

Preliminary market consultation (PMC)

One of the effective ways to promote innovation and learn about new innovative solutions is to conduct open market consultation or, as stated in article 40 of the Directive 2014/24/EU, preliminary market consultation.

It can be described as a formalised dialogue between the contracting authority and other entities (economic operators, suppliers or independent experts), aiming to obtain answers to the question of how the problems of the contracting authority can be solved.

Another possible definition is that “the concept of preliminary market consultation roughly encompasses a multi-faceted query whereby a contracting authority ask experts and market operator to offer their contributions in order to make up the object of the contract and to define the other feature of the procedure.”¹

The legal definition of preliminary market consultation is stated in article 40 of the directive 2014/24/EU. According to this article, „before launching a procurement procedure, contracting authorities may conduct market consultations in view of preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants. That advice may be used 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 a violation of the principles of non-discrimination and transparency.“

Is it a new institute?

Yes and no. There was market engagement before the preliminary market consultation was introduced in the directive 2014/24/EU. By introducing PMC into it becomes more formalised, and this was strengthened the importance of PMC.

The reasons for organising PMC and its benefits of it

The benefits and also the reasons for organising PMC are:

- The contracting authority does not know how it would be possible to ensure the realisation of its unmet need – e.g. possible different methods of disposal of dangerous waste;
- Identification of the suitable suppliers on the market;
- Obtaining information about existing technical solutions, their prices, conditions of performance, etc.;
- Promoting innovation in the market;
- Determining the estimated value of the contract;
- Verification of non-discriminatory qualification criteria and conditions for performance of the contract, which will allow the submission of a tender for all suitable suppliers;
- Verification of the feasibility of the contractual conditions;
- Minimisation of imminent risks in the implementation and operation of the subject of tender;
- It is a legal way of informing the suppliers about the public tender;
- Minimising the risk of review procedures within public procurement;
- Shortening the time of preparation of tender documents;
- Acquiring more competitive offers and solutions.

¹ A.M.Lopez, Preliminary market consultations in innovative procurement: A principled approach and incentives for anticompetitive behaviors, in G.M. Racca and Ch.R.Yukins, Joint public procurement and Innovation: Lessons across Borders, Bruylant, 2019, p. 390.

This white paper "**Lessons learned on legal aspects**"² from the project **PPI4HPC** concludes that market consultations have several benefits such as:

- for technical aspects:
 - Help in reviewing common and lot-specific requirements;
 - Identification of collaborative developments which, on top of existing products, can implement technology goals defined by the technology team;
 - Improvement of definition and clarification of ambiguous requirements;
- for legal and procedure aspects:
 - Means to organise the procurement procedure: dematerialised procedure or full paper procedure;
 - Conflict of laws during the procurement procedure;
 - Subcontracting;
 - Clarification on the application form;
 - Language;
 - Analysis of candidates' applications (qualification).

What are the benefits for suppliers?

It is not only the contracting authority that benefits from conducting PMC. The suppliers can also benefit from participating in PMC, and these benefits can overcome costs that they may have with participating.

Suppliers can benefit from PMC in the following ways:

- A better understanding of the situation and problems of the contracting authority;
- A legal way how to "influence" the preparation of the tender;
- The opportunity to present innovations, ideas, thoughts;
- The possibility to draw attention to discriminatory conditions without the need to use the review procedure;
- Faster decision-making whether the given supplier is interested in the given tender and whether it is, therefore, important to further deal with the prepared public tender;
- To be able to better plan over time the efforts of companies (anticipation in terms of human resources, materials) and to propose more accurate offers.

How to organise PMC?

There are several ways to organise preliminary market consultations, for example, "physical and online meetings or questionnaires. Presentations and testing of samples allowing end-users to verify the suitability of the proposed solutions in real-life conditions can complement these meetings. Less conventional methods, such as competitions, hackathons, idea markets or category innovation roadmaps can be considered."³ What should always be kept in mind when organising a preliminary market consultation is **that the process must comply with the principles of equal treatment, non-discrimination and transparency stated in the directive 2014/24/EU.**

Steps to follow when conducting PMC

- 1) PMC preparation

² E. Brunel, P. Alberigo, J. Bartolome, D. Pleiter, F. Robin: PPI4HPC white paper "Lessons learned on legal aspects", Oct. 2020., available at https://ppi4hpc.eu/sites/default/files/public/file-uploads/PPI4HPC_white_paper_2_0.pdf

³ EC Guidance Notice on Innovation Procurement, p. 31, available at: <https://ec.europa.eu/digital-single-market/en/news/commission-notice-guidance-innovation-procurement-available-now-all-eu-languages>

- 2) Announcement of PMC
- 3) Registration of PMC participants
- 4) Sending documents about PMC to participants
- 5) Participants send responses to the contracting authority
- 6) Meeting and discussion with PMC participant
- 7) Assessment of participants' responses
- 8) Finalisation of the description of the subject of the tender
- 9) Documentation from PMC

PMC PREPARATION

- Start by communicating with end-user regarding their need (unmet need);
- Define the aim and goal of PMC;
- Decide on how PMC is managed – are there going to be individual consultations with the suppliers or one joined meeting;
- Share with other departments that may have the exact needs the idea of organising a PMC;
- Nominate one contact point and have clear rules about information flow;
- Choose the members who will carry out the consultation and assign them specific roles regarding interactions with suppliers;
- Instruct the members who are there for the technical part that it is crucial to provide all information in some manner to all participants. It is important to secure that the process complies with the principles of equal treatment, non-discrimination and transparency stated in the directive 2014/24/EU;
- Prepare documents for the announcement of the PMC – description of the subject of the tender, application form, prior notice.

