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# GOLDEN RULES OF EARLY CONTRACTOR INVOLVEMENT

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# The question

What are the golden rules of how not to confer an advantage through early contractor involvement, i.e.

- (1) Pre-market testing
- (2) Designing tender parameters
- (3) Specification writing

# Overview

- Guidance on pre-market testing
- What do the PCR 2015 provide?
- Questions that frequently arise in practice
- What does case law say?
- What golden rules apply?

# What guidance is available?

- PPN 04/12 (9 May 2012)
- PPN 10/16
- OGC Guidance on Early Market Engagement
- National Audit Office Procurement Manual
- Government Digital Service Guidance
- Scottish Government (Journey Route 3)
- SPP Regions Best Practice Report

# Pre-2014 context for the current legal position

**Assitur** (C-538/07)

**Fabricom** (C-21/03 and C-34/03)



# Article 40/Regulation 40 – preliminary market consultations

- Authorities may, in order to:
  - Prepare the procurement
  - Inform operators of procurement plans and requirements
- conduct market consultations
- seek or accept advice (for example) from:
  - Independent experts
  - Other authorities
  - Market participants

# Article 40/Regulation 40 (Continued)

- Such advice may be used in the planning and conduct of the procurement procedure providing:
  - It does not have the effect of distorting competition; and
  - Does not result in a violation of the principles of non-discrimination and transparency.

# A41/R41 – Prior involvement of operators/related undertakings

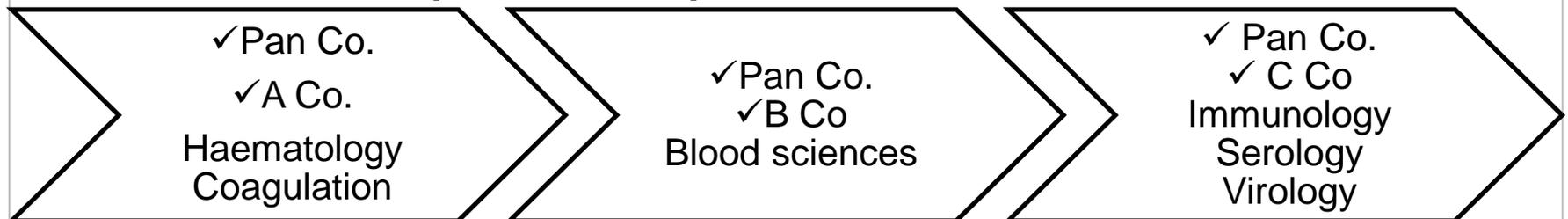
- CA shall take appropriate measures to ensure that competition is not distorted by the participation of that tenderer – and document in Reg. 84 report.
- Shall include communication of information to other tenderers, adequate time limits.
- Exclusion of tenderer may only be done where no other means to ensure equal treatment and tenderer has had chance to prove competition is not distorted.

# Practical application

- (1) Do Contracting Authorities (“CAs”) have to meet with all potential providers?**
- (2) Can CAs specify a preference for a particular solution?**
- (3) When does prior involvement amount to a conflict of interest necessitating exclusion?**

# A set of facts

- Trust re-procuring pan pathology MSC. Wants:
  - Interface with diagnosis/patient records tools.
  - Greater automation
  - Quicker turn around times
  - “Best in class” testing
- Market comprises “pan” providers who can do all tests and specialist providers



# 1. Would the Trust have to ask questions of the whole market?

- Considerable number of potential providers.
  - No time to meet with all individually.
  - Providers will hold back at bidder days.
  - So can CA have one on one meetings with selected providers?
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- May not be unlawful to conduct selective one to one meetings, provided selection is objective and non-discriminatory, and appropriate measures are taken.

# Regulations and Guidance provide..

- PPN 04/12 (9 May 2012)
  - Envisages meeting with a “proportionate number of suppliers in relation to market size”.
  - R40: can conduct market consultations including accepting advice from market participants providing no distortion of competition, no discrimination and act transparently.
  - R41: protects an operator who has advised or helped prepare a procurement from automatic exclusion.
  - APPROPRIATE MEASURES

# What might amount to appropriate measures?

- PIN inviting expressions of interest?
- Independent selection of who to meet (e.g. an external consultant selects a range of suppliers)?
- Those responsible for evaluation do not conduct the meetings?
- Pre-determined set of questions asked?
- Responses provided summarised and disseminated with OJEU?
- Audit trail

# The set of facts develops

- Pan providers will not sub-contract but cannot offer best in class across all disciplines.
- Specialist providers will form consortia but processing tests from more than one provider can diminish efficiency.
- New “universal track” integrates pathology tests from multiple different operators promoting automation, integration and the ability to divide into lots to achieve “best in class”.

## 2. Can CAs specify a preference for a particular solution?

- **R. 41:** Appropriate measures and audit trail.
- **R. 18(3):** Must not design procurement in way which unduly favours or disadvantages certain operators.
- **R. 21:** Must not disclose information designated as confidential.
- **R. 42:** “or equivalent”.

# “Or equivalent” case law

## **Concordia Bus (C-513/99)**

Awarding marks for use of buses powered by natural gas lawful as (a) linked to subject matter of contract (b) specific and objectively quantifiable (c) stated in tender documents.

## **Elekta v The Common Services Agency [2011] CSOH 107 (OH)**

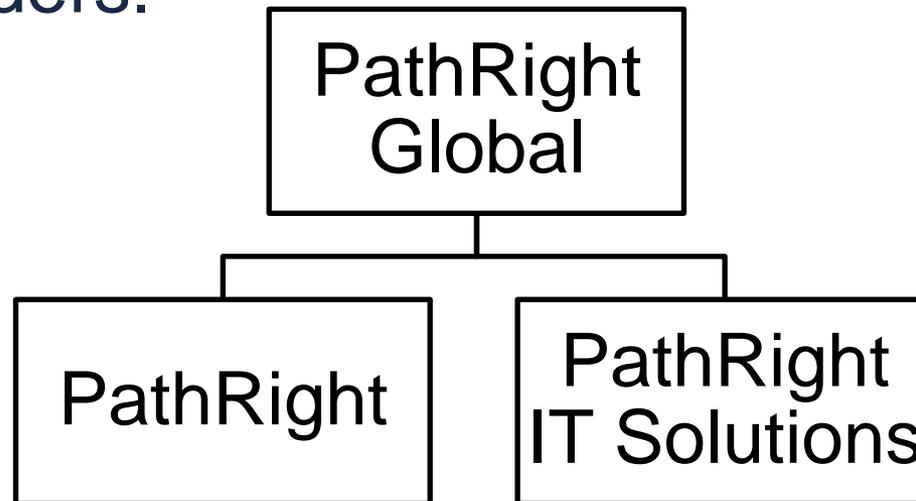
Requirement that LINACs be compatible with ARIA (an existing system made by Varian) not unlawful as objectively justifiable, even in circumstances where in reality this meant only Varian could meet the requirement

# What might amount to appropriate measures?

- Could the tender be “outcomes based” (i.e. with reference to turn-around times, automation, ability to interface, not by reference to particular product or solution)?
- Ensure appropriate measures are taken including adequate time limits and communication of information (e.g. about how to integrate with existing software).
- Ensure build in plenty of time for clarifications and tender responses.
- Audit trail.

# The set of facts - final development

- Trust needs expert input re integration of solutions with existing patient records system (“PRIS”).
- Existing PRIS provider is related to one of the likely bidders.



