

Procurement Policy Note – Procurement Supporting Growth: Supporting Material for Departments

Action Note 04/12 9 May 2012

Issue

1. On 26 April the Minister for the Cabinet Office, Francis Maude, announced the next steps in implementing the Government's radical and ambitious programme to ensure that the huge purchasing power of the public sector is used to support growth, building on the announcements made on 21 November 2011 and published in the 2011 Autumn Statement. This programme of reform is designed to support growth and UK businesses, including SMEs.
2. This Procurement Policy Note (PPN) provides departments, their agencies and NDPBs with a range of supporting material to assist in implementing these commitments, including a checklist that they must follow in order to operate the presumption against competitive dialogue, and further supporting material to assist with conducting early supplier engagement including a Mythbusting Factsheet.

Dissemination

3. Please circulate this PPN within your organisation, its Executive Agencies and Non Departmental Public Bodies and to all Contracting Authorities for which you are responsible, drawing it to the attention of those with a purchasing role.

Contact

4. Enquiries about this PPN should be addressed to the ERG Service Desk on 0845 000 4999 or via servicedesk@cabinet-office.gsi.gov.uk.

Scope of this PPN

5. The contents of this PPN are mandatory within all Central Government Departments including their Executive Agencies and Non Departmental Public Bodies. All other Contracting Authorities are strongly encouraged to adopt the Government's new approach to procurement, including the advice set out in the Mythbusting Factsheet and the advice in the competitive dialogue checklist about the circumstances in which use of competitive dialogue is most appropriate.

Background

6. On 21 November 2011 Francis Maude unveiled a [package of measures](#) to change how Government buys from the private sector, supporting business and promoting economic growth. Measures included:
 - Providing industry with greater visibility of Government demand through publishing rolling pipelines of upcoming procurement opportunities and the capabilities needed to deliver them;
 - Adopting an open door policy to enable industry to discuss requirements pre-procurement;
 - Making it 40% faster to do business with Government through a presumption against the competitive dialogue process except in the most complex procurements and mandating the adoption of lean sourcing principles across central government procurement from January 2012.
 - Taking further steps to open up procurement to SMEs with additional measures being [announced on 9 March 2012](#).

7. On 26 April 2012, Francis Maude [announced progress](#) in delivering this programme of reform including:
 - Publishing the next phase of rolling medium term pipelines of future public procurement on [Contracts Finder](#);
 - Publishing plans for strengthening supply chain capabilities, using the current activity in construction as an illustration of how pinch points in the supply chain for tunnelling are being addressed;
 - Publishing a [Procurement Pledge](#) which industry can use to hold government to account and to encourage the wider public sector to follow Government's approach.

8. In order to succeed, these reforms will need to be embraced across the public sector, and Cabinet Office is publishing the following material to support procurers in delivering reform:
 - A checklist which departments, their agencies and NDPBs must follow in order to implement the presumption against competitive dialogue in all but a handful of areas. This includes seeking Departmental Accounting Officer sign off for those rare cases where competitive dialogue is still appropriate - see Annex A;
 - A mythbusting factsheet to give contracting authorities the confidence to talk to suppliers pre-procurement. Early pre-market engagement enables contracting authorities to better define their requirements and reduces their reliance on complex procurement procedures – see Annex B;
 - The LEAN Sourcing Standard Solution has already been published on the [Government Procurement website](#). The key principles are attached at Annex C

Next Steps

9. These announcements mark the next steps in this radical programme of reform but more remains to be done. New pipeline sectors will be published in the coming months and pipelines already published on Contracts Finder will be updated every 6 months.
10. Government recognises that there is already much good practice in wider public sector procurement and is not seeking to mandate this approach outside central Government.

However, Government believes that this new approach will stimulate economic growth and will enable all contracting authorities to achieve better vfm through better solutions and more efficient procurement. Government therefore encourages wider public sector organisations to include their pipeline data on Contracts Finder, and to sign up to the Procurement Pledge signalling their support to the Government's new approach by emailing [procurementconcordat@cabinet-office.gsi.gov.uk].

