

“How do you level the playing field, specify correctly and assess tenders objectively when the incumbent has a favourable position or in-built advantage?”

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Agenda



Legal
Background



Access to
Information



TUPE

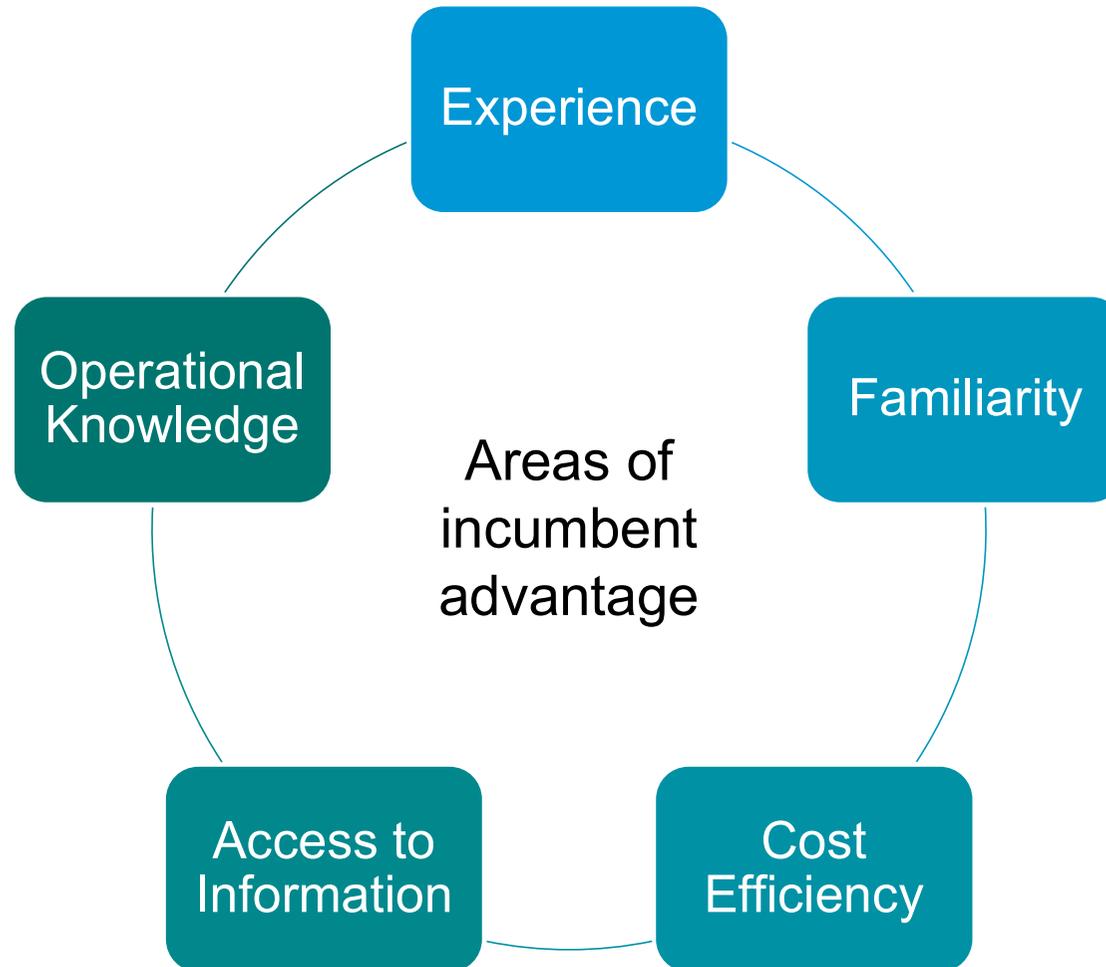


Mobilisation/
Transition Costs



Designing
Specifications/
Award Criteria

What is the issue?



What is the issue?

