Legal considerations for market engagement

GPP webinar
24 November 2015
Presenter: Abby Semple, LL.B.
Public Procurement Analysis
What is market engagement?

Effort

- Web search
- Phone calls
- Open day(s) or supplier meetings
- Market sounding questionnaire
- Attend industry events
- Prior Information Notice (PIN)
- E-mails to suppliers/other buyers
- Technical dialogue
- Pre-commercial Procurement (PCP)

Formality
Definition

“Market engagement is a process which takes place prior to procurement and which aims to:

i) Identify potential bidders and/or solutions

ii) Build capacity in the market to meet the requirement(s)

iii) Inform the design of the procurement and contract”
Legal context

- Preliminary market consultation under Article 40 of Directive 2014/24/EU (formerly, ‘technical dialogue’ in recitals)

- Must ensure that this does not lead to any unfair advantage or disadvantage – e.g. by making same information available to all undertakings and allowing sufficient time for tenders

- Prior involvement can lead to exclusion of tenderer, but only if there are no other means of ensuring fair process (Article 41)

- New directives emphasise early publication of tender documents (Art 53) – so pre-procurement stages become more important, especially in two-stage procedures
## Benefits and risks

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<thead>
<tr>
<th>Benefits</th>
<th>Risks</th>
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<tr>
<td>Understand market players and develop appropriate specification/criteria</td>
<td>One or several bidders may influence the specification or criteria unduly</td>
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<tr>
<td>Choose best procedure for procurement</td>
<td>May delay start date for procurement</td>
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<td>Encourage more competition, including from SMEs</td>
<td>In some cases risk of supplier collusion may increase</td>
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<td>Decide on lots, contract duration, service model and performance indicators</td>
<td>May be influenced by those who are most vocal during the engagement</td>
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<td>Allow bidders more time to start thinking about their bid</td>
<td>Incumbent will know who their potential competition is</td>
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<td>Send message that procedure will be open and transparent</td>
<td>Some bidders may think they have already won/lost the contract</td>
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Avoiding the risks

- Advertise the market engagement, and allow all interested operators to participate
- Ensure that information is made available to everyone, and ensure adequate time for responses
- Decide in advance how you will deal with confidentiality and intellectual property, and inform participants of this
- Make clear that the procurement process is separate, but all participants will be informed when it begins
- Consider best format for any meetings – one-on-one may be better than a open day if collusion or incumbent interference are a risk – but less chance for groupings to form
- Keep a record of all market engagement activities
How, what, who and when

**How**: No ‘one-size-fits-all’ approach; depends on i) contracting authority and ii) nature of market/requirement

**What**: Allowing sufficient **publicity** and **time** key to success. Plan it, don’t assume it will happen organically. Make clear the objectives and that it is **not** a procurement

**Who**: Make sure you are not just talking to the ‘usual suspects’ – include subcontractors/second tier as these influence **VfM**. Acknowledge all participation and follow up as necessary. On CA side, try to include at least one **neutral observer**

**When**: More than one round of market engagement may be needed, particularly if the requirement is new or innovative. As a guideline, engage at least 3-6 months prior to tender
Thank you.

Questions welcome at end of webinar

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‘Market engagement in innovation procurement’

GPP Webinar

Gaynor Whyles
JERA Consulting

November 2015
Creating conditions for innovation

Don’t ask……don’t get

• The public sector is a large and influential market
• Many creative companies
• Innovation can offer:
  • better services
  • lower costs
  • ‘more for less’
  • better quality of outcomes
• But we fail to make the most of this potential in the supply chain

Why?
• Risk averse procurement practices?
• Failure to understand suppliers?
• Lack of credible, articulated, demand
  • We fail to ask for what we want
  • We fail to engage with suppliers in a way that motivates investment and innovation
Introduction to innovation procurement