Annex A: Presumption against Competitive Dialogue

On 21 November, Francis Maude announced a series of commitments that will see the huge purchasing power of the public sector being used to support growth through publishing pipelines of future procurement opportunities, and earlier supplier dialogue leading to all but the most complex procurements being completed in 120 working days. This builds on Government's radical programme of procurement reform.

One of these announcements was a presumption against the use of the competitive dialogue procedure except where its use can be justified.

The competitive dialogue procedure is designed to be used for particularly complex contracts. Too often, however, public procurers have relied on it as a means of engaging in dialogue with suppliers, instead of engaging in thorough pre-market engagement to understand the market and supplier offerings prior to going to market.

The presumption

If departments, Executive Agencies and Non-Departmental Public Bodies wish to use the competitive dialogue procedure they must seek approval from their Accounting Officers (AOs¹). AOs may choose to delegate sign off, but they may not delegate it below Commercial Director level and must retain ultimate responsibility for each decision to use competitive dialogue. Where sign off has been delegated by AOs to the Commercial Director and the Commercial Director is absent, approval must be passed up the chain, e.g. to Heads of Finance or Corporate Services, or back to the AO.

In order to sign off the use of competitive dialogue, AOs must satisfy themselves that:

- Commercial teams have conducted extensive pre-market engagement with current and potential suppliers in accordance with lean principles and
- As a result of those discussions, they are still unable to use a less complex procurement procedure and must use competitive dialogue.

AOs should not sign off the use of competitive dialogue if:

- Further pre-market engagement would enable the department, Executive Agency or NDPB to better define its requirement and consequently use a less complex procurement procedure.
- The requirement is not complex.
- Where the procurement is for a Part B service, a procedure that replicates a competitive dialogue should not be endorsed.

The Competitive Dialogue procedure must only be used for particularly complex contracts where after pre-procurement market engagement, the department, Executive Agency or NDPB is unable to identify the technical means of delivering its requirement and/or the legal/financial make-up of the project.

It must not be used where a department, Executive Agency or NDPB could have established what it wanted to buy through better or more prolonged pre-market engagement, which would allow less complex procurement procedures to be used in order to award the contract.

¹ http://www.hm-treasury.gov.uk/psr_governance_accountingofficers.htm

Projects for which competitive dialogue might still be suitable include those large and complex procurements that fall outside the 120 working day commitment. In particular, these might include:

- Those with an iterative design element, such as construction or economic infrastructure,
- Those with a private finance element or other form of public private partnership,
- Those that will require some form of planning permission and
- Those where complex commercial arrangements apply, such as joint ventures and mutuals.

A definition of complex procurements falling outside the 120 working day commitment and potentially suitable for procurement via competitive dialogue is attached at Annex A.1.

The presumption against Competitive Dialogue should not result in greater use of the negotiated procedure, apart from under the Defence and Security Public Contracts Regulations where there is recognition that the negotiated procedure is uniquely suited to the defence and security sectors.

Cabinet Office will monitor and report on the use of the competitive dialogue procedure by departments, Executive Agencies and NDPBs, collecting data from Tenders Electronic Daily, which departments will be required to validate.

Annex A.1 – Definition of complex procurements that will not achieve 120 working days (OJEU to Award)

The list below is not exhaustive. Neither would we necessarily expect all procurements in these categories to take more than 120 working days. But for all procurements we would expect to see the application of Lean principles and consequent reductions in timescales.

