
It pays to talk

Cora Marler, associate director at Currie & Brown, examines the importance of market engagement as part of procurement procedures.

The key to any successful project is good planning. The more complex the project, the more important this is. There is real value in forging strong, sustainable, open and transparent relationships with suppliers ahead of commencing a procurement process.

This is particularly true of the public sector, where regulation of procurement processes is necessarily strict. Preliminary market consultation during pre-procurement planning, known as market engagement, can bring real benefits to all parties.

However, this process must not be seen to distort competition, favour one particular supplier over another or in any way compromise safeguards against fraud and corruption.

An increasing number of public bodies are using market engagement as part of their procurement procedure. In the UK, the process has been made easier as a result of the introduction of Regulation 40 in the Public Contracts Regulations (PCR) 2015, which eased some of the worries public sector authorities had about the perception of giving an advantage to one supplier over another.

Old habits die hard, however, and some contracting bodies remain concerned that market engagement may create bias, leaving them vulnerable to claims of discrimination or a lack of transparency in the process which is addressed in Regulation 41 of the PCR 2015. Fears such as these can be mitigated by using independent procurement consultants who can provide valuable input or carry out the market engagement on the client's behalf.

There are a number of key aspects to engagement which contracting authorities may wish to consider. It allows clients to clearly communicate their procurement needs as well as allowing a range of options to be discussed; generating ideas and stimulating innovation; and facilitating an understanding of whether suppliers can actually deliver on the proposed contract.

At this early stage in a procurement programme, discussions are likely to revolve around what is the most appropriate form of contract and how it should be packaged, along with whether the supplier can satisfactorily service the project or programme.

Market engagement is popular with suppliers. It helps to get them in front of the client and promote themselves at an early stage, either for an individual project or a programme of work.

For the process to deliver maximum value and ensure best practice, there has to be honesty and openness on both sides. Contracting authorities, for instance, need to recognise that suppliers are driven by a commercial imperative alongside a genuine

desire to build long-term relationships. A project can only be successful if all sides get something out of it.

Contracting authorities also have to realise that they may not always hear what they want to hear. Suppliers sitting on the other side of the table might suggest taking a different approach to a project. Although he who pays the piper ultimately calls the tune, more enlightened authorities will see this flow of ideas as a positive outcome from market engagement. In other words, recognising the need to listen.

How does the process take place? It can be in a number of ways. One route is to use supplier briefing events; another is through questionnaires or one-to-one sessions. There can be direct pre-procurement discussions with tenderers, either across the board or with a select cross-section of the market.

Complications can arise if one supplier already has a working relationship with the contracting body, but by making the same information available to everyone along with equal access to all prospective bidders this can help alleviate these.

If the tender documentation has already gone out, it may make sense to hold a “bidders’ day” that allows tenderers to ask specific questions. The 2015 regulations provide a useful framework, insisting that contracting authorities must not design the procurement process in a way that unduly favours or disadvantages certain companies. Splitting the resources allocated to carry out market engagement from tender evaluation can also be a useful way for clients to maintain visible integrity.

The whole exercise can be as simple or as complex as an authority wants it to be. The really important thing is for suppliers to ensure that the right questions are being asked and that they are framed correctly. This ensures that the data provided can be meaningfully analysed.

It is also important for contracting authorities to maintain a focus on the desirable project or framework outcomes rather than specifying exactly what they want. This allows the suppliers to consider the best way of achieving those outcomes rather than focusing on a particular process or having to stick to rigid rules. It also means that the intelligence they supply in the course of this process can be captured for future use.

At the end of the day, market engagement is a learning process for all involved. The 2015 regulations have brought much needed clarity regarding its permission, but their effect is taking time to work their way into the public procurement arena and there is still some nervousness among contracting authorities about engaging with the market.

This is perhaps understandable, but anything which helps develop client-supplier relationships and create better long-term sustainable contracts and frameworks within the construction sector is to be applauded. This is one area where fortune really does favour the brave.