

Construction Procurement Handbook

Chapter 4

Preliminary Market Consultation

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Introduction

1.1 The procurement of construction related contracts is often complex but, regardless of complexity, its aim is to get the best product available while achieving the best value for money. This process and the outcomes of it can often be improved by consulting with the market prior to a formal procurement process being commenced. This is not a substitute for and should not be confused with additional commissioned work required as part of the project including during the design or construction phases. How much information a client can reasonably expect to receive from the market, without payment, is a grey area and CAs should be aware of the risks to their procurement should they stray into areas of work that should reasonably be paid for as this might raise an expectation from participants in the consultation of favour or unfair advantage.

Objectives

2.1 The objective of undertaking pre-market engagement is:

- To understand the potential options available to achieve the project outcomes;
- To engage with partners and potential suppliers as early as is practicable and appropriate;
- To clearly identify and articulate the required outputs having taken into account market conditions and available offers;
- To properly refine the business case and budget; and,
- To select the most appropriate procurement route to best deliver the defined outcomes

Legislation

3.1 Paragraph 2.1 of *Chapter 1: Introduction and Overview* of this handbook sets out the relevant pieces of primary and secondary legislation which govern public sector procurement in Scotland. These are the [Public Contract \(Scotland\) Regulations 2015 \(the 2015 Regs\)](#), [the Procurement Reform \(Scotland\) Act 2014 \(the Act\)](#) and the [Procurement \(Scotland\) Regulations 2016 \(the 2016 Regs\)](#) are also relevant to this chapter of the handbook.

3.2 The principal regulations for pre-market consultation are Regulations 41, 42 and 58(8)(f) of the 2015 Regs and Regulation 9(5)(f) of the 2016 Regs. Regulation 41 of the 2015 Regs allows a contracting authority (CA) to “...conduct market consultation with a view to preparing the procurement and informing economic operators of the authority’s procurement plans and requirements.” before commencement of a procurement. It notes that advice received “...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.”

3.3 Regulation 42 of the 2015 Regs provides safeguards by setting out that CAs must take appropriate measures to ensure that competition is not distorted by the participation in the competition of a candidate or tenderer which has provided advice to the CA or has otherwise been involved in the preparation of the procurement. It also sets out measures which must be taken and arrangements where exclusion may be appropriate. In essence this requires that no party should have any information or other knowledge, as a consequence of dealings with the client, which is not available to others and which could provide it with an unfair advantage in any public procurement.

3.4 Regulation 58(8)(f) of the 2015 Regs and 9(5)(f) of the 2016 Regs allows for the exclusion of economic operators from participation in a procurement procedures regulated by the Act where a distortion of competition may arise from the prior involvement of the economic operator in a procurement procedure as per Regulation 42 of the 2015 Regs.

Specific Requirements

4.1 As a minimum, the measures that the CA takes must ensure that any relevant information exchanged in preliminary market discussions is shared with all parties interested in bidding and adequate timescales are set to ensure all bidders have sufficient time to consider that information in advance of submitting their bid/tender.

4.2 The CA must also detail the measures that they have taken to ensure that the competition is not distorted. This is to be set out in the written report that [the CA] is required to produce on each procurement process, see Regulation 83 of the 2015 Regs.

4.3 A company which has provided advice or which has been involved in the preparation of a procurement, either as part of any preliminary market consultation or not, should only be excluded where their continued participation in the procurement would distort the competition and provide them with an unfair advantage over other participants and compliance with the principles of procurement – that is to treat all bidders equally and without discrimination and to act in a transparent and proportionate manner – cannot be assured by any other, less intrusive, measures.

4.4 CAs should not rely on a single supplier to form a specification, as this could potentially lead to a conflict of interest where that specification suits the particular supplier's bid to the detriment of others. If the contracting authority is considering excluding a supplier due to their involvement in preparing the procurement procedure on this basis, the supplier must be given the opportunity to prove that their involvement will not distort the competitive process.

When to Consult

5.1 During the life of a project there may be a number of opportunities to engage with the market, this will depend on the scale of the project and the maturity of the design.

It follows that a large project will have more opportunities to engage with a wide range of stakeholders including suppliers. A design which is far advanced will have less scope for change and therefore the benefit of consultation will be reduced and the cost of implementing any suggested changes increased. This is not though to say that in these circumstances that pre-market engagement will not be appropriate, however it is clear that the earlier that market consultation is undertaken the greater the value to the project.