Construction and infrastructure procurements

- i. Extended timescales are required for suppliers to build robust supply chains, which requires significant investment and, for major schemes, can run into £millions. Whilst discussions do take place between the parties in advance of the formal procurement process, Tier 1 suppliers are unlikely to risk the significant bid investment costs to set up Special Purpose Vehicles (SPVs), for example, prior to a formal procurement process.
- ii. In order to build their supply chains, Tier 1 suppliers seek market responses to a series of design and build packages, which means timescales are extended whilst these packages are agreed.
- iii. Procurement of rail franchises and rolling stock involve large scale investment by suppliers in new design and innovation in service provision, which will extend timelines beyond 120 working days in order that suppliers have sufficient time to make investment decisions against the level of risk they are prepared to take. These decisions are unlikely to be made outside a formal procurement process because the investment risk is too high.
- iv. Independent risk assessments of design solution, operating plans, and safety aspects are required to provide Government with the necessary assurance that bidder proposals are fit for purpose. These assessments cannot be made until the formal bid proposals have been submitted by the supplier and so cannot be conducted prior to the formal procurement process.
- v. Timelines will be extended where lengthy planning and design elements are required at key stages of a procurement, for example, where contractor input is required to support town planning, environmental impact assessment, or other statutory processes.

Private Finance

- vi. Financiers require sufficient time within the OJEU to Award process to conduct their own analysis and to complete the financial negotiations, and will expect to do this within the formal commitment of a procurement process.

New models

- vii. Setting up new models, such as mutuals or joint ventures, may involve TUPE transfer where there are statutory due diligence processes, some with fixed timescales for consultation and 3rd party input, to be conducted and these cannot all be undertaken prior to the formal procurement process.

Large scale asset disposals

- viii. Procurements involving complex asset disposals where complexity arises from scale (i.e. a high number of assets involved) and geographical spread are unlikely to complete a formal procurement process within 120 working days.

Defence procurements

- ix. Technical integration risk determines complexity in defence procurement; for example when integrating new capability with existing command and control systems. Mitigating activities for high levels of integration risks will extend the procurement timelines beyond 120 working days.

Medicine procurements

- x. Procurements which extend beyond the simple purchase of medicines to areas including those where additional services are required as part of a licensing or regulatory framework or pre-licensing product development or agreements that require advanced commitments to production of a medicine where the final formulation of the product cannot be finalised in advance of a disease outbreak.

Annex B: Pre-Procurement Engagement

Fact: It is not against EU procurement law to talk to potential suppliers before starting the formal procurement process

Pre-procurement engagement with the market (including talking to potential suppliers) is not prohibited by EU procurement law, nor is it subject to any detailed procedures provided that it does not prevent an effective competition taking place once the procurement has started. In fact, engaging with the market before starting the formal procurement process is best practice and helps to maximise value for money from the resulting procurement.

What is Pre-procurement engagement?

Pre-procurement engagement describes the range of activities undertaken by the contracting authority to engage the market before starting a procurement process, which may include a technical dialogue to inform a specification.

What are the benefits?

Both the contracting authority and potential suppliers can benefit from early two-way communication.

Pre-procurement engagement can:

- Help to manage the market – through stimulating increased competition which can reduce the dependency on a limited number of suppliers.
- Help to define the requirement – by informing the business case and helping to identify or develop the requirements of what is needed. It is much more difficult to change your requirements once the formal procurement process has started without potentially falling foul of the law.
- Help to provide a better understanding of the feasibility of the requirement, the best approach, the capacity of the market to deliver and possible risks involved.
- Reduce procurement timescales – by minimising the dialogue needed during the formal procurement process. This will help to complete all but the most complex procurements within of 120 working days (from OJEU to award).
- Minimise the need for using complex and costly procedures such as Competitive Dialogue.
- Encourage 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.
- Provide the market with an opportunity to ask questions/raise queries and any issues addressed at an early stage.

When conducting pre-procurement engagement

Do:

- Engage early and widely with the market to give them an opportunity to shape the requirement and get ready to meet the demand.
- Discuss outcomes to inform the specification.
- Ensure that suppliers are aware that any resulting procurement will be conducted competitively.
- Speak to a proportionate number of potential suppliers in relation to the market size. This will help to ensure that the process is not overburdened by speaking to every conceivable potential supplier.
- Maintain the commercial confidentiality of information received during discussions with potential suppliers in line with applicable laws, such as the Freedom of Information Act.
- Discuss whether splitting a contract into smaller contracts/lots will stimulate greater competition and deliver better value for money or whether this can be achieved through encouraging a more diverse supply chain.
- Discuss with the market how the requirements might be made more exportable overseas – for example, through the use of internationally recognised product standards.