The procurers view of innovation

• Sensible procurers worry when they hear the word “new”
• New products and services have risks.
• They might.....
  • not work as expected
  • not be delivered on time
  • cost more ..... and anyway, have no track record
• We try to avoid innovation because it is risky

• But in some cases (more than we admit) we have no choice – the old solutions don’t work
  • Many existing products and services cannot deliver what we need.
  • If we keep buying them we will fail
  • New challenges need new solutions
  • New technology offers new opportunities
  • The cost of NOT innovating

• How can we buy innovative goods and services sensibly?
Introduction to innovation procurement

The suppliers view of innovation

- Developing new products incurs technical risk and requires investments of time and money

- Rational suppliers innovate and develop new products only if they have to, e.g.
  - to protect margins
  - to win business
  - to retain business

- Technical and resource risks are under the control of the supplier and can be managed

- The risk that the supplier cannot control is:
  - Having developed the product will someone buy it?
  - Is there a genuine and credible demand?

  - How can we encourage and enable suppliers to innovate?
Valley of death?

Commercialisation of innovation
FIGURE 3: The EIG re-imagined the 'valley of death' as a 'mountain of risk'. Shown in the figure is the risk profile of a supplier of innovation. The time of maximum risk (indicated as the ‘mountain of risk’) occurs during demonstration and scaling up. Suppliers have to invest while there is uncertainty about future commercial sales. (Adapted by Van Meerveld, Nauta and Whyles (2014) from DTI (2006)).
The status quo...... stifles innovation

This is what we bought last time...and it was the cheapest....no one complained....well not much

This is what they bought last time ...they seemed to like it...so best not change it....
Introduction to innovation procurement

The buyer - supplier paradox

- Suppliers respond to customer demand
- Customers tend to buy what is available – rather than asking for what they need
- The result? ‘more of the same’ and little room for innovation.
- Innovation Procurement aims to change this...by creating a credible demand

BUYER
If there was a viable and affordable solution to my problem we would buy it

SUPPLIER
If there was a demand we would invest to supply solutions
Innovation procurement

Solving the paradox

1. Customers need an **accurate** understanding of their unmet and future needs

2. Customers need to **communicate** this **early** in an accurate & **convincing** way to suppliers

3. Suppliers need an **opportunity** to offer new solutions on an **equal** playing field

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1. Identification

2. Market engagement

3. Pro-innovation procurement
Creating a credible demand

• A critical factor for suppliers of new products is the confidence that there will be a market for the new product once it is proven.

• The amount of investment made by developers and by their suppliers depends on this confidence.

• The future customers of the new products can significantly affect investments by suppliers by making the future market as certain as possible (while retaining competition).

• If procurers want suppliers to innovate they need to make the future market visible and credible.

• And to buy innovation in a way such that neither procurer or supplier incur unmanageable risks.
Introduction to innovation procurement

Forward Commitment Procurement (FCP)

1. Identification
   - Recognise problems, unmet needs & opportunities
   - Consult with stakeholders and set up team
   - Define an outcome based requirement
   - Prepare a FCP project outline/business case for sign off
   - Wider market demand

2. Market Engagement
   - Market Sounding
   - Market sounding review & analysis
   - Supply chain feedback
   - Market consultation
   - Market consultation report

3. Procurement
   - Develop pro-innovation procurement strategy
   - Feedback to the supply chain and stakeholders
   - Implement procurement strategy
   - Negotiate Procurement Contract
Case examples

Innovation procurement in practice....

- Case studies in UK, Netherlands, Poland, Italy, Hungary....

- Outcomes?
  - Cost saving
  - Operational benefits
  - Environmental benefits
  - New solutions on the market
  - Several award winning projects
  - Spin-off projects

“To use FCP as a tool you need to know what you want to achieve, be committed to achieving it and be able to convince the market that you really want it.”  

Dr Jonathan Frost OBE, Industry Member and Chairman of EcoQUIP and TRANSFORM Project Boards
What is the unmet need?

