

A&L Goodbody

Levelling the Playing Field

Awarding Public Contracts Skillfully & Lawfully within Irish Procurement Rules

Anna-Marie Curran, Partner

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The thorny question...

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

The incumbent's advantage/disadvantage...



Incumbent's advantage

1. Experience/knowhow/understanding
2. Has the relationship
3. Access to info not in public domain
4. Info on costs of TUPE (if applicable)
5. No mobilisation/transition/start up costs



Incumbent's disadvantage

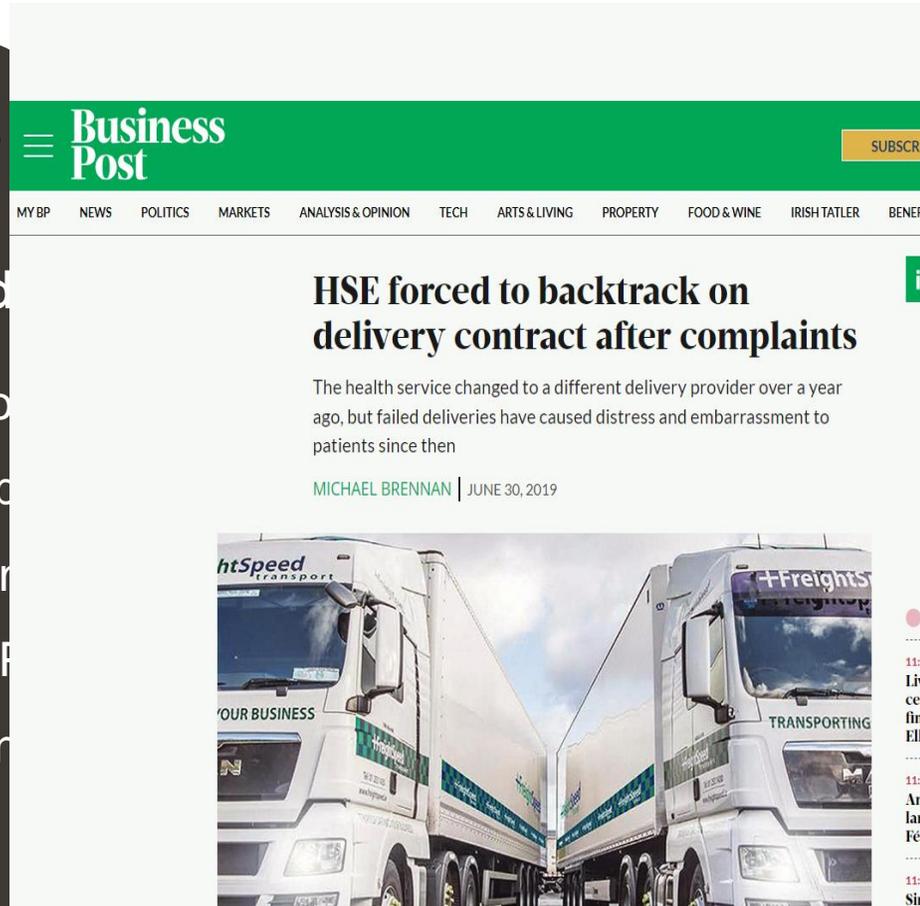
1. Knows the true cost
2. Measures to address conflicts or advantage
3. Client relationship may not be good
4. May be less innovative because knows what works/doesn't work

The incumbent's advantage/disadvantage...



Incumbent's advantage

1. Experience/knowledge
2. Has the relationships
3. Access to info not in
4. Info on costs of TUR
5. No mobilisation/transport costs



Incumbent's disadvantage

- the true cost
- res to address conflicts or
- age
- relationship may not be good
- less innovative because
- what works/doesn't work

Legal obligations

General Principles of EU Law 1

Must treat economic operators **equally** and **without discrimination** and must act in a **transparent** and **proportionate** manner

Design of procurement/specifications 2

Design of a procurement must not be made with the intention of **artificially narrowing competition** – competition will be considered artificially narrowed where design is made with the intention of unduly **favouring or disadvantaging** certain bidders

Conflicts of interest 3

Must take appropriate measures to **prevent, identify & remedy conflicts** to avoid distortions of competition and to ensure equal treatment – may exclude a bidder where a conflict cannot be remedied by other less intrusive measures

