

**How can you lawfully level the playing field and assess bids objectively when the incumbent has a favourable advantage?**

Valentina Sloane KC  
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# Incumbent advantages

1. Knowledge and information

2. Embedded product

Experience

3. Familiarity with contracting authority's needs

4. No switching costs

# PCR relevant legal obligations



Regulation 18: equal treatment and transparency



Regulation 24: contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest



Regulation 41: prior involvement of candidates or tenderers

# Case law principles

- Case C-21/03 *Fabricom*
  - *It cannot be maintained that the principle of equal treatment requires that a person with prior involvement be treated in the same way as any other tenderer*
  - *Automatic bar on participation is disproportionate*

# De facto advantages enjoyed by incumbent

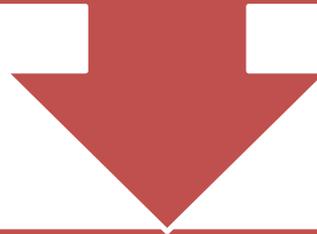
- Case T-345/03 *Evropaiki Dynamiki*

*“in order to protect as far as possible the principle of equal treatment as between tenderers and to avoid consequences that are contrary to the interests of the service of the contracting institution, the potential advantages...must none the less be neutralised but **only to the extent that it is [1] technically easy to effect such neutralisation, where it is [2] economically acceptable and where it [3] does not infringe the rights of the existing contractor**”.*

# (1) Costs of new entry

Case T-345/03 *Evropaiki Dynamiki*

No requirement to pay for costs of running-in period:



*“Double payment would be contrary to one of the principal objectives of the law governing the award of public contracts, which seeks, inter alia, to facilitate the acquisition of the service requirement for an unpaid running-in phase”*

# (1) Costs of new entry cont.



T-232/06 *Evropaiki Dynamiki*: take-over costs



T-211/17 *Amplexor*: subsidised new entry costs

# (1) Costs of new entry cont.

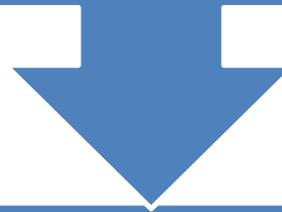
- What about contracting authority's own switching costs?
  - Regulation 67: contract criteria include *“cost, using a cost-effectiveness approach”*
  - Regulation 68: Life-cycle costing (*“costs relating to acquisition”*)

# *Bromcom* [2022] EWHC 3262 (TCC)

- Total overall cost would include incumbent costs
- *“Implied power”* to add costs to effect equal treatment
- Contracting authority added to Bromcom’s bid the authority’s internal costs of setting up the *“pull”* interface (incumbent had in-house *“push”* solution)
- Incumbent was able to offer discount
- Alleged *“incumbent provider influence”*

## (2) Exclusive access to technical information

T-345/03: Incumbent had access to information from the start of the procedure whereas other tenderers were informed only one month before deadline



Unequal treatment:

Commission could easily have made it available

No additional costs

No IP issues which prevented disclosure

## (2) Access to information cont.

- T-50/05 *Evropaiki Dynamiki*, tenderers were not given source code (known by incumbent)
  - 1) Is there disparity in information?
  - 2) Is the information useful for the preparation of tenders?
- T-232/06 *Evropaiki Dynamiki*, Court rejected complaint that tenderers were denied relevant information

## (2) Access to information cont.

- What information belonging to the incumbent can/must be disclosed? Balancing informed bidding v breach of confidentiality
- C-927/19 *Klaipedos* and C-54/21 *Antea Polska*
- Compare approach in US: *Centerra Group* (2016), US Government Accountability Office

## (3) Award criteria & specifications

T-461/08 *Evropaiki  
Dynamiki:*

*“ability to provide a pool of  
staff from own resources”*  
= imprecise criterion  
capable to favouring, in  
practice, the incumbent  
contractor

## (3) Award criteria cont.

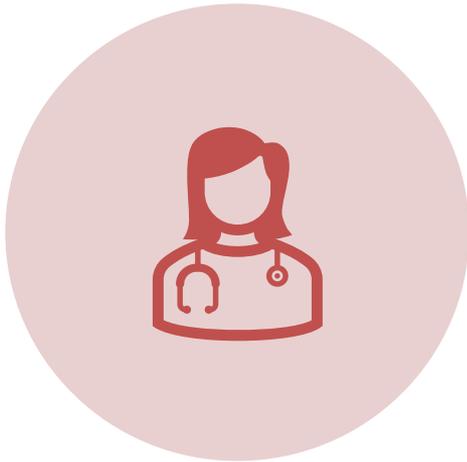
T-10/17 *Proof IT*

“excessively broad use of the discretion” “vague award criteria” “giving more points to the successful tenderer because of the knowledge acquired by it during performance of a similar contract”

## (4) Design of procurement

- Italian canteens study:  
<https://www.economia.unipd.it/sites/economia.unipd.it/files/20190242.pdf>
- T-232/06 *Evropaiki Dynamiki*
- C-513/99 Concordia Buses
- *Abbvie*

# (4) Design of procurement cont.



ELEKTA LTD V THE COMMON SERVICES  
AGENCY [2011] SCOTCS CSOH\_107



CANADIAN INTERNATIONAL TRADE  
TRIBUNAL, THE *COREL & MICROSOFT*  
LITIGATION

# (5) Evaluation



*Native Energy & Technology (2018), US  
Government Accountability Office*



*Case T-10/17 Proof IT*

## (5) Evaluation cont.



Case T-148/04 *TQ3 Travel Solutions v Commission*



Case T-211/07 *AWWW v European Foundation for the Improvement of Living and Working Conditions*



Case T-394/12 *Alfastar Benelux SA*

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