

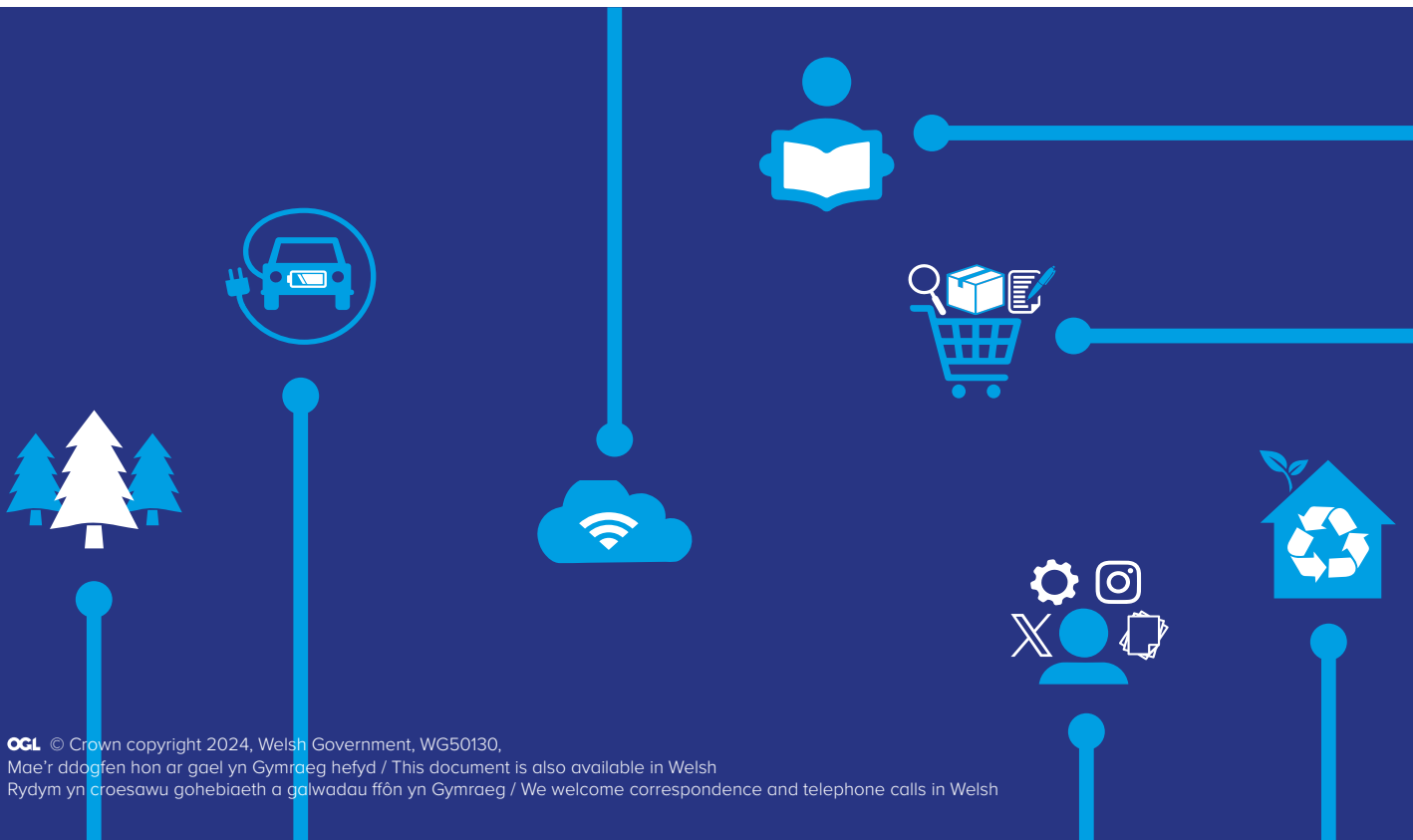


Llywodraeth Cymru
Welsh Government

Guidance

Preliminary Market Engagement

July 2024





Guidance: Preliminary Market Engagement

What is preliminary market engagement?

1. Preliminary market engagement under the Procurement Act 2023 (the Act) takes place before the publication of a tender or transparency notice and helps contracting authorities and the market prepare for the procurement. This engagement is of particular importance under the Act, where contracting authorities have significant flexibility to design and tailor their competitive procurement procedures. However, this engagement must be conducted in a way that does not give a supplier an unfair advantage or distort competition.
2. The Act also includes a provision for contracting authorities to publish a preliminary market engagement notice. The notice is used to invite suppliers to participate in preliminary market engagement or to notify the market that engagement has taken place. Notices can help to ensure a level playing field and also serve to attract new entrants.