Prior involvement 4

Must take appropriate measures to ensure that competition is not distorted by the **participation** of a bidder (or an undertaking related to the bidder) that **has advised** the contracting authority or has been involved in the preparation of the procurement

Levelling the playing field

Equal treatment

SIAC Construction (Case C-19/00)

“Tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority”

No automatic exclusion

Fabricom (Case C-21/03)

Not permitted to automatically prohibit participation of a person who has carried out research, experiments, studies or development in connection with a public contract where no opportunity to prove that experience acquired was not capable of distorting competition

Discriminatory spec

TQ3 Travel Solutions v Commission (Case T-148/04)

“To require the tenderer to have the requisite number of employees at the time it lodges its tender would be tantamount to favouring the tenderer holding the existing contract and thus nullify the very essence of the call for tenders”

Neutralising incumbent's advantage

Evropaïki Dynamiki v Commission (Case T-345/03)

- Successful bidder had to undertake **unpaid** running-in phase of up to 3 months (not necessary for incumbent & tenderer connected to incumbent by sub-contract) = **not discriminatory**
- Court recognised that there was an inherent de facto advantage for incumbent tenderer
- The potential advantages of the existing contractor or a tenderer connected to that party by virtue of a subcontract must be neutralised, but only
 - to the extent that it is **technically easy** to effect such neutralisation
 - where it is **economically acceptable**
 - where it does not **infringe the rights of the existing contractor**
- Late provision of technical info (incl. technical spec and existing source code) = **breached equal treatment**
 - > Info could easily have made info available without additional cost
 - > Info would have assisted bidders in estimating costs
 - > No reason why source code could not have made available to third parties

Neutralising incumbent's advantage

Amplexor Luxembourg Sarl v European Commission (Case T-211/17)

- Tender design afforded new tenderers a **3% funding allowance** to finance **take-over** costs during the transition between the old contract and the new
- Incumbent would be afforded only a **0.3% allowance for transition costs**
- Contracting authorities are afforded a wide margin of discretion in designing and setting award criteria and the adoption of a scoring system that favours one bidder over another does not automatically breach equal treatment
- Treating tenderers in different positions differently likely to encourage the development of healthy and effective competition between tenderers and ensure the broadest possible competition
- Court considered contracting authority was correct to neutralize the incumbent's advantage:
 - > offering offsetting funding was **technically easy**
 - > intervention was **economically acceptable**
 - > did **not infringe on the rights** of the incumbent contractor

Advantage: access to information

Evropaïki Dynamiki v Commission (Case T-50/05)

If unsuccessful tenderer claims unequal access to info (e.g. on source code), it is appropriate to examine:

- whether there was a **disparity** in the info provided to tenderers
- if there was a disparity, whether the relevant info was **useful for formulating tenders** such that the tenderer with access to the info would have had an advantage to the detriment of the other tenderers
- whether the alleged disparity in respect of useful info was the result of a **procedural defect** brought about by the contracting authority
- if there was such a defect, whether, but for that defect, **the procedure could have had a different outcome**
- Claims failed

Evropaïki Dynamiki v EIB (Case T-461/08)

- Award criterion assessing the “**ability to provide a pool of staff from own resources**” to meet requirements for additional services
- Too imprecise to allow tenderers to know what the optimum capacity they should offer to obtain the maximum score
- The successful tenderer, who was also the incumbent service provider, “*was also in the best position, as a result of its experience, to assess what the real needs of the EIB might be*”.
- The lack of precision of a particular award criterion, “*favoured the incumbent contractor, to the detriment of the other tenderers... in breach of the principle of equal treatment, under which tenderers must have equality of opportunity in formulating the terms of their bids.*”

Access to TUPE info

- If an undertaking transfers as the result of a public contract being re-tendered, the successful tenderer may be required to take on the employees of the incumbent, on the same terms.
- Often contractual obligation to provide TUPE info e.g. Clause 9(E) of the OGP template Service Contract:

*“If requested, by the client, the contractor shall promptly furnish such **anonymized information** relating to the **terms and conditions of the employment** of all persons providing the Services as may be required by the Client (“Employment Information”). The Contractor agrees that the Client **may release** the Employment Information to third parties for the purposes of any procurement competition for the provision of the Services upon expiry of the Term or earlier termination of this Agreement for whatever cause”.*

SRCL Ltd v National Health Service Commissioning Board [2018] EWHC 1985

- Claims (by incumbent) that successful tender and second placed tender were abnormally low
- Incumbent contrived an exchange of correspondence in relation to TUPE
- Incumbent *“took this opportunity to produce **misleading information** about the extent of staff transfers that would occur... to overstate the extent (and hence cost) of TUPE liabilities that a winning bidder would inherit”*
- One bidder had not participated because of TUPE costs but other bidders didn't believe the info

Advantage: adequacy of TUPE info

Turning Point Ltd v Norfolk County Council [2012] EWHC 2121 (TCC)

- Council provided some TUPE info but **90 queries** raised on the TUPE info
- TP had “*great concern*” about adequacy & completeness of TUPE info as it was extremely difficult to make accurate estimations of likely payroll, redundancy & pension costs
- TP submitted bid with following qualification:
“Due to lack of full & complete TUPE information, it is assumed that the restructure of staffing will be achieved through natural wastage & therefore we have assumed no redundancy costs. If redundancies were to occur, we would wish to enter into further discussions”.
- TP were excluded & issued proceedings
- Court held that the proceedings were time-barred as TP had knowledge of the facts which “*clearly indicated an infringement of the Regulations with regard to the basic inadequacy or incompleteness of the information...*”

Disadvantage: TUPE/labour costs

Brinks Security Luxembourg v European Commission (Case T-437/05)

- Brinks had provided security & surveillance services for European Commission buildings from mid-1970s
- Call for competition in 2005 and Brinks was unsuccessful
- Brinks had long-standing employees and therefore had high labour costs
- Other bidders had less experienced staff and could therefore tender at a lower price
- Brinks argued that EC should have insisted on the application of TUPE and/or on longer experience requirement than the 1 year specified
- Court held that EC did **not breach equal treatment** by failing to require more than 1 year's work experience
- Court held that EC was not in a position to determine whether TUPE would or would not apply and it was **not for the EC to** require that new contractor take over existing employees

Assess tenders objectively...

Proof IT SIA v EIGE (Case T-10/17)

- Unsuccessful tenderer alleged that EIGE had interpreted the award criteria so as to benefit successful tenderer who had knowledge from performing a similar contract
- Successful tenderer assessed as presenting “**a deep understanding** of the objectives of the framework contract that is at the same time holistic and highly specific”
- Unsuccessful tenderer assessed as presenting an “**incomplete and mechanical understanding**” of the framework contract – cut and paste of tasks from ITT
- Unsuccessful tenderer lost marks for not suggesting utilizing EIGE’s existing contract – claimed this was unfair and not publicly available info – however, this info was in fact published online and tenderers should have known of it
- Claims filed

Bromcom Computers v ULT [2022] EWHC 3262

- Unlawful to allow successful tenderer (Arbor) to include a discount related to fees charged under separate contracts
- A cost was added to Bromcom’s financial submission to reflect the cost of establishing a data interface (which Arbor already had established under separate contract)
- The advantage of the data interface should have been neutralized by deducting the cost from Bromcom’s bid:
 - as it was **technically easy** to deduct the cost
 - there was an **economical justification** (i.e. not to deter competition where there was this inherent advantage) and
 - It **did not infringe** the rights of the existing contractor

Specify correctly....

Roche Lietuva UAB (Case C-413/17) ECLI:EU:C:2018:865

- Roche claimed that technical spec limited competition because of the **high level of specificity**
- Alleged that technical spec corresponded to products of particular suppliers of blood analysers
- Technical spec should afford equal access and not create unjustified obstacles to competition
- The more detailed the spec, the greater risk of favouring a particular supplier
- Court observed that references to specific makes, particular processes etc are a derogation to the rules and conditions must be interpreted strictly
- It was for the national court to determine whether the level of detail in the spec was necessary and proportionate in the circumstances

Practical steps

Early steps on conflicts/advantage

Put in place measures with incumbent e.g. re exit management, provision of info, clarity on IP/IT ownership



Access to info

Ensure proper and full access to info necessary for bids – does incumbent have an advantage that should be neutralized?



Specification

Don't over-specify/gold-plate technical spec; consider whether brand references are justified



Transition costs

Permitted to include off-set funding / deduction if technically easy etc.





Questions?