Identification stage precedes market engagement

• Planned procurements, opportunities, problems, thinking ahead......

• Identify an area or issue as a focus
• Identify accurately the unmet need
• Express the unmet need in outcome terms
• Genuine procurement requirement?
Identification of an accurate and credible demand

Identification stage

- Stakeholder and end-user engagement
  - Consultation is essential for accuracy and engagement
  - Cross-departmental project teams

- Embed in the organisation
- Articulate as ‘outcomes’ - allow room for innovation

1. Identification

- Recognise problems, unmet needs & opportunities
- Consult with stakeholders and set up team
- Define an outcome based requirement
- Prepare a FCP project outline/business case
- Wider Market Demand
• We need a new solution! ....we know the outcomes we need and our colleagues agree - other hospitals say they are interested and our management is supportive......

• Will it be delivered? Can we afford it? Will it work? Who can supply it?
Market engagement. Once you have an accurate understanding of the outcomes you need and internal commitment .......tell the supply chain in a way they can understand and that stimulates a response......

We need to deliver these outcomes. We need to buy a solution within 3 years. We can make a forward commitment to buy. Other organisations are interested. What are our options?

Is it worth my investments?
Communicating an accurate credible demand

Market engagement

- Pre-procurement
- Communicating with the supply chain in a way that convinces them that you are a serious and credible procurer
- Communicating your requirement EARLY
  - Innovation takes time
- Testing appetite, capacity, capability of the supply chain to meet your needs
  - (NOT an assessment of suppliers)

“Market sounding is the process of assessing the reaction of the market to a proposed requirement. Market sounding should begin at the earliest possible stage in the procurement process”.

2. Market Engagement

- Market Sounding
- Market sounding review & analysis
- Supply chain feedback
- Market consultation
- Market consultation report
Communicating an accurate credible demand

Market engagement

TOOLS?
- Market Sounding Prospectus
- Prior Information Notice (PIN)
- Market consultation workshops
- Technical dialogue

2. Market Engagement
- Market Sounding
- Market sounding review & analysis
- Supply chain feedback
- Market consultation
- Market consultation report
• Market Sounding Prospectus (MSP)
  • ‘credible articulated requirement’
  • unmet need
    • (the problem or issue you are addressing)
  • requirement
    • (in outcome terms)
  • context
    • (current situation, why innovation, drivers)
  • procurement opportunity
    • (scale and timeframe)
  • wider market
    • (who else has this unmet need)
  • Messages to the supply chain on direction of travel

• The MSP forces clarity and consensus in the team
Prior Information Notice

• Prior Information Notices in the OJEU
  • an effective way to launch a market sounding.

• Be proactive in seeking out suppliers and communicating your needs
  • (communication plans are helpful)

• Use intermediaries

• A market sounding response form can be helpful

• Web-page creates a focus for communication

  • Example: https://www.sheffield.ac.uk/procurement/suppliers-information/vendingservices
Section II.B: Object of the contract (Supplies or services)

Title attributed to the contract by the contracting authority:

Market sounding and call for innovative solutions informing the procurement of an integrated ultra low carbon energy solution for Nottingham University Hospitals NHS Trust.

The Trust needs to procure an innovative and integrated ultra-low carbon energy supply and management solution for the City Hospital Campus that is able to adapt to meet the Trust’s power, heat and cooling needs now and in the future. The energy solution needs to be reliable, low maintenance, and flexible enough to meet the shifting demands of health care over the next 20 years. It should be cost effective, deliver progressive improvements and be future proofed i.e. take advantage of new and emerging technologies and anticipate increases in the cost of energy and carbon and in emissions standards.

Procurement approach.

The Trust is aware that business as usual will not deliver these aspirations – new approaches and thinking are needed. This call has been issued to communicate this unmet need, stimulate innovative solutions and pull together the necessary technical and market information to develop a procurement strategy that can deliver the requirement. The Trust also wishes to understand what the market could provide in terms of innovative technical and commercial approaches, for example to spread the cost of capital investment.

