



# Favouring suppliers in the procurement process

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*How do you eliminate **any inference** or **perception** of bias at the tender stage towards certain suppliers, e.g. those who (1) participated in soft-market testing or consultation or (2) are incumbents or project advisers who informed the specification or (3) have staff cross over?*

# Obligations

- To comply with obligations of transparency, equal treatment and non-discrimination.
- To minimise risk of distortion of competition/unfair advantage.
- To comply with specific provisions of Public Contracts (Scotland) Regulations 2015.

## **Lancashire County Council v Environmental Waste Controls Limited 2010**

“a judge would be entitled to find that the decision maker was in fact influenced by an irrelevant consideration, even though he was honestly not aware that he was influenced...The issue must be considered not in the context of a “hunch” preference for one tender over another but in the context of a carefully devised and operated assessment procedure...If that procedure is honestly operated...it is extremely difficult to...find that the process was defective by reason of regard for an irrelevant consideration.”

## Matrix-SCM Limited v London Borough of Newham 2011

- Report to the Mayor on outcome of process
- Referred to “additional benefits” by awarding to incumbent
- *“What Newham was required to do was to apply the criteria and approach set out in the ITT and Evaluation Model in good faith and without manifest error”*

## **Advantages of (for) an incumbent**

- Facilities – depot / plant / office / IT/ Business processes and other IP
- Understanding the client and the requirement
- Existing relationships
- Seamless transition
- No start up costs

## Dealing with “Advantage” (1)

T-345/03 *Evropaiki Dynamiki v Commission*

No objection to “inherent de facto advantage” of incumbent which is inevitable and does not result from any conduct on authority’s part.

Incumbent’s advantages must be neutralised only if that is:

- Technically easy
- Economically acceptable
- Not infringing rights of existing contractor

## Equal treatment

T-21/03 *Fabricom SA v Belgium*

- Comparable situations must not be treated differently
- Different situations must not be treated the same

## Dealing with Advantