

APPLYING MARKET CONSULTATIONS IN THE AWARD OF PUBLIC CONTRACTS

This project has received
funding from the
European Union



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1. BACKGROUNDⁱ

Preliminary market consultations were introduced with Directive 2014/24/EU and Directive 2014/25/EU¹ with the aim of improving the efficiency of the awarding contract process. They could be interpreted as a kind of “purchase supporting activities”, representing a specific form of consultations on the development of the awarding procedures, which contracting authorities are allowed to implement within the preparation stage. The analysis of the repealed Directive 2004/17/EC and Directive 2004/18/EC indicates that they do not contain an equivalent legally structured tool, which contracting authorities may use in the preparation of awarding procedures. The only text found in this direction is included in the recitals to the directives and represents a specified option for contracting authorities to seek or accept advice in the preparation of the specifications prior to launching an awarding procedure in the form of a "technical dialogue", as far as this does not distort or prevent competition. This condition, however, has not been implemented in the body of the directions and has not been transposed in the Bulgarian Public Procurement Act (PPA) in force at that moment.

With the new directives, the European legislator indicates that contracting entities may conduct market consultations in order to:

- Prepare the contract awarding; and
- Inform economic operators of their procurement plans with regard to the future procurement²;
- Inform economic operators of their procurement requirements with regard to the future procurement.

The scope of market consultation is indicatively illustrated as an opportunity to seek (active form) and to accept (passive form) advice from independent experts or authorities or from market participants. The advice received could be used in both planning and performing contract awarding procedures.

With the adoption of the new Public Procurement Act³ the relevant Community legislation regulations have been introduced in the Bulgarian legal system⁴.

¹ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

² In this regard, some similarities could be observed between the market consultation and the publication of prior information notice. However, the conduct of market consultation does not allow to carry out the functions of the prior notification with regard to the possibility of applying shortened terms for submission of tenders and requests.

³ Promulgated in State Gazette, issue 13 of 16 February 2016, in force as of 15 April 2016.

⁴ See Article 44 of PPA. In the Bulgarian legislation market consultations are envisaged only in their active form. In this regard the contracting authority may conduct market consultations only by seeking advice from independent experts or authorities, or from market participants. Therefore, the national legislation does not provide for contracting authorities' competences in relation to unsolicited proposals.

2. SCOPE AND APPLICATION

The foregoing allows to outline the scope of market consultations, including the moment of their conduct and application:

- The use of market consultations is an option and is not an obligation; whether market consultation will be implemented is a matter left to the discretion of the contracting authority and generally is not subject to control;
- Market consultations are carried out only at the initiative of the contracting authority;
- Market consultations are carried out prior to launching the awarding procedure; subject to consultations can be certain information (conditions, requirements, documents) related to awarding a future contract, as well as the procurement documentation in its entirety;
- Market consultations may not be related to an awarding procedure and could be used in procurements which are below the respective thresholds – award through submitting tenders with notice, with invitation or direct awarding;
- Market consultations may refer to informing economic operators of contracting authorities' plans for future procurement;
- Market consultations may refer to informing economic operators of contracting authorities' requirements for future procurement;
- Contracting authorities are not restricted from conducting a single marketing consultation in relation to the relevant public procurement; if the results of the market consultation are not satisfactory or require substantial modification of the original intentions of the contracting authority, it is free to conduct follow-up consultations.

With regard to the aforementioned, market consultations' functions could be divided in the following main groups:

- on the first place is the possibility for contracting authorities to assess the current conditions on the market; this option can be used both to identify proposed solutions and in connection to determination of potential contractors;
- next, by providing information on the public procurement and the possible requirements related to the future award of the contract, the contracting authority allows the interested persons to take the necessary steps for planning and mobilizing resources that will be necessary for the preparation of their proposals and facilitate the creation of a prior organization, which is to contribute to the preparation of proposals that meet the awarding requirements.