5.2 Early on in a project, when outcomes are still being established, holding a design charrette (workshop) allows the participation of a wide range of stakeholders including community representatives, suppliers and other interested parties. This not only helps to develop design concepts and tease out practical issues but also brings about early engagement with stakeholders and creates a strong foundation for the delivery of the project. As plans develop consultation may focus on design issues relating to the output, i.e. the physical project/building, as well as improving understanding of the best route to market.

5.3 Later, when a client has established what, in broad terms, it is seeking to procure, there may remain some uncertainty or questions regarding the exact nature of what is to be bought. This could, for example, relate to the most practical solution, specifications of materials, the best procurement and contractual route and whether the market has the capacity to deliver it. Further consideration may be enhanced by the involvement of suppliers in providing some of the missing detail to allow a final plan to be developed by the client. This could be achieved by, for example:

- Talking to suppliers about new or emerging technologies.
- Investigating available innovative construction techniques and materials.
- Splitting contracts into lots that align with current market capacities.

5.4 The engagement process could also include a technical dialogue to inform a specification, although clearly not to the extent of following a formal procedure such as a competitive dialogue.

5.5 There are many advantages to both the purchaser and potential bidders/tenderers in participating in such a process. The table at *Figure 1* sets out some of the benefits of engaging in preliminary market consultation.

Advantages of preliminary market consultation
<ul style="list-style-type: none">● Assists in defining the requirement, by better informing the business case and helping to identify or develop the requirements.● Stimulates and encourages interest from potential bidders / tenderers and thus increases competition which can reduce dependency on a limited number of suppliers.● Helps to provide a better understanding of the feasibility of the requirement which can result in a clearer specification and consequently more appropriate and better refined bids during the tender stages.● Tests the capacity of the market to deliver the outcome

- Gives greater understanding of the risk environment.
- Informs the procurement strategy and approach.
- Minimises the need for using complex and costly procedures such as Competitive Dialogue.
- Encourages a more responsive market – by giving the market sufficient time to prepare to meet demand e.g. by ensuring the right skills and resources are in place.
- May inform the approach to procurement, including for example what construction contract to adopt, the procurement procedure to follow, the selection and award criteria to adopt when setting the procurement and how to achieve sustainable outcomes.

Figure 1: Advantages of preliminary market consultation

Specific Preliminary Consultation

6.1 There can be a fine line between what is preliminary market consultation and what is more appropriately early or advanced work. It is essential that contracting authorities do not seek to get something for nothing. The difference could be defined as:

- preliminary consultation assists the CA in understanding the requirement and the art of the possible; whereas
- activity which is legitimately part of the scope of the design and construction of the asset should be properly commissioned and paid for

6.2 In construction, preliminary market consultation aims to minimise risk and there are a number of instances where seeking information from the market may assist with this. It should also be borne in mind that information received may be superficial in nature and, consequently, its usefulness may be limited. Examples of where information may be useful include:

- Assessing site constraints – this may inform the client if there are obvious constraints (physical, technical or logistical), that may affect the proposed project – for example, the requirement for a tower crane to have over-sailing rights may need to be addressed.
- Buildability – engaging with consultants and contractors to understand if design proposals have any particular issues with regards to construction methods.
- Market capacity, including sub-contract market capacity – for example, there may be constraints in the market, or shortages in certain trade packages, leading to a requirement to consider alternative building methods.
- Testing of construction programme assumptions with contractors.
- Researching price assumptions, particularly in a volatile market – although any discussions must be purely indicative and not aimed at learning what a particular party may bid.

6.3 All of these areas are the primary responsibility of the design team and other design consultants as part of their normal activity. For example, cost consultants will base cost plans on market intelligence gathered from other projects. However, that may be enhanced by consultation with the market.

6.4 The purpose is to gather general market intelligence and must not be about how a particular supplier would deliver the requirement or shape the requirement such that it would favour a specific supplier. There will be occasions when to reduce project risk it would be more appropriate to commission discrete packages of work to fully consider items such as those above, to allow informed decisions to be made. This information would then be owned by the client and can be released to bidders as part of the procurement process. This would not be considered as preliminary market consultation. Examples of such work may for example include:

- Site investigations
- Condition Surveys
- Traffic impact reports
- Outline planning applications
- Environmental impact reports

6.5 Prior to undertaking preliminary market consultation, a CA should analyse their project and understand where such action may be of benefit. Following this a plan should be prepared setting out how it will be undertaken, including ensuring that sufficient time is set aside to conduct a meaningful consultation. The plan must also safeguard against an issue occurring with the procurement procedure or the exclusion of a supplier from the competition who has voluntarily engaged with the preliminary market consultation. The plan should record the approach to be taken and may include the following:

- Engaging with a number of suppliers – this leading to greater market intelligence while reducing the risk of being accused of creating unfair advantage to a particular supplier.
- Explaining to those suppliers consulted that any information received from them may be published and used as part of the procurement process. For this reason any commercially sensitive or confidential information should not be discussed.
- Records of all discussions / meetings should be kept and relevant information received must be made available to all bidders, with sufficient time allowed within the process for all bidders to consider and react to such information. All records must be kept for a minimum of three years from the date of the award of contract.