T-345/03 *Evropaïki Dynamiki v Commission*

- *"...it is inherent in any situation in which a contracting authority decides to initiate a tendering procedure for the award of a contract which has been performed, up to that point, by a single contractor. That fact constitutes, in effect, an 'inherent de facto advantage'."*

Legal Obligations

Public Contracts (Scotland) Regulations 2015



Regulation 19 – Duty of equal treatment and transparency



Regulation 25 – Contracting Authorities to take steps to prevent and remedy conflicts of interest



Regulation 42 - Prior involvement of candidates or tenderers

Prior involvement – Regulation 42

- A contracting authority **must take appropriate measures** to ensure that competition is not distorted by the participation of a candidate or tenderer where that candidate or tenderer, or an undertaking related to that candidate or tenderer has advised the contracting authority, whether in the context of regulation 41 (preliminary market consultation) or not; or has otherwise been involved in the **preparation of the procurement**.



Conflicts of Interest – Regulation 25

- Conflicts of interest includes any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.
 - *“We expect suppliers to mitigate appropriately against any real or perceived conflict of interest through their work with the government. A **supplier with a position of influence** gained through a contract should not use that position to unfairly disadvantage any other supplier or reduce the potential for future competition...”* - The UK Government’s Supplier Code of Conduct
- Issues with contract managers where the incumbent “has their ear”
 - E.g. OFT study into supply of ICT to public sector



Counted4 CIC v Sunderland City Council [2015] EWHC 3898

Equal treatment – Regulation 19

C-21/03 *Fabricom*

- *“Taking account of the situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer. However, a rule which provides that person with no possibility to demonstrate that in his particular case that situation is not apt to distort competition goes beyond what is necessary to attain the objective of equal treatment for all tenderers.”*
- Automatic ban on participation of incumbent is disproportionate



Neutralisation

T-345/03 *Evropaïki Dynamiki*

- To protect the principle of equal treatment as far as possible, incumbent advantage should be "neutralised" to the extent that:
 1. technically easy to effect such neutralisation;
 2. economically acceptable; and
 3. where it does not infringe the rights of the existing contractor or the said tenderer.

Access to information

What is the problem?

- Information is key when participating in procurements
 - What information?

T-50/05 Evropaiki Dynamiki v Commission

- Could not be shown that access to a source-code (known by the incumbent) would have been useful for the purposes of pricing the non-incumbent's offer.



N.B. what is relevant information could evolve during the procurement process.

Access to information

T-345/03 *Evropaïki Dynamiki v Commission*

- Incumbent tenderer had access to information on 'CORDIS' databases before the opening of the tendering procedure
- Other tenderers were given the information one month before the deadline for submitting tenderers expired.
- Unequal treatment as:
 1. The Commission could have made the information available easily
 2. There would have been no extra costs in doing do
 3. There were no IP issued which prevented disclosure

Ethical Walls Agreements – a solution?

- What is an EWA?
- Cabinet Office recommends use to deal with incumbency and COI situations.
- But, EWA can have devastating impacts for incumbent. Is it sensible where no COI?
- Use should be proportionate and considered.

TUPE

What's the issue?

- Bidders need accurate information about staff they might inherit.
- Incorrect/incomplete information leads to unsustainable bids and/or skewed evaluation.

What's the solution?

- Robust contractual requirements regarding disclosure of information
- Consider seeking indemnities regarding the accuracy of information
- Ensure timing of disclosure is sufficient to allow authority consideration and meaningful disclosure/consideration by bidders

Mobilisation/Transition costs

What's the problem?

- Entrenchment of incumbent where high mobilisation/transition costs
- High entry or exist costs stifle new entrants
- Impact of inclusion of mobilisation/transition costs on outcome of procurement



Mobilisation/Transition costs

Bromcom Computers PLC v (1) United Learning Trust and (2) United Church Schools Trust [2022] EWHC 3262 (TCC)

- Contracting Authority **added a cost** to a non-incumbent tenderer, Bromcom's, financial submission to reflect the cost of establishing a link for the transfer of data.
- The same cost **was not added to** the incumbent's tender was because the applicable data link had already been established under the existing contract.
- Contracting Authority allowed incumbent to include discount in tender to reflect a rebate on fees under existing **(and separate)** contract with incumbent.
- Issues should have been neutralised as
 1. was technically easy
 2. had economic justification (not to deter competition);
 3. and did not infringe the incumbent's rights.