Figure 1. Market consultations' functions



Market consultations could be applied to any awarding procedure, regardless of its type, specific features and characteristics. The legislator sets no limits in this regard and apart from achieving more favourable conditions for selecting a contractor, the contracting authorities may freely use the market consultations, incl. in order to submit a request for openness and transparency. An analysis of the updated content of the awarding procedures, shows that market consultations can be successfully used especially in cases of activities characterized with a particular level of complexity. These could be procurements associated with one or more of the following circumstances:

- contracting authority's needs cannot be satisfied without adapting the current market solutions;
- the public procurement includes solution/s associated with design or innovation;
- the public contract cannot be awarded without conducting negotiations due to specific conditions related to the nature, complexity or the legal and financial framework, or because of the associated risks;
- the contracting authority cannot set the technical specifications with the necessary accuracy by reference to a standard, European technical assessment, common technical specifications or technical reference.
- in cases where the contracting authority does not have the necessary experience, expert and/or administrative capacity to prepare the tender documentation and (based on a separate public contract) external consultancy support is, for one reason or another, impossible;
- in cases where the contracting authority cannot solely determine the connection between market conditions, on the one hand, and the established business and functional requirements of the contract – on the other;
- as well as in any other case, where due to objective reasons, the technical specifications, the financial and/or legal framework of the procurement cannot be specified, which questions the economic operators' (interested persons') reaction and/or the quality of the proposals to be submitted; and others.

These are practically the reasons that a contracting authority may use as a base for choosing one of the more specific procedures for selecting a contractor – competitive procedure with negotiation; competitive dialogue; and innovation partnership.

Besides from the foregoing, a contracting authority may carry out market consultations even in cases where it has no sufficient information on the market options, related to the performance of the contract.

Depending on the specific circumstances as a result of the consultation carried-out: 1) the preliminary parameters of the contracting authority's needs could be identified and/or the means for its satisfaction and the conditions thereto; as a consequence of which 2) the most efficient manner of awarding (choice of procedure) could be determined. For example:

- in case that no applicable market solutions are available for the performance of the public contract and it is necessary to perform R&D activities in order to develop an innovative product, service or work and the subsequent acquisition of the results is expected, the innovation partnership should be applied;
- in case that the contracting authority's needs could be satisfied with existing solutions but they need to be adapted for which it would be necessary to conduct negotiations, the application of competitive procedure with negotiation would be appropriate;
- in case that the contracting authority cannot determine the technical specifications, the financial and/or legal framework of the performance of the contract, competitive dialogue should be applied.

What unites the three procedures above is the fact that their application is envisaged as an exception of the general rules for contract awarding in open and restricted public procedures⁵.