- Discuss procurement pipelines with the market and the capabilities needed to deliver them.

Do Not:

- Give any one potential supplier an advantage in bidding over another – for example, by providing one supplier with substantially more information than another – this could be overcome by publishing all information on your website to ensure equal access.
- As a result of pre-procurement dialogue shape your requirement in favour of any one particular potential supplier.
- Engage in a way that disadvantages any one particular potential supplier or group of potential suppliers – for example, SMEs and mutuals.

Methods of engaging with the market:

There are various ways that contracting authorities can engage with the market pre-procurement. These include, but are not limited to:

- Market Sounding Exercises – can include the use of questionnaires or crowd-sourcing. This can be useful in establishing the feasibility, capability, maturity and capacity of the market as a whole.
- Product Surgery – where a contracting authority has an idea of what they want to buy, they can hold a product surgery to allow potential suppliers to present possible solutions.
- Issue a Prior Information Note (PIN) – to inform the market of your upcoming procurement need and provide an opportunity to seek feedback from potential suppliers. The use of PINs must be in accordance with Regulation 11 of the Public Contracts Regulations and Regulation 14 of the Defence and Security Public Contracts Regulations. Contract Notices or Expressions of Interest for lower value contracts can also be issued on Contracts Finder and published in trade journals.
- Industry Boot Camps (Industry Days) – to capture potential suppliers' views on your requirements, including viability and possible delivery options. This can help to stimulate innovative solutions from a diverse range of potential suppliers. This also provides an opportunity for potential suppliers to discuss opportunities with one another (e.g. partnering arrangements, sub-contracting opportunities etc).
- Solutions Exchange – From May, a new online tool will help government buyers to engage earlier with potential providers, especially SMEs, by allowing them to put informal postings about what they need to buy in future online and for SMEs and potential providers to respond and explain what they can offer.

Annex C: Lean sourcing principles:

- Establish a **clear understanding of the required business outcomes** and ensure that the customer's needs are agreed and clearly stated through structured engagement with business stakeholders. Use this to develop outcome based specifications to test with the marketplace.
- **Carry out extensive pre-procurement market engagement** with prospective suppliers and use structured and time-boxed advertised industry days to test out and refine thinking on the business requirement and target outcomes before the formal procurement process begins.
- Establish a **strong planning and management discipline** using the Standard Solution as a guide; use visual management tools to help drive progress
- **Ensure proper readiness to go to market** by publishing a full bidder's pack (specification, selection and award criteria, terms and conditions and timescales) at the point of going to market alongside the OJEU Contract Notice. This allows suppliers to make informed decisions as to whether they wish to tender for the requirement.
- **Streamline engagement with suppliers** by using a 'boot camp' approach to make best use of limited time and expensive resources.
- **Use OJEU compliant e-sourcing tools** to help manage the full process.
- **Drive continuous improvement and reductions in procurement turnaround times by monitoring and measuring performance** and applying effective project planning and management approaches that highlight progress in a visible way. Challenge deviation from the Standard Solution to assure the efficiency of the process.

You should also take all opportunities to simplify requirements and where appropriate, break down into lots. Any requirements that are below the value of the current OJEU threshold² should be sourced through the Government Dynamic Marketplace³.

Consideration of the Open Procedure should be the starting point. This is a faster and more efficient procurement route that does not restrict competition.

²<http://www.cabinetoffice.gov.uk/sites/default/files/resources/10%2011%20Threshold%20Rates%20for%202012%20and%20AR%20Procedure%20Update.pdf>

³<http://gps.cabinetoffice.gov.uk/i-am-buyer/buy-item>