Mobilisation/Transition costs



T-345/03 *Evropaïki Dynamiki*

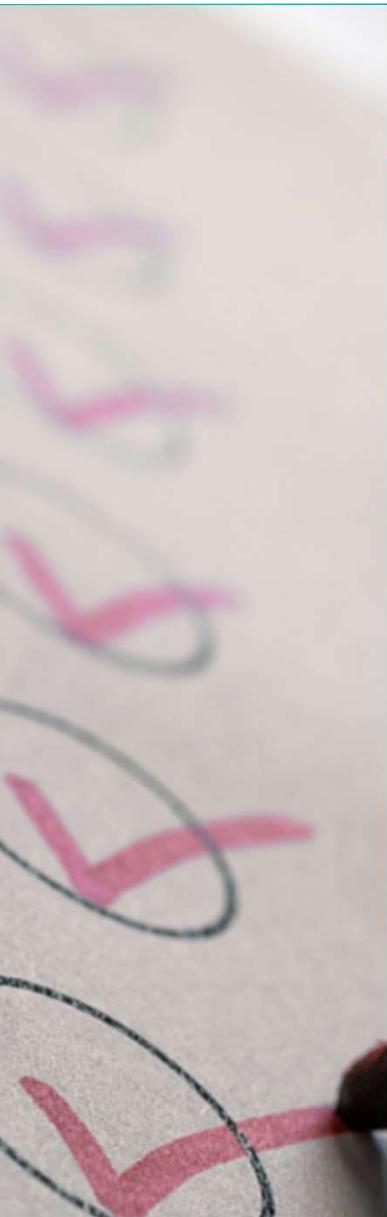
- "double payment for the running-in phase would be contrary to one of the principle objectives of the law governing the award of public contracts, which seeks, *inter alia*, to facilitate the acquisition of the service required in the most economic manner possible"

T-211/17 *Amplexor*

- Non-incumbent tenderers could claim up to 3% of contract price for relevant tools and systems
- Incumbent tenderers could claim up to 0.3%

Designing Specifications

- What is the problem?
 - Improperly drafted specification can favour incumbent
 - Incumbent solution can become entrenched in authority requirements
 - Overreliance on knowledge of incumbent can stifle innovation/ improved solutions – see *OFT study into supply of ICT to public sector*
 - Potential lack of understanding of specifications by non incumbent



CHECKLIST FOR SPECIFYING CORRECTLY



Specifications must *afford equal access of economic operators* ... must not have the *effect of creating unjustified obstacles* to the opening up of public procurement to competition (Reg 43(9)).



Express specifications in terms of performance or functional requirements



Do not make reference to a specific make or source; specific processes; or trademarks, patents etc except where justified by subject matter

- On an exceptional basis where requirement can't otherwise be described, but with "or equivalent"



Consider interoperability issues

- (*Elekta Limited v The Common Services Agency* [2011] CSOH 107)

CHECKLIST FOR SPECIFYING CORRECTLY



Ensure you are specific

- *Evropaïki Dynamiki T-461/08* (so vague and imprecise only the incumbent could understand it).



Utilise premarket engagement/other expertise

- Don't rely on knowledge and expertise of incumbent



Test and challenge where criteria requires existing equipment at point of bidding

- C-234/03 - *Contse v Ingesa* – requiring open office in region and specific plant within specified distance at point of tender is discriminatory and favours incumbent



Do not afford supplier benefit merely because it is the incumbent

- C-234/03 - *Contse v Ingesa*

Award Criteria

What is the issue?