- A separate statement regarding this information should be included in the procurement documents and form an annex to the contract notice

Case Studies

7.1 The case study at annexes A and B sets out some of the consultation conducted during the project to construct the Forth Crossing.

7.2 Two case studies are attached at annexes A and B. The first was included in Chapter 6 of the Review of Scottish Public Sector Procurement in Construction and shows how consultation was applied in the preparation of a framework and the second sets out some of the consultation conducted during project to construct the Forth Crossing.

Summary

8.1 The potential value of preliminary market consultation has been recognised by explicitly allowing for it in the 2015 Regs. It will not be appropriate in all situations and its use will be largely related to the complexity of the contract being procured. Care should be taken when using it, ensuring equal treatment of bidders / tenderers, ensuring transparency and proportionality, and not providing information in a discriminatory manner which may give some bidders an advantage over others. The CA must ensure that there are no conflicts of interest. However, if proper processes are put in place, CA should not fear its use and indeed should undertake this as a normal activity as it can enhance the quality of the procurement information leading to better tenders being submitted.

Case Study One:

Transport Scotland: Principal contract for the design, construction and completion of the Forth Replacement Crossing

Background

Despite significant investment and maintenance since it opened in 1964, the Forth Road Bridge had shown signs of significant deterioration in the recent years. It was no longer deemed viable as the long-term main crossing of the Firth of Forth.

In 2006-7, Transport Scotland carried out the Forth Replacement Crossing Study - part of the wider Strategic Transport Projects Review - to examine a wide range of options for replacing the existing road bridge.



Computer Image of the new bridge and the existing Forth Road Bridge

Responding to the study in December 2007, Scottish Ministers announced their intention to build a new bridge to the west of the current Forth Road Bridge. A challenging timescale was set due to the potential need for future restrictions to Heavy Goods Vehicles using the existing bridge. The new bridge – the Queensferry Crossing - opened to traffic in the summer of 2017.

Following this bridge building announcement, Transport Scotland immediately began on the fast tracked scheme – appointing Jacobs/Arup as joint venture design consultants in January 2008.

In tandem with the design, various other work streams were established comprising a number of related projects. As well as delivering a new bridge, associated projects included upgrading the connecting road network on both sides of the Firth of Forth and the development of an Intelligent Transport System.

The preliminary design work for the bridge proposed a three tower cable-stayed bridge to be situated to the west of the existing bridge. Although the detailed design and construction of the bridge represented significant engineering challenges, the challenges of the project were not confined to just engineering. Others included - obtaining the requisite consents, acquiring the necessary land, mitigating environmental impact, working to a tight programme and ensuring value for money for Scotland's largest infrastructure spend to date.

Pre-market Engagement

The tight timescales coupled with the scale and complexity of the project, meant that statutory work and procurement had to be commenced in tandem to the design.

Transport Scotland recognised the advantages of engaging with the market early to identify market participants and to benefit from their knowledge. They followed a structured process that allowed them to engage in discussions with world class bridge contractors and consortia. The knowledge gained provided better understanding of the market, particularly the risk appetite of market participants, their preferred procurement route and confirmation that the proposed form of contract, the International Federation of Engineers 'FIDIC - silver book' form of construction contract was the most appropriate. It also allowed consideration of the appropriate allocation of risk and the resultant amendments to the contract that would be acceptable to bidders.

Industry Day

The initial part of this pre-market engagement process was the holding of an *Industry Day* event in March 2009. The event was attended by 140 delegates from 60 industry companies, as well as Transport Scotland's integrated team. This audience included leading bridge contractors, responsible for projects around the world.

Members of the Transport Scotland team outlined the works content, the policy and statutory environment, and the procurement expectations, as well as confirming the Scottish Government's commitment to the project.

Participants were provided with information on the background to the project, the designs as they had thus far developed, and other proposals including the proposed procurement route and contract choice.

Delegates were invited to respond in writing to a structured questionnaire covering thirteen issues. These questions are reproduced at Appendix 1.

The questions focussed broadly on three main topics - route to market, risk apportionment and buildability.

The route to market questions considered topics such as, the splitting of the overall project into different packages (bridge and road connections) or releasing as one procurement, whether bidders were likely to be single entities or consortiums and the number of bidders that should be invited to tender following the selection procedure. Risk apportionment sought industry views on key contract risks, price hedging and

applicability of performance bonds. Buildability sought opinions on the programme, site requirements for set -down / fabrication and also views on the availability of local labour.