### 3. Will PathRight IT's prior involvement affect PathRight?

- **R18 and R40:** Involvement of PathRight must not distort competition or discriminate and must be transparent
- **R41:** Trust must take appropriate measures to ensure competition is not distorted AND may not exclude PathRight unless no other means to ensure equal treatment AND even then only after PathRight has had a chance to prove its exclusion is unnecessary.
- **R24:** Conflicts of interest

## R24: Conflicts of Interest:

“Contracting authorities shall take **appropriate measures** to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any **distortion of competition** and to ensure **equal treatment** of all economic operators”. [Emphasis added]

# Must investigate before exclusion

## Intrasoft v Commission

(T-403/12)

- Involvement in similar tender was capable of giving rise to a conflict but automatic exclusion was unlawful.
- Risk needs to be objectively justified.
- Tenderer must have opportunity to address.



# What might be appropriate measures?

European Dynamics v  
EU IPO (T-556/11)



# In summary, in our example

- The involvement of PathRight IT is at least capable of conferring an advantage on PathRight.
- The Trust must manage the situation:
  - Disclosure of technical information to whole field in good time?
  - PathRight IT agrees to contain information?
  - Transparency with other bidders and audit trail?

# What are the golden rules?

**T**iming

**O**utcomes

**A**udit Trail

**D**etail

**S**eparation

# Some relevant case law

## **Commission v Ireland (C-45/87)** (Irish Pipes)

Unlawful to stipulate that pipes had to comply with Irish Standard Mark. Should have used “or equivalent”.

## **Commission v Netherlands (C-359/93)** (UNIX)

Unlawful to require use of UNIX operating system. Should have used “or equivalent”.

## **Concordia Bus (C-513/99)**

Awarding marks for use of buses powered by natural gas lawful as (a) linked to subject matter of contract (b) specific and objectively quantifiable (c) stated in tender documents.

## **Elektá v The Common Services Agency [2011] CSOH 107 (OH)**

Requirement that LINACs be compatible with ARIA (an existing system made by Varian) not unlawful as objectively justifiable, even in circumstances where in reality this meant only Varian could meet the requirement

# Some relevant case law (Continued)

## **Assitur (C-538/07)**

Unlawful to systematically exclude undertakings affiliated to one another from taking part in same procurement. Proportionate assessment on a case by case basis required to establish whether links capable of influencing respective content of tenders.

## **Fabricom SA v Etat Belge (C-21/03 and C-34/03)**

ECJ noted that a tenderer who had prior involvement may have obtained an advantage. Blanket ban on participation was unlawful because did not give the tenderer an opportunity to prove that no advantage had been conferred.

## **Intrasoft v Commission (T-403/12)**

Drafting tender documents for a previous “Europe Aid” project (and then bidding for a subsequent Europe Aid project) was capable of giving rise to a conflict, but that the Commission’s failure to investigate prior to exclusion meant the risk of conflict had not been objectively justified.

## **Deloitte Business Advisory NV v Commission (T-195/05)**

Ticking a box on the conflicts form to assert no conflict of interest in circumstances where consortium applying to join the public health framework had a large number of related contracts  
Rejection without further notice was lawful given failure to address conflict of interest.

# Some relevant case law (Continued)

## **eVigilo (C-538/13)**

Experts used in the preparation of tender documents and evaluation of the tenders were university colleagues with experts used by a bidder.

This was objective evidence of potential bias and the CA should have taken an active role in detecting, preventing and remedying conflicts.

## **AFCon Management Consultants and Others v Commission (T-160/03)**

Not enough to change panel - should have investigated to ensure that participation of conflicted member had conferred no advantage.

## **Nexans France v European Joint Undertaking for ITER (T-415/10)**

## **European Dynamics v EU IPO (T-556/11)**

EUIPO had checked connection with PWC Spain and other PWC entities involved in tender specification.

## **Elektá v The Common Services Agency [2011] CSOH 107 (OH)**

Requirement that LINACs be compatible with ARIA (an existing system made by Varian) not unlawful as objectively justifiable, even in circumstances where in reality this meant only Varian could meet the requirement

## **Michaniki (C-213/07)**

### **European Ombudsman cases:**

- 642/2008/TS
- 1348/2009 (CK) RT
- 1005/2011/MMN