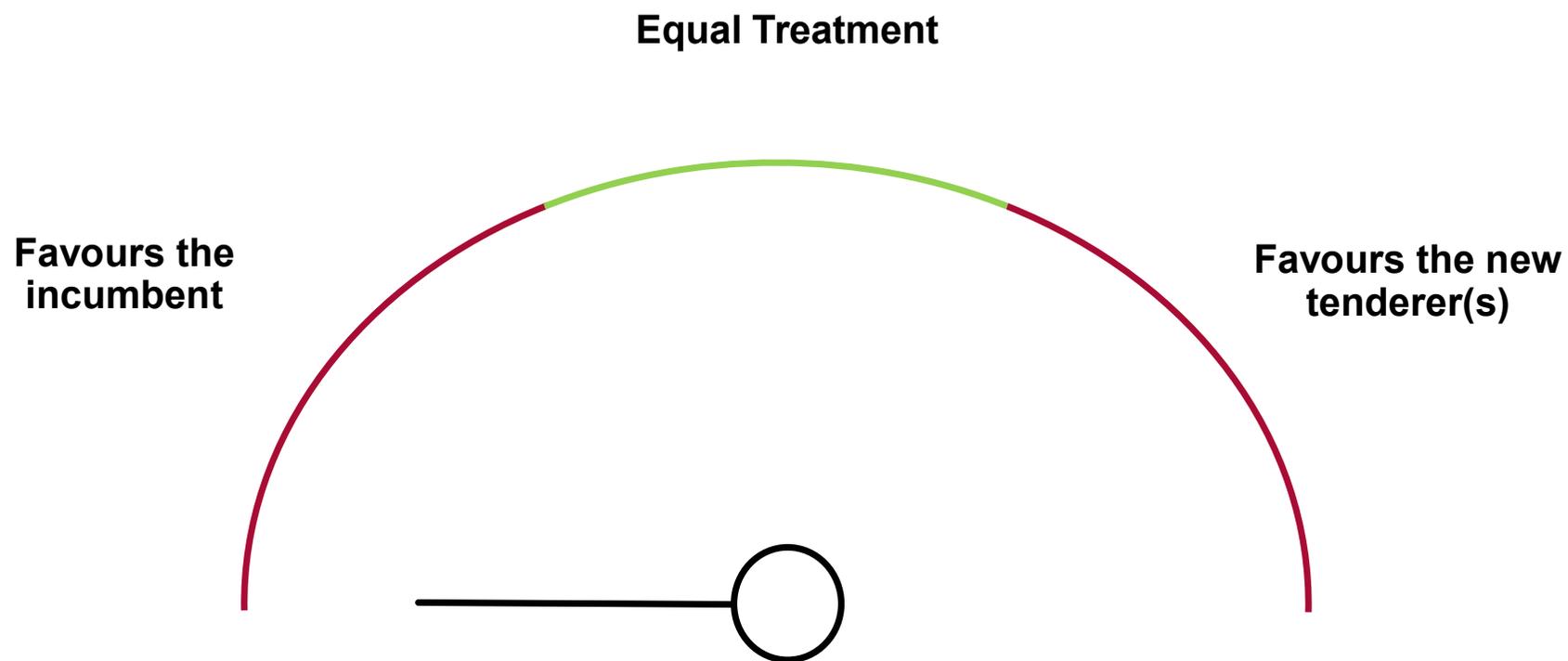
- T-10/17 – *Proof IT SIA v European Institute for Gender Equality*
 - Claim that contract award criteria were imprecise and the evaluation process lacked transparency.
 - Award report stated winning provider "*presents a deep understanding of the objectives...that is at the same time holistic and highly specific*" and "*presents an understanding of the objectives in three levels: product development, IT infrastructure and use need levels*"
 - Nothing in the evaluation report suggested the successful tenderer had benefited from its previous interactions. It had been successful because its response was better.



“ How do you level the playing field, specify correctly and assess tenders objectively when the incumbent has a favourable position or in-built advantage? ”

Answer

- Consider proposals to level playing field on a case-by-case basis
- Specify in accordance with Regs, by reference to functional requirements with input from independent experts and market – understand what you are buying
- Be prepared – ensure effective contractual positions with the incumbent which:
 - *Require disclosure of information – timing is critical*
 - *ensure tightly worded TUPE clause in contracts which entitles the authority to request employee liability information; and*
 - *ensure contracts contain a warranty re accuracy.*
- Take action to level where:
 - technically easy;
 - financially acceptable; and
 - allow the incumbent to meaningfully participate.
- Test and challenge re designing of award criteria.



Any questions?



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Thank you