What is the legal framework that governs preliminary market engagement?

3. The main provisions on preliminary market engagement are included in section 16 and section 17 of the Act.
4. There are also various overarching provisions under the Act, for example, the procurement objectives, non-discrimination requirements and conflicts of interest obligations which are relevant to preliminary market engagement.

What has changed?

5. These sections are similar to the provisions in the Public Contracts Regulations 2015 (PCR) (see regulations 40 and 41). A key difference is the addition of obligations regarding a preliminary market engagement notice.
6. In addition, unlike the PCR (see regulation 41(2)) which sets out some examples of measures that an authority could take to ensure competition is not distorted, there are no specific examples given in sections 16 and 17 of the Act. However, measures such as the sharing of relevant information that has been gathered or exchanged with suppliers and fixing adequate time limits for the receipt of tenders



would also be measures that could be adopted under the Act to prevent unfair advantage and ensure competition is not distorted.

Section 16 - Preliminary market engagement

7. Section 16 permits contracting authorities to engage with the market, lists the permitted purposes of such engagement, and requires that contracting authorities take steps to ensure that participating suppliers are not unfairly advantaged and that competition is not otherwise distorted.

Section 17 - Preliminary market engagement notices

8. Contracting authorities are not required by the Act to conduct preliminary market engagement. However, section 17 requires that if a contracting authority carries out preliminary market engagement it must either:
 - a. publish a preliminary market engagement notice before it publishes a tender notice; or
 - b. explain, in the tender notice, why it did not publish a preliminary market engagement notice.
9. Following amendments in the Procurement Regulations 2024 and the Procurement (Wales) Regulations 2024, this section will not apply to private utilities.

Key points and policy intent

10. The policy objective is to encourage contracting authorities to speak with the market before commencing a procurement. Whilst this is not mandatory, the information gathered during this stage can be invaluable for the contracting authority as it clarifies its requirements, assesses the market's capacity and develops its procurement strategy.

Determining what might be considered preliminary market engagement

11. Section 16(1) lists the permitted purposes of engagement. The list is deliberately broad to give contracting authorities confidence to engage with the market about relevant and reasonable commercial considerations prior to commencing a procurement. The permitted purposes are:
 - a. developing the authority's requirements and approach to the procurement;
 - b. designing a procedure, conditions of participation or award criteria;



- c. preparing the tender notice and associated tender documents;
- d. identifying suppliers that may be able to supply the goods, services or works required;
- e. identifying likely contractual terms; and
- f. building capacity among suppliers in relation to the contract being awarded.

12. Contracting authorities should note that what constitutes preliminary market engagement in section 16(1) is the purpose and subject of the engagement and not the form of engagement. This means that whether or not the contracting authority considers the engagement to be 'formal' or 'informal', if its purpose is listed in 16(1) it should be seen as preliminary market engagement and handled as such. It should, however, be noted that not every engagement involving contracting authorities and suppliers and other persons will be for the purpose of 16(1), and therefore would not be defined as preliminary market engagement to which section 16 applies.

13. Preliminary market engagement is a particularly important tool for the achievement of value for money. It allows contracting authorities, for example, to recognise divergence between suppliers which enables the identification of suitable areas for negotiation, dialogue or testing/demonstration as part of a competitive flexible procedure. Contracting authorities should, where relevant, also use preliminary market engagement to increase the understanding of how requirements ought to be set in such a way as to reduce whole lifecycle costs rather than focus on the initial purchase price of the contract.

Preparing to conduct preliminary market engagement

14. Contracting authorities will need to consider the purpose and format of their preliminary market engagement. The engagement is likely to be more effective if contracting authorities know the purpose and intended outcomes of the engagement and clearly articulate these to suppliers. The format could include various types or combinations of engagement such as face to face presentations or webinars, workshops, site visits, one to one meetings or a simple invitation to prospective suppliers to get in touch. It is important that contracting authorities consider the market's resources and the time and cost of engagement. For example, the requirement in the procurement objectives to have regard to the barriers small and medium-sized enterprises (SMEs) may face and to consider whether such barriers can be removed or reduced might affect how preliminary market engagement is carried out. As well as in-person events, hosting digital webinars or recording sessions can help make the engagement more accessible.



The details of the format of the event must be included in the preliminary market engagement notice, which may also include the purpose (or other information).