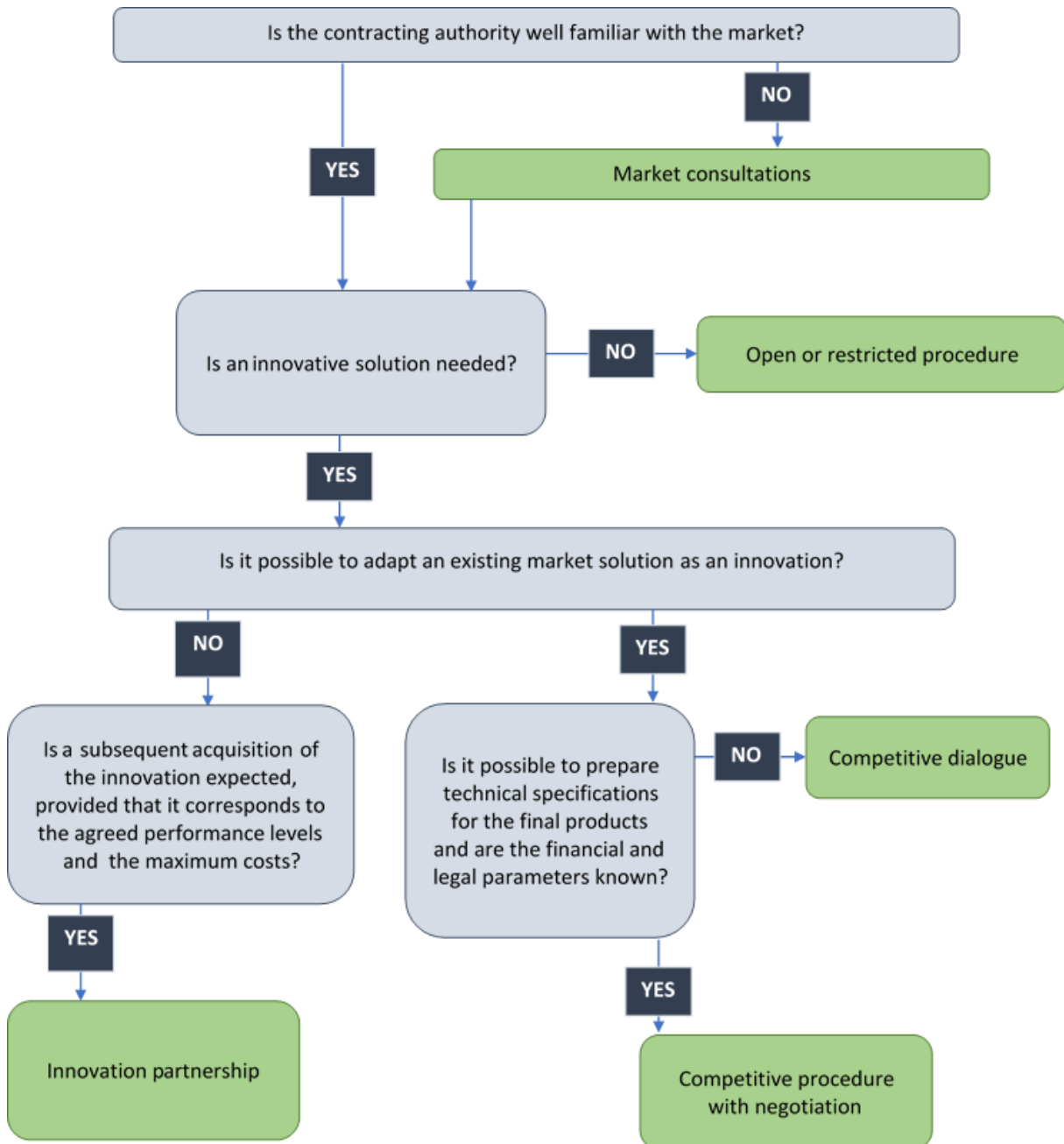
In this sense, whenever a contracting authority intends to implement the competitive procedure with negotiation, the competitive dialogue and the innovation partnership, it must justify the choice of procedure and justify the presence of the respective factual and legal basis, which is an absolute legal prerequisite to the implementation of the respective procedure. Conducting a market consultation may serve to achieve this goal.

Next, the mechanism of market consultations could be successfully applied as regards the structuring of project proposals which contracting authorities use when applying for financial support under operational programs, financed by the structural and investment funds of the EU. In this sense, the conduct of market consultations in specifying the content of the project activities, which include the future contract award, may serve as an answer to the challenges which contracting authorities face at this early stage.

Often the project proposal should be accompanied by a justification of the scope and content of the proposed interventions, including justification of the financial parameters. The method used at the time is mostly based on collecting of at least three separate indicative and referent tenders from relevant market players. However, this mechanism is characterized by a number of disadvantages, among which stands out the lack of transparency and the possibility of violating the principle of equal treatment. A significant disadvantage is also the risk of inadequate tenders due to poor understanding of the needs of the contracting authority or insufficient level of engagement of the market.

⁵ With regard to contracting authorities (classic contracting authorities).

Figure 2. Selection of a procurement procedure as a result of conducted market consultations



3. LEGAL RESTRICTIONS TO MARKET CONSULTATIONS

Despite the brief regulation on market consultations and the lack of a structured approach for determining their content, their applicability is also characterized with limitations. The conditions for their conduct are related to ensuring competition, equal treatment, non-discrimination and transparency. In this sense, contacting authorities are required as a minimum:

- to publish on the buyer profile all the information exchanged during the preparation of the awarding procedure, including the result obtained by the contracting authority;

- to specify through the buyer profile a place where the information could be obtained – in case publication on the buyer profile is not possible;
- to determine an appropriate term for receipt of tenders, including to assess whether the reduction of terms does not violate the principle of equal treatment.

The requirements above are related to the legal obligation for the contracting authority not to give advantage to persons who participated in the market consultations and/or the preparation of the procedure over other candidates or tenderers. Despite of the foregoing, in case that complying with the principle of equal treatment cannot be achieved within an already announced procedure, the contracting authority will be obliged to disqualify a candidate or a tenderer, who has participated in the market consultations, provided that the contracting authority cannot prove that its participation in the procedure does not lead to violation of the principle. This legal provision is introduced with the new directives of 2014, as well as in the national law and reflect the established case law of the European Court of Justice, in particular – Judgement of the Court in Joined Cases C-21/03 and C-34/06⁶.

4. CONDUCT OF MARKET CONSULTATIONS

As stated above, contracting authorities are free to conduct market consultations in line with their needs, practice and in accordance with the scope of information to be subject to consultation. Nevertheless, given these legal restrictions, it is recommended to implement a structured approach to ensure maximum competition, equal treatment, non-discrimination and transparency as between the participants during consultations, as well as in connection to the subsequent implementation of the procedure.

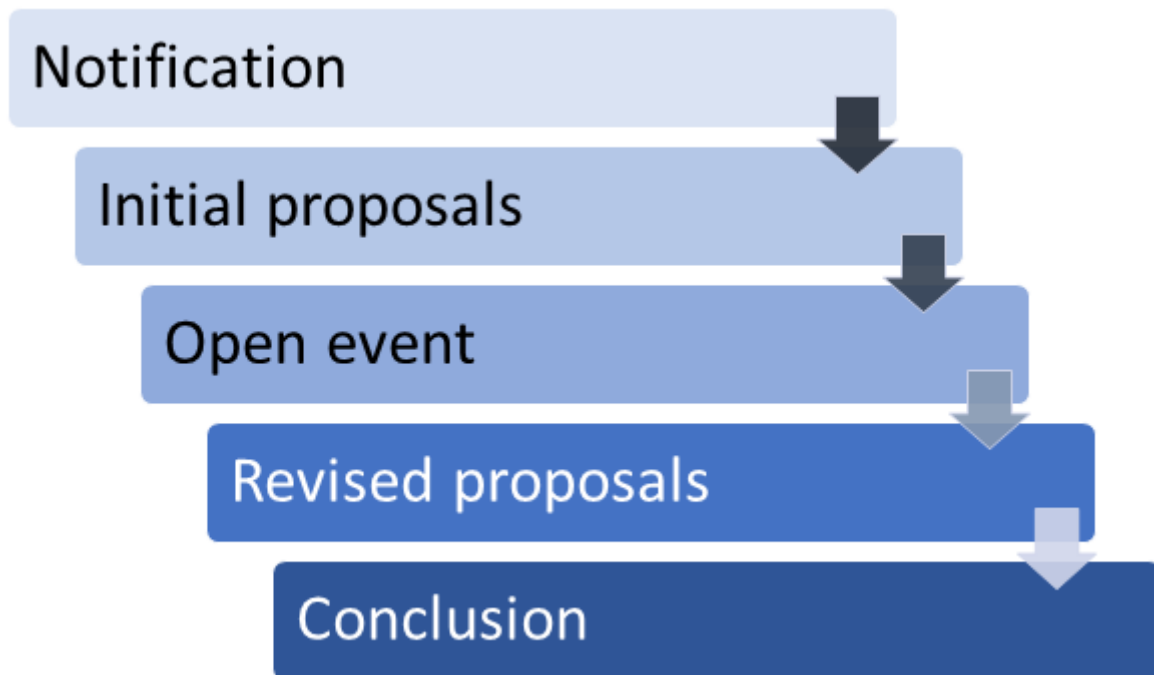
In this sense, a market consultation could be conducted by applying the following indicative structure and consequence of actions:

4.1. Notification

The law sets a minimum requirement for publication of information on the buyer profile or an indication of a place where the relevant information could be obtained. Moreover, for the purpose of circulating information about the consultation, it may be considered advisable for the contracting authority along with the publication on the buyer profile, to use the option of publishing in the Public Procurement Register and/or the Official Journal of the European Union of a notice of preliminary information which contains the minimum required set of data for access to information, related to the conduct of the consultation. It is also possible to provide an option for publication in the media, incl. national newspapers and/or national and international journals, as well as providing information to relevant chambers of commerce or similar professional associations.

⁶ [Judgement of 3 March 2006 in Joined Cases C-21/03 and C-34/03.](#)

Figure 3. Indicative structure of market consultations



It is advisable for the contracting authority to also publish the conditions for conduct of the consultation and samples of documents which may be used for that purpose. In order to guarantee equal treatment of the participants in the consultations, it is needed the entire communication with them to be prepared in writing. Regardless of the chosen form of notification, the advisable minimum set of data, which shall be included, is as follows:

- A summary of the scope and objectives of the future public procurement;
- Objectives and scope of the market consultation – may include a general reference to relatively more detailed documents and information, as well as an indication of the specific elements of a future public procurement, which the contracting authority intends to finalize through a market consultation; the objectives and the scope of the market consultation may refer to:
 - The accuracy and the completeness of the contract performance conditions and/or the technical specifications;
 - The assessment of the extent to which the interested persons understand the technical specifications and/or the contract performance conditions and whether they have significant objections against them;
 - The assessment of the extent to which the market could respond to the set conditions and requirements for contract performance and/or the technical specifications; and others.
- A schedule for implementation of the separate stages of the consultation;
- An address (incl. a physical one), where the interested persons may obtain the necessary information regarding the future contract and the scope and objectives of the market consultation, as well as an address, where statements, opinions and/or proposals could be submitted;

- A deadline for submission of statements, opinions and/or proposals;
- A place and time for conduct of an open event/s for the interested persons (open meetings);
- An address (incl. a physical one), where the interested persons may receive the results of the conducted market consultation.

4.2. Submission of initial statements, opinions and/or proposals

After expiry of the set deadlines, the contracting authority receives the respective initial statements, opinions and/or proposals by the interested persons. Here it is advisable for the contracting authority to carefully examine the received comments, to classify them (according to the content of the documents reviewed within the consultation) and unite them into a single text in the form of a report, that also contains a formal assessment of the relevance, correctness and other characteristics of the received proposals by the interested persons, together with the intention of the contracting authority to accept or not to accept one or another solution. One of the objectives of this document is to establish a basis for carrying out an open event/s⁷.

4.3. Open event with interested persons (open meeting)

The possibility of an open meeting between the contracting authority and the interested persons, as well as the possible benefit from it, should be assessed with respect to the specific parameters of the market consultation. The objective of this meeting is to provide for the opportunity of a broader discussion on the future contract and to allow the interested persons to clarify their statements and proposals. The event and the number of attendees may also give a valuable insight on the engagement of the market with the future contract.

A structured conduct of the event is essential for achieving its purpose. In this sense, it is necessary: to announce the number of interested persons' representatives in advance; to organize the event as a sequence of presentations by the contracting authority and the interested persons with a fixed and equal for all duration, followed by a brief discussion on each of the presentations; to submit to the contracting authority in advance the materials that will be presented by the interested persons; if possible, and if necessary – to group the presentations into thematic panels, etc. Essentially important is the proper documentation of all key elements of the conducted event. The results and materials from the event are prepared in a separate document (the form of a report is recommended).