Bilateral Discussions

Following receipt of the *Industry Day* responses, a number of parties were selected to participate in bilateral discussions. These were structured around this same question set and sought to better explore and expand on the responses. Restricting the agenda to these questions ensured transparency and maintained a proper process throughout thereby reducing the risk of challenge to the conduct of the procurement procedure. Records of the meetings were kept and responses to the questions were analysed and summarised.

Through these discussions the participants provided further feedback on the extent of risks that they may be asked to assume, and the process that would allow them to quantify those risks.

Transport Scotland continued and extended their bilateral discussions in a controlled manner over the period before the publication of the Contract Notice. Beyond this point such communication would compromise the procurement process.

Importantly, Transport Scotland ensured that the information received through the pre-market engagement process was collated and fully articulated in their procurement and contract proposals as constructively as possible, by developing a project philosophy and timeline.

Project Philosophy and Timeline

Following analysis of feedback, coupled with Transport Scotland's own research, a tender process timeline was developed to accompany the project philosophy. These documents provided clarity for the development of the project and how *Transport Scotland* anticipated the project progressing, with regard the programme associated with prequalification, tendering and award of the contract.

These documents were issued to potential contractors/consultants, requesting further feedback and meetings to discuss the philosophy proposed. Again records of all responses were maintained and any new relevant information was provided to bidders in the contract notice.

Buildability

The various discussions confirmed, for example, that *Transport Scotland* should be responsible for securing land for site offices and compound, on both the north and south side of the Firth of Forth. This commitment was confirmed in the procurement documents that were released at the selection stage.



Construction of the Queensferry Crossing

Form of Contract

The form of contract was based on the FIDIC silver book form of contract, this being a contract suitable for turnkey bridge projects. The contract transfers significant risk to the contractor who is responsible for the majority of the design, effectively a design and build form of contract. There were amendments to the contract, many as a result of the pre-market engagement, to reflect the particular requirements of the project, including appropriate risk allocation, but also to reflect Scots Law. These changes were detailed as part of the procurement documents released at the selection stage, allowing bidders to fully consider their implications at this early stage.

Procurement Procedure

Pre-market responses also confirmed the choice of Competitive Dialogue as the correct procedure to follow. This was due to the complexity of the project coupled with the costs associated with bidding for a project of this magnitude. This procedure allowed design and construction methodology to be developed, as well as continuing contractual dialogue on commercial and risk apportionment associated with the chosen form of contract.

Notice Publication

The procurement process was governed by EU Public Procurement Directives implemented for Scotland by the Public Contracts (Scotland) Regulations 2006. In order to stimulate the market further Transport Scotland issued a Prior Information Notice (PIN) in the Official Journal of the European Union (OJEU) on 9 April 2009. This provided early notice of the procurement to the wider market.

Subsequently, Transport Scotland published a Contract Notice, calling for expressions of interest from competent contractors on 1 July 2009. At the start of the pre-qualification process, Transport Scotland used the information gained in the pre-market engagement to explain the basis on which they would contract, in a draft

'Heads of Terms', to ensure that intending bidders were fully aware of contractual expectations from the outset.

Information from the pre-market engagement exercise had highlighted that bidders were concerned over the level of costs associated with bidding for such a complex project. This was in part a nervousness from bidders that the Scottish Government wouldn't commit to the project. To counter this Transport Scotland and the Scottish Government agreed to pay a proportion of "Participation Costs", if the Scottish Government didn't award the contract, or they couldn't - if they failed to get the necessary Royal Assent. It was also agreed to pay a proportion of under bidders' costs, capped at a pre-agreed level, ensuring that there would be bids. This demonstrated the very firm commitment that the Scottish Government was making to the project.

Conclusion

The Queensferry Crossing and the associated works represent a project complexity and scale that is highly unusual in the Scottish Public Sector Procurement landscape. However, the process that Transport Scotland followed offers valuable lessons for projects of a lesser scale.

The most important aspect was the structured nature through which information from contractors was captured, Transport Scotland seeking initial responses using a questionnaire and thereafter holding bilateral conversations but keeping these to those same questions, expanding on the information received. Detailed records from both parts of the exercise were kept. As the case study demonstrates, the information received helped shape aspects of the procurement procedure, including contract details and the employer's requirements. Transport Scotland followed best practice ensuring any relevant information gained was shared openly with all parties as part of the procurement process. This ensured that no bidder would have unfair advantage and thus there was no distortion of the competition.