15. Contracting authorities can use preliminary market engagement to increase competition and the diversity of suppliers in procurement. For example, hosting events where suppliers can understand the bidding process and what the contracting authority is looking for in a tender can be helpful to new suppliers and SMEs. Indeed, engaging with a broad range of suppliers should improve the procurement. It is also important that preliminary market engagement is not used as a means of tailoring a procurement to a particular supplier.
16. Contracting authorities can engage with everyone who expresses an interest in preliminary market engagement. However, it is also possible for a contracting authority to state in the preliminary market engagement notice how numbers will be reduced; for example if there are too many respondents. Nevertheless, contracting authorities will still need to comply with their obligations in section 16 and the overarching duties under the Act, including those in section 12.
17. The conflicts of interest obligations in Part 5 of the Act are relevant when considering preliminary market engagement. This includes the requirement that contracting authorities must take all reasonable steps to identify and mitigate any conflicts of interest or potential conflicts of interest. In addition, before publishing a tender or transparency notice the contracting authority must also prepare a conflicts assessment in relation to the procurement. See guidance on conflicts of interest for more information.

Steps to ensure a supplier is not put at an unfair advantage and/or to avoid competition being distorted

18. The Act requires contracting authorities to take steps to ensure that suppliers participating in the preliminary market engagement are not put at an unfair advantage and that competition in relation to the award of the contract is not otherwise distorted. Contracting authorities should consider their approach to meeting this requirement before they begin their preliminary market engagement. If a contracting authority considers that a supplier's participation in the preliminary market engagement has put a supplier at an unfair advantage in relation to the award of the contract and that the advantage cannot be avoided, the supplier must be excluded from the procurement.
19. A contracting authority should keep a record of the information it has shared and received as part of the preliminary market engagement. This can help to ensure that the information gathered is taken into account in the procurement. The



information can also be shared with other parties and used to help ensure that participating suppliers are not unfairly advantaged. Depending on the nature of the information shared and received, it would be best practice for any such information and/or outcomes of the engagement to be included in the tender notice or tender documentation. To help with this, contracting authorities should consider in advance how they will handle any confidential information including intellectual property. This could include information relating to the contracting authority, an incumbent supplier or organisations involved in the engagement.

20. Contracting authorities may be able to use preliminary market engagement to help comply with their duty to consider whether any particular barriers to participation faced by SMEs can be removed or reduced (this is one of the procurement objectives in section 12 of the Act). Preliminary market engagement sessions focused on SMEs and new entrants are permitted, provided this does not put those particular suppliers at an unfair advantage or distort competition. Such engagement must also comply with other procurement objectives such as sharing information and acting with integrity.
21. Contracting authorities who undertake preliminary market engagement are not obliged to proceed with the procurement to which it relates and if no tender or transparency notice has been published, a procurement termination notice is not required. However, even though no such notice is required it is best practice to record the reasons for a decision not to proceed with a procurement and a procurement termination notice can be used voluntarily to indicate that a particular procurement set out in a preliminary market engagement notice will not be progressed.

Publishing a preliminary market engagement notice

22. It should be standard practice to publish a preliminary market engagement notice where it has been identified that preliminary market engagement will be beneficial to the procurement and it is intended that preliminary market engagement will take place. The decision to carry out market engagement without using a preliminary market engagement notice will need to be justified in the tender notice and contracting authorities will also need to bear in mind the objectives in section 12, non-discrimination requirements and conflicts of interest obligations. This means there is not complete freedom to decide not to use a preliminary market engagement notice for a covered procurement when a contracting authority intends to conduct or has conducted preliminary market engagement.



23. If the contracting authority has not conducted any preliminary market engagement, there is no requirement under the Act to publish the reason for not doing so in the tender notice.
24. Section 17(2) and Regulation 18 sets out the content that needs to be included in a preliminary market engagement notice. There is no set timeline for publishing the preliminary market engagement notice. However, if a notice is used to invite suppliers to attend a preliminary market engagement event, given the duties under section 12, it is advisable to allow a sufficient time period for those who may want to take part to prepare, proportionate to the nature of the preliminary market engagement intended to be undertaken. The time period can vary, for example, depending on the complexity of the market and the type of engagement planned. For example, some preliminary market engagements may require time for participants to read background documents and prepare questions/feedback. Other engagements may simply require attendance at a meeting to discuss the contracting authority's requirements (with no preparation required).
25. Contracting authorities can also use a preliminary market engagement notice to declare that preliminary market engagement has already taken place (for example with a selected group of suppliers) and provide details of the process by which it was undertaken. In this scenario, the notice can be used to share engagement outputs and ensure a wider audience is kept informed about the contracting authority's emerging thinking, therefore supporting the objectives of section 12 and ensuring all suppliers have access to the same information. The notice can also flag additional upcoming engagement opportunities.
26. During this stage of the process, when a contracting authority is completing the 'contract subject-matter' field in the notice, it may only be able to describe this in broad terms or provide high level estimates. The requirements in subsequent notices related to the procurement do not have to match precisely the information/estimates in the preliminary market engagement notice. Considering the purpose of this engagement is to help the contracting authority develop its requirements, these might be adjusted depending on the outcomes of the preliminary engagement.

Joint Preliminary Market Engagement

27. Contracting authorities can jointly undertake preliminary market engagement exercises. In this case, a 'lead authority' can publish a preliminary market engagement notice on behalf of all of the contracting authorities and all of their procurements can be included in a single notice. When the contracting authorities are publishing their tender notices, they will be able to state in their notices that they are relying on the lead contracting authority's preliminary



market engagement notice as justification for not having published their own preliminary market engagement notice.

Engagement without publishing a preliminary market engagement notice

28. The Act does allow a contracting authority to carry out preliminary market engagement without a notice, provided it gives its reasons for not doing so in the tender notice. Contracting authorities will also still be required to comply with the provisions contained within section 16 concerning *how* to conduct preliminary market engagement; for example the obligation to take steps to prevent unfair advantage and distortion of competition. A contracting authority must also consider the Act's overarching duties (such as those in section 12) when making this decision not to publish.
29. The option to allow non-publication of a preliminary market engagement notice, provided a contracting authority provides reasons in its tender notice, has been made to capture what is anticipated will be a limited number of circumstances. Whilst it will always be fact-specific, examples of situations where this might arise are where it was necessary to keep the engagement secret for national security purposes, or where there are extenuating circumstances, for example because there is a high risk of a critical service failure if the procurement does not progress quickly.
30. As the reasons for not publishing a preliminary market engagement notice will be published in the tender notice, any interested parties will be able to raise any concerns with the contracting authority.

Preliminary market engagement for covered procurements which do not require a tender notice

31. Although the obligations set out in section 16 are linked to publication of a tender notice, section 16 does not prevent a contracting authority from engaging with suppliers as appropriate before commencing a procurement which does not require a tender notice. For example, in respect of contracts awarded under frameworks or direct awards. Similarly, a contracting authority establishing a dynamic market is not prevented from engaging with the market before publishing a dynamic market notice.
32. However, these will not be preliminary market engagements as defined in section 16(1) and some of the purposes set out in section 16(1) will not be relevant, such



as in the case of frameworks, where, for example, the award criteria will have been set out in the framework.

33. If contracting authorities do engage with the market in these circumstances, other relevant requirements in Act, such as the procurement objectives in section 12, must be complied with.
34. In these circumstances, a contracting authority may also choose to notify the market of an engagement, which it can do using a preliminary market engagement notice, but, again, there is no requirement to do so under the Act.

Below-threshold contracts

35. The obligations in sections 16 and 17 do not apply to below-threshold contracts. Again, contracting authorities can, but are not required to, publish a preliminary market engagement notice for below-threshold contracts. There is also no requirement to explain non-publication of a preliminary market engagement notice in a below-threshold tender notice.

Private utilities

36. Private utilities are encouraged to publish a preliminary market engagement notice when they intend to conduct or have conducted preliminary market engagement, but where they choose not to do so, they are not required to explain this in the tender notice.

What notices are linked to this aspect of the regime?

37. The nature of the preliminary market engagement notice means that it is published early on in the sequence of notices provided for under the Act. It will usually be preceded by the pipeline notice but it could also be published as the first notice in the sequence (if the procurement is not published in a contracting authority's pipeline notice or if preliminary market engagement occurs prior to the contracting authority making a decision to proceed with the procurement and publish a pipeline notice). It could also follow the planned procurement notice.
38. The next notice in the sequence after the preliminary market engagement notice will be one of the following:
 - a. pipeline notice - to publish the individual procurements making up a pipeline.
 - b. planned procurement notice - to provide advance notice of the procurement and potentially take advantage of reduced timescales.



- c. tender notice - to advertise the opportunity to tender. As set out above, if preliminary market engagement is conducted but no preliminary market engagement notice is published, there is a requirement to explain this non-publication in the tender notice.
- d. transparency notice - for use when a direct award is being made.
- e. procurement termination notice - can be used voluntarily to indicate that a particular procurement set out in a preliminary market engagement notice will not be progressed.

39. Contracting authorities must ensure that when publishing the next notice in the sequence that they refer back to the originating notice. See further guidance on notice sequencing and flowcharts and the Welsh Digital Platform.

What other guidance is of particular relevance to this topic?

- Guidance on notice sequencing and flowcharts
- Guidance on covered procurement objectives
- Guidance on competitive tendering
- Guidance on direct award
- Guidance on conflicts of interest
- Guidance on the Welsh Digital Platform