Additional information:

The Contracting Authority intends to use an eTendering system in this procurement exercise when it commences and reserves the right to use a reverse auction.

This PIN is being published as part of the pre-procurement market sounding activity to investigate feasibility and options.

The purpose of this PIN is to:

- Forewarn the market that a procurement exercise will begin in the future,
- Alert the market to outcome requirements, prior to any potential procurement process,
- Initiate dialogue with the supply chain about the requirement and procurement approach,
- Facilitate international participation in the market consultation exercise and help to ensure that this pre-procurement process is open and transparent.

The PIN is an indication of potential future procurement activity and is subject change. This notice makes no commitment to procure anything.

The PIN is not part of any pre-qualification or selection process.
Market Engagement Workshops

- Market consultation workshops enable you to
- develop the dialogue with the supply chain
- identify any perceived barriers
- involve other stakeholders and buyers
- Record the market consultation event and publish a summary report
- Helps demonstrate you are maintaining a level playing field
- Publish a directory of companies responding

“What is great about this process is that it gives us time to plan, build consortia, and bring new solutions forward”

workshop participant
From Theory to Practice

Ultra Efficient Lighting for Future Wards

- Refurbishment planned over 8 years
- CEO Vision for ‘hospital of the future’
- Project team identified unmet need:
  - ‘smart, ultra efficient lighting, future ready, progressive improvements, cost effective, replicable’
- Support from DH for FCP and baseline study
- Market sounding prospectus (MSP)
- PIN published - 50+ responses
- Early market engagement – 3+ years in advance
- Market Engagement Workshop - 70+ suppliers and stakeholders
From Theory to Practice

Ultra Efficient Lighting for Future Wards

- Response to the tender
- Pan-European Consortium responded to the tender

Sweden
Lund University,
United Kingdom
Kings College De Montfort
Germany
From Theory to Practice

Ultra Efficient Lighting for Future Wards

• New solution developed

• Prototype at TRFT

• Demonstration at Healthcare Installation at BRE

• Award winning demonstration at Barts NHS

"The key to success was to begin by asking for what was needed – not what we thought was available or affordable. The results have exceeded all expectations".

John Cartwright, Director of Estates and Facilities, Rotherham NHS Foundation Trust.
You get what you ask for........

An energy efficient bed lamp

Step change in the patient experience and energy efficiency, future-ready bio-dynamic lighting

Efficiency
Quality AND
Sustainability

(future ready for Organic LEDS)
Creating conditions for innovation

Market engagement # key points

• Communicate your requirement to the supply chain proactively
• Use outcome based terms and keep key outcomes up-front
• Be ambitious!
• Start early
• Need to convince the supply chain of your credibility and commitment as a customer
• A market sounding prospectus is a (very) helpful tool
• A Prior Information Notice in the Official Journal of the EU adds credibility
• Demonstrate a wider demand
• Engage with the market in the context of a real procurement
• On-going improvement e.g. progressive reductions in operational and embedded carbon over the life of the contract

NOTE
Some supply chains are resistant to customer demand – in some cases other demand side measures are needed to support eco-innovation e.g. regulation
Thank you

• EcoQUIP Study Tour: Robotic Bed-washing Facility, Erasmus MC, Rotterdam
  • 13 January 2016 (ecoquip.eu)

• EPP-eHEALTH Peer Learning Workshop – Market Engagement,
  • 12 January 2016, Rotterdam
ENGAGING THE MARKET