ANNOUNCEMENT OF PMC

- Publication of a preliminary notice in the official journal of EU is a recommended practice. You can also advertise by publishing on the web of contracting authority.
- The preliminary notice contains basic information about what the PMC is, how to participate and who can participate.
- After publishing the notice, you should publish the documents through the e-procurement system that is contracting authority. Documents that should be published are the application form, description of the tender subject, etc.
- The CA can send an invitation to participate to potential participants after the publication of the notice.

REGISTRATION OF PARTICIPANTS

- They can register by sending the completed form – based on the received invitation from the CA, or they could learn about PMC from the preliminary notice.
- The application form should contain: Contact details, identification of the contact person, consent to the processing of the data and consent to the making of the record
- One contact person maintains the list of the participants at the CA.

SENDING DOCUMENTS ABOUT PMC TO PARTICIPANTS

- After participants registered to PMC, the CA sends a description of the subject of the PMC, or a questionnaire/the survey directly to the registered participants
- Several questions could be in the questionnaire, and it depends on the aim of the PMC. For example, the questionnaire can contain questions like this:
 - How can supplier fulfil the unmet need the CA has?
 - Are there other ways to solve the problems of the CA than the traditional one?
 - Is it possible to submit a tender based on the information about the subject of the tender provided?
 - If the answer to the above question is no, then what other documents and information are needed?
 - Is there an entity in the relevant market (EU) that could provide or deliver the entire subject of the contract?
 - In the case of services, what experts should be participating in providing services, what experience or certificates should they have?
 - What cooperation would be required from the CA when providing the subject of the contract?
 - Do you identify any legal or financial risks that could arise from the execution of the contract? If yes, do you have ideas on how it could be mitigated? (This would help identify the associated risks in advance and see how companies anticipate possible difficulties and prevent them in the future contract.
 - What would be the earliest time when can suppliers start with providing the services or the effective date of the contract?
 - What is the delivery time of the products?
 - How many days do you need to submit an offer?
 - What is the estimated total price for the subject of the contract?
- The CA should state the deadline for sending answers or additional questions. The deadline should be reasonable but can also be extended.
- The questionnaire can be published through an e-procurement system.

PARTICIPANTS SEND RESPONSES TO THE CONTRACTING AUTHORITY

- It is advisable to have a structured questionnaire because then there will be structured answers.
- Participants have the costs of participating in PMC, but on the other hand, they have an opportunity to stir the subject of the tender legally. By participating, they are rewarding the CA the willingness to open the competition.
- Participants have the opportunity to present their solutions and can also modify the subject of the contract.

MEETING AND DISCUSSION WITH PMC PARTICIPANT

- There does not have to be in every case meeting with participants. When it comes to the more straightforward subject of tender, PMC may also be conducted in writing, for example, in the survey forms.
- In the case of a pandemic situation, the meeting shall be held online. It is also the case when there are participants from different countries.
- It is crucial to have a recording from the meeting – video or at least audio.
- Preparation for the meeting is crucial. The CA must moderate the session in a well-structured form. Discussion is welcome, but it should be regulated.
- The meeting can be, for example, done in this way: The CA goes through the questionnaire and asks the participants if there are any questions. Then the CA provides additional explanation.

- Minutes of the meeting should be taken, but they may be prepared afterwards.

ASSESSMENT OF PARTICIPANTS' COMMENTS

- The CA should evaluate the answers it received from participants
- If there are still uncertainties, there may be another round of meeting.

FINALISATION OF THE DESCRIPTION OF THE SUBJECT OF THE CONTRACT

- Optimally, the contracting authority has a final description of the tender subject at the end of PMC. The CA can ask the participants for consent with the description of the subject of the tender.
- CA should also have an idea about
 - the number of possible suppliers and reasonable qualification criteria
 - Contractual terms and conditions,
 - Criteria for the evaluation of tenders

DOCUMENTATION FROM PMC

- Audio-video recording should be stored in documentation from PMC.
- Minutes from the PMC should be in the e-procurement system that the CA is using, so it is generally available.
- Where appropriate, the final description of the subject of the tender is also published.

Appropriate measures

Article 41 of directive 2014/24/EU states the rules concerning prior involvement of candidates or tenderers:

„Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of Article 40 or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take **appropriate measures** to ensure that competition is not distorted by the participation of that candidate or tenderer.

Such measures shall include **the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure** and the fixing of adequate time limits for the receipt of tenders.

The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.“

How can these appropriate measures be secure?

For example, CA publishes all the minutes from the PMC and the information that you gather on your profile in the e-procurement system or web page. You can also post the final technical description of the tender, qualification criteria, evaluation criteria and other parts of the tender document.

In the tender documents related to the public tender itself, CA shall mention that all information gathered from PMC is published in the e-procurement system or web page and adds its link.