4.4. Submission of revised statements, opinions and/or proposals after the event

The /possible engagement of this stage in the structure of the market consultation could be justified with the provision of the possibility for interested persons to submit revised, amended and supplemented versions of their statements, opinions and/or proposals in the

⁷ While there is no legal restriction in this regard, it could be considered advisable for the contracting authority to not provide information regarding the persons, that submitted statements, opinions and/or proposals. In any case, indication of the authors of the respective proposals should be assessed in accordance with the content of the follow-up stages of the market consultations. In case of a planned open event, of course, keeping in secret the origin of the statements and the proposals is to no purpose.

light of the results of the open meeting. When processing these additional materials, it is advisable to observe the same rules of procedure for processing and preparing as for the initial statements, opinions and/or proposals.

4.5. Conclusion of the consultation and notification of the results

At the conclusion of the market consultations, it is advisable for the contracting authority to prepare a structured and detailed final document (report), which besides incorporating the prepared interim reports, should also include conclusions on the results and in this sense – should indicate which considerations of the participants the contracting authority will accept, and which – not. Therefore, the report should contain information regarding the modification, amendment and supplement to the information, subject to consultation. After the preparation of this document, it should be announced – by providing it both to the interested persons, that has participated in the consultations, and to any economic operator, that would be interested in the future contract. Pursuant to that, it is needed to at least publish it on the buyer profile, and in addition to that – the contracting authority may:

- Publish information on the completed market consultation in a section in its webpage, which allows to be accessed by the widest possible range of persons; and/or
- Provide information for the completed market consultation to respective commercial chambers or other similar associations; and/or
- Notify each of the participants in the market consultations;
- Publish information in the media, incl. national newspapers and/or national or international journals; and others.

5. BENEFITS AND RISKS

Amongst the benefits of market consultations, the following could be outlined:

- Preparation of correct technical specifications and contract performance conditions, which meet both the contracting authority's requirements and the market's capacities;
- A possibility to conduct a comprehensive study on the possible methods (procedures) for awarding the contract, including supporting the process of motivating and justifying the use of specific types of procedures;
- A possibility to better structuring of the applicable procedure for awarding and implementation, including through the introduction of lots, adoption of a decision on the award of framework agreements, the use of electronic catalogues, electronic auction, etc.;
- Achieving a higher degree of maturity of the market in order to prepare better proposals for performance of the contract;
- A reduced possibility of contesting the procedure at the stage of its opening;
- Receiving the market's confirmation of its willingness to meet the needs which the contracting authority will announce with the contract notice;

- Creation of a basis for a higher degree of competition between the interested persons;
- Increased transparency in the preparation of the procedure.

The conduct of market consultation, however, is accompanied with certain risks and negative consequences, as well. These could be:

- Delays in announcing the contract;
- A possibility for interested persons to use the process in order to amend certain terms and requirements in a way to facilitate their future participation in the process of selecting a contractor or in a way that fosters the interested person in the performance of the future contract, incl. to the prejudice of the contracting authority;
- An increased risk of creating prohibited relationships between interested persons;
- More active participants in the consultation process may have more influence on the results, regardless of the accuracy or relevance of their proposals;
- Some of the interested persons perceive the consultations and their participation in them as a signal that they are or will be selected as contractors;
- Interested persons will gain an idea of the potential competition; and others.

ⁱ This Policy Paper was developed and written by Boyan Ivanov and Radina Tomanova on behalf of *Dimitrov, Petrov & Co* under the direction of Paulo Magina, Head of the OECD Public Procurement Unit and Petur Berg Matthiasson, Policy Research and Advice, OECD Public Procurement Unit with contribution from Zdravka Pekova, Local Coordinator for the OECD in Bulgaria for this project.