IDEAS AND APPROACHES FROM
THE PPPI SERVICE POINT IN AUSTRIA FOR
GPP WEBINAR

Vienna, 24.11.2015
Stefan Wurm
Public Procurement Promoting Innovation

Main services of Service Point in Austria

- Design and launch of an online platform that serves as a brokerage tool between procurers and innovative suppliers
- Developing KPIs to quantify innovative procurement
- Publishing of annual reports on the situation of PPI in Austria
- Supporting organisations in their innovation process
- Consulting on the design and implementation of innovation strategies
- Initiating and supporting PPI projects in Austria
- Building a community of innovative procurers
- Organisation of conferences and learning labs
- Focus on different procurement groups
- Establishing a common body of knowledge on innovation amongst the public procurers
- Internal and external trainings and workshops
Stefan Wurm - Profile

**Professional Experience:**

- Head of Public Procurement Promoting Innovation Service Point
- Project coordinator of innobooster inLIFE ([www.innobooster.eu](http://www.innobooster.eu))
- Before: General Manager of a NPO and Management Consultant

**Education:**

- MBA in Entrepreneurship & Innovation
- Degrees in Public Management as well as Political Science
- Certificates in Innovation Consulting, Organizational Consulting and Systemic Management
Ready to jump?
Art 2 – Definitions, (1), 22:

“‘innovation’ means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”

Where to implement innovation procurement in an institution?

- Legal
  - „It‘s the law“
- Strategic level
  - Mission
  - Vision
  - Values
  - Principles
- Operational level
BBG wins Public Procurement of Innovation Award 2015

Problem discovery
High costs
Investment on plan
Maintenace
High usage of fresh water

Functional and performance requirements
Lowest LCC including all costs available for five years
Evaluation of technologies available

Procedure with Negotiation
Clear focus on requirements
Allow time and freedom for new ideas
practical tests incl. Result Analysis

Results
Optimal Life Cycle Costs (LCC)
Lowest water usage of fresh water and reduction of waste water
Compression of the residual waste
How the supplier engagement was conducted? (1/2)

Step 1:

Suppliers were invited to provide information on their ability to provide an innovative solution. This included references on previous innovative solutions provided. An external consultant analysed available technologies beforehand.

Step 2:

The best suppliers were then asked to submit a first offer, including a detailed concept and calculation of the life cycle costs (LCC). This calculation included: all energy costs, costs for maintenance including the working hours of personnel, cost for maintenance resources, waste disposal costs as well as the cost of purchase. Based on this, the bidders were provided with wastewater and had to prove the practical application of their concept. The contract performance clauses were drawn up based on these reported test results. The chosen supplier needed to be able to guarantee these values for a period of five years.
Step 3:

*Based on the results of the practical application*, the final suppliers were invited to submit a final offer.

The IP rights for the finally procured system lie with the supplier and therefore, any other organisation can also *purchase this innovative solution on the market*.

*Based on the award criteria the best supplier was chosen*. The main criteria were *the life cycle costs based on the net present value for a calculation time of five years*. Additional points were awarded for the warranty time and reaction time for maintenance.
Impact

• *Structured process which helped all participating parties*

• *Reduction of the fresh water usage of 97% of the filtered water can be reused.*

• *Remaining waste is highly concentrated, reduces the logistic costs for the waste disposal*

• *Extensive cooperation between organisations*
Engaging the Market

Generally Speaking:

- Differences in the product groups / industries
- Depends on the specific solution
- Knowledge of purchasing officer and/or the purchasing organization
- Find ways to handle procurement law and/or rumours about it
- Public procurer has to broaden up the market view in a larger scale and could possibly look at adjacent supplier markets
(Test) experiences so far

• **Supplier innovation days**
  were organized where several suppliers have been identified upfront. On the other hand an open invitation via the website was pronounced at the same time.

• **External consultants**
  These experts can conduct a technology-based analysis of the market which helps to articulate the technical specifications.

• **Precise market analysis**
  This has to be done before a tender project is started. This can be carried out by using business sector data, dialogues with representatives from chamber of commerce and/or business sector representatives, direct dialogues with possible suppliers or telephone interviews.
Your questions and remarks
Our Team

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