in neighbouring geographic areas and about prices of possible alternative products;
- To collect information about past tenders for the same or similar products;
- To coordinate with other public procuring authorities who have recently purchased similar goods, services or works to improve the understanding of the market and suppliers.”

<https://www.oecd.org/governance/procurement/toolbox/>

**When to conduct a market analysis:** A market analysis is undertaken in the planning stage of a procurement procedure, well before the launch of the procedure.

Market analysis may be undertaken at set times during the year for purchases that are procured on a regular basis or it may be undertaken as part of the planning for a specific procurement.

**Market analysis process:** A market analysis can be a purely desk-based exercise to collect information, involving the review of a variety of sources of publicly available information about the works, supplies or services that are the subject matter of the proposed procurement and about the market in which they are available.

### Online resources for desk-based analysis

Procurement Journey Scotland is an online resource maintained by the Scottish Government that provides an in-depth, step-by-step guide concerning procurement processes, including guidance notes and template documents.

This online resource comprises three “routes” for procurement. Routes 1 and 2 relate to procurement below the EU financial thresholds, while Route 3 relates to procurement above the EU financial thresholds.

Route 3 provides, in Section A, comprehensive coverage on the preparations for procurement. The “Develop Strategy” portion of Section A includes a sub-section on “Supply Market Analysis”, which provides useful guidance notes and templates as well as a list of suggested resources for researching the market as part of the market analysis process (see “Supply market sources document” under the heading “External sources for supply market data”).

The resources listed are specific to the United Kingdom, in particular to Scotland, and are slightly out of date, but they provide a good indication of the types of resources available online that may be used for a desk-based market analysis. The resources referred to include professional purchasing organisations; public sector organisations, including policy-making bodies and representative organisations; sources of economic data; general market research information; and company overview information.

<https://www.procurementjourney.scot/procurement-journey>

Market analysis may also involve direct engagement with economic operators and other organisations with relevant expertise, such as trade bodies or chambers of commerce. Direct engagement can complement desk-based research, providing first-hand knowledge from the market’s economic operators. Direct engagement with economic operators is also commonly referred to as “market sounding”, “solicitation of supplier information”, or “preliminary market consultation”.

**Warning:** Where there is direct engagement between the contracting authority and economic operators, it is extremely important to ensure that the engagement process and the outcomes of the direct engagement are transparent, ensure equal treatment, do not distort competition, and minimise the risk of corruption.

Direct engagement with economic operators is addressed further below, and information is provided on requirements in the 2014 Public Sector Directive<sup>1</sup> (the Directive) to ensure transparency, equal treatment and competition.

**Scope of the market analysis:** The OECD’s Procurement Toolbox confirms that, at a minimum, a market analysis will generally involve the gathering of information on the following:

- structure of the market
- capabilities of economic operators
- price trends.

The scope and depth of the market analysis process will vary depending on the nature of the procurement. A simple desk-based analysis that is used to clarify the market structure, identify active economic operators, and understand prices may be an appropriate approach for standard, commoditised procurement.

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<sup>1</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

In other cases, the market analysis may be wider-reaching and more comprehensive. The contracting authority may use, for example, a market analysis process to explore the level of potential innovation in the market where the authority's requirements are unusual or complex or to assist it in preparing for the use of a life-cycle costing approach for the evaluation of a product. See SIGMA Public Procurement Brief 34, *Life-cycle Costing*, for more information on market analysis and life-cycle costing.

A market analysis may be used to gather information that could assist in strategic decision making on such issues as whether and how to divide a contracting authority's requirements into lots, the suitability of a framework agreement or dynamic purchasing, or whether to use a competitive negotiated procedure. See SIGMA Public Procurement Brief 36, *Division of Contracts into Lots*, for more information on lots.

A market analysis can also be tailored to collect and analyse information on how to achieve wider objectives, such as participation of small and medium-sized enterprises (SMEs), promotion of innovation, or support of social and economic objectives, where permissible under the EU procurement rules. See also SIGMA Public Procurement Brief 33, *SMEs in Public Procurement*.

**Record of the market analysis process:** It is important to record the process used to prepare for and conduct the market analysis so that there is a clear understanding within the contracting authority of the purpose and aims of the market analysis and of the need to ensure the transparency of the process and equal treatment. It is a good idea for the contracting authority to prepare and use a market analysis research document to identify issues that are to be considered and the process that will be followed to gather relevant information.

**Market analysis report:** At the end of the market analysis process, the contracting authority prepares a report on the market analysis. The report will be a transparent record that lists and explains the issues that have been considered, includes a record of the research sources and information used, and sets out the conclusions of the market analysis.

### Templates

OECD Procurement Toolbox – “Template for a Market Study Report”

<https://www.oecd.org/governance/procurement/toolbox/templateformarketstudyreport.htm>

Procurement Journey Scotland – “Market Summary Template Document”

<https://www.procurementjourney.scot/route-3/route-3-develop-strategy-profiling-commodity-supply-market-analysis>

### Direct engagement with economic operators as part of a market analysis

According to the Directive, a contracting authority may engage directly with economic operators as part of a market analysis. The process needs to be planned and managed very carefully so as to avoid the risks of lack of transparency, unequal treatment, or distortion of a subsequent competition.

The Directive includes provisions, in Articles 40 and 41, related to such direct engagement, using the term “preliminary market consultations”. A summary of these provisions, with comments, is set out below.

**Article 40 – Preliminary market consultations:** Article 40 of the Directive sets the context for preliminary market consultations: “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 procurements.”

Contracting authorities are permitted, but not obliged, to use preliminary market consultations. The purpose of preliminary consultations as set out in the Directive is twofold:

- to assist the contracting authority in preparing its procurement, including the opportunity to “seek or accept advice from independent experts or authorities or from market participants”, and in using that advice in the planning and conduct of the procurement procedure (provided that such advice does not have the effect of distorting competition and does not result in any violation of the principles of non-discrimination and transparency);
- to provide information to economic operators about the proposed procurement.

**Article 41 – Prior involvement of candidates or tenderers:** Article 41 of the Directive concerns candidates or tenderers with prior involvement in the preparation of the procurement procedure. The reference in Article 41 to “prior involvement” includes the provision of advice to the contracting authority in the context of preliminary market consultations or other involvement in the preparation of the procurement procedure. A practical example of “other involvement” is the provision of professional advice on the content of a technical specification or on the structuring of the procurement process.

Article 41 encapsulates an important principle established by the Court of Justice of the European Union (CJEU): a candidate or tenderer that has had prior involvement may only be excluded from a tender procedure where there are *no other means* to ensure compliance with the principle of the equal treatment of tenderers<sup>2</sup>.

Where a contracting authority decides that it must exclude an economic operator in view of its prior involvement in the procurement procedure, the economic operator concerned must then be given the opportunity to prove that its involvement will not distort the procedure. The contracting authority must document the relevant measures taken in the individual report required under Article 84 of the Directive.

It is thus not permitted for a contracting authority to automatically exclude from a tender procedure a candidate or tenderer that has had prior involvement in the procedure. The CJEU has ruled in several cases<sup>3</sup> that automatic exclusion is a disproportionate response and that national legislation requiring automatic exclusion of economic operators in cases where there has been prior involvement is unlawful. See also SIGMA Public Procurement Brief 7, *Selecting Economic Operators*, and SIGMA Public Procurement Brief 24, *Use of Automatic Exclusion Lists*.

The contracting authority is required to take and document “appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer”. Article 41 specifies, in a non-exhaustive list, the measures that the contracting authority is required to take. The contracting authority must:

- provide all candidates and tenderers all of the relevant information exchanged or arising from the prior involvement. This requirement is an attempt to neutralise any potential advantage that an economic operator with prior involvement may have;
- fix adequate time limits for the receipt of tenders. This requirement aims to ensure that the time limits set are not too short, which could be advantageous to an economic operator with prior involvement and knowledge.

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<sup>2</sup> SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris. <http://www.sigmaweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf>

<sup>3</sup> Ibid.

## Decision to engage directly with economic operators

A contracting authority needs to consider carefully whether or not to engage directly with economic operators. Direct engagement is not appropriate in every case. It is particularly suited to more complex or innovative projects. In certain cases it makes good sense to engage directly with economic operators as part of the market analysis process in order to complement information obtained at the desk-based stage.

Direct engagement may be very helpful to the contracting authority in assessing, for example, whether the proposed contract:

- is feasible from technical, financial, legal and operational perspectives and can be delivered within the desired timescale;
- has been delivered previously;
- can be delivered by a single economic operator or requires more than one operator in a consortium or supply chain.
- In addition, the contracting authority needs to determine:
  - whether there is a sufficient number of suppliers in the market to ensure effective competition;
  - whether similar contracts are in preparation in the market and when they are coming onto the market.

This information, obtained through direct engagement with economic operators, can assist the contracting authority in defining and refining tender requirements and in deciding on the timing of the procurement process, the choice of tender procedure, and the use of procurement tools. Direct engagement can save time and effort by providing a focus for activities later in the procurement process. It may also permit the contracting authority to assess budget and cost issues more accurately, identify contract risks and market capacity and other issues which may affect contract delivery, encourage innovation, and assist in developing a new market.

As already mentioned, contracting authorities must be transparent in their decision making, and it is advisable to prepare a checklist or record that includes the reasons justifying a decision to engage directly with economic operators.

## Identification of economic operators

The contracting authority first needs to decide how it will identify and engage with economic operators. This decision can be quite difficult. On the one hand, the contracting authority needs to bear in mind the principles of transparency and equal treatment and to ensure that the competitiveness of the future procurement process will not be distorted. On the other hand, it must try to achieve a meaningful and instructive engagement with economic operators, so that it may gather information that is genuinely helpful to the procurement planning process.

One approach used in the European Union (EU) is to advertise the market engagement process in the *Official Journal of the European Union (OJEU)* by using a Prior Information Notice. The advantage of this approach is that the opportunity is publicly advertised at EU level and made available to a potentially very large market of participants. One disadvantage of this approach would be the large number of economic operators that may wish to participate in the market engagement process, which would result in the contracting authority having to manage the large amount of information received from economic operators. Economic operators may also

be disinclined to provide useful information if they believe that it will be widely shared with their competitors.

Contracting authorities may find it more efficient to contact known economic operators directly on a confidential basis, thereby limiting participation in the market engagement process. The advantage of this approach is that it may lead to more open discussions with economic operators. A major disadvantage, however, is that it is likely to be seen as lacking in transparency and that it may therefore entail allegations of unequal treatment or even corruption.

### Engagement with other organisations

Market analysis might also involve engagement with other organisations. For example, a contracting authority may find it beneficial to engage with an active trade organisation rather than with individual economic operators. It might, alternatively, advertise the opportunity to participate in market engagement widely but then limit participation to a maximum number of economic operators selected at random. However, any selection process is likely to increase the risk of legal challenge.

### Methods of engagement with economic operators

There are various ways of engaging with economic operators. What is appropriate will depend on the nature of the procurement and on the objective that the contracting authority wishes to achieve from the direct engagement process. A few examples are set out below.

**Important note:** It is critical when planning direct engagement to bear in mind the key requirements of ensuring that the principles of non-discrimination and transparency are observed and that the process will not distort subsequent competition. In all cases it is very important to maintain clear records of the process followed and the information provided.

**Desk-based contact:** Direct engagement with economic operators may be simply a desk-based exercise. In that case, the contracting authority may consider the use of a questionnaire tailored to the specific procurement that is sent to economic operators, requesting responses within a set time frame. If a contracting authority prefers anonymous responses in order to avoid the risk of alleged preference for a particular economic operator, it could use, for example, an anonymous online survey, with responses analysed by an independent third party. A web-based portal is another possible approach.

The OECD Procurement Toolbox includes a “Template to Solicit Supplier Information”:

<https://www.oecd.org/governance/procurement/toolbox/templatetosolicitsupplierinformation.htm>

**Telephone contact:** Direct engagement may also involve direct contact by telephone. The contracting authority’s procurement team could conduct telephone interviews based on a standard set of questions and record the written responses received anonymously. To ensure equal treatment, the contracting authority could arrange, for example, for all telephone interviews to be conducted by an independent body, with a summary of anonymous feedback provided to the contracting authority.

**Open days:** In some cases it may be appropriate to organise open days for interested economic operators. Such days may be useful in cases where the requirements of the contracting authority are not standard or require innovation or where it is important for economic operators to actually see the geographical location of the contract delivery. To



extend the opportunity to participate as widely as possible, it is worth considering the organisation of an event that would be accessible live in a web-based format.

#### Case study: Dorset County Council Street Lighting PFI Project – Market Consultation

In 2004 Dorset County Council in the UK developed a business case for its long-term street lighting PFI project. Soon after the case was approved, the Council organised a market consultation event, during which it planned to meet with suppliers that would be interested in taking on the project. The event was advertised on a nationwide scale, with advertisements placed in the national media and in the technical press.

The one-day event, held in London, focused on promoting Dorset County Council as a good procurer. To promote the Council in an effective way, Dorset collaborated with local government procurement experts and 4Ps (a specialist public sector PFI/PPP advisory body) and it also invited a representative of the Department of Transport to make a presentation at the event. Between 20 and 30 leading players in the industry attended the event, which was opened by a Cabinet Member.

The event consisted of presentations outlining both the strategic intent as well as the technical aspects of the project. A series of discussions and questions relating to the project followed, which enabled Dorset County Council to gain feedback on its intended approach. Attendees also had the option of submitting written feedback after the event if they did not want to discuss some issues in front of their competitors.

In addition to promoting itself to the industry, through this event Dorset County Council gained a greater focus and knowledge about the market, and it was able to gauge the interest of the supply base in the project. It also received useful feedback from potential suppliers, which enabled it to further define and develop its strategic approach.

Source: UK Office of Government Commerce (2009), “Early Market Engagement Principles and Examples of Good Practice”

[http://webarchive.nationalarchives.gov.uk/20100503135839/http://www.ogc.gov.uk/documents/Early\\_Market\\_Engagement\\_Guidance.pdf](http://webarchive.nationalarchives.gov.uk/20100503135839/http://www.ogc.gov.uk/documents/Early_Market_Engagement_Guidance.pdf)

**Transparency and equal treatment:** All of the information provided to economic operators during an open day must also be made available to candidates and tenderers in the subsequent tender process. The information provided at the open day should be made available as part of the procurement documents on the date of publication of the *OJEU* contract notice, available free of charge online. It may also be appropriate to provide a weblink to a recording of the live event so that economic operators that were not able to participate in the event would have the opportunity to hear the presentations and discussions.

## Utilities

The Utilities Directive<sup>4</sup> uses the same wording as in the Directive:

- Article 58 – Preliminary market consultations;
- Article 59 – Prior involvement of candidates or tenderers.

<sup>4</sup> Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.



## Further information

### Publications

SIGMA (2015), *Public Procurement Training Manual* – Modules A1, A2 and A3, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf>

### Public Procurement Briefs

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2016), *Division of Contracts into Lots*, Brief 36, OECD Publishing, Paris

SIGMA (2016), *Life-cycle Costing*, Brief 34, OECD Publishing, Paris

SIGMA (2016), *SMEs in Public Procurement*, Brief 33, OECD Publishing, Paris

SIGMA (2016), *Use of Automatic Exclusion Lists*, Brief 24, OECD Publishing, Paris

SIGMA (2016), *Selecting Economic Operators*, Brief 7, OECD Publishing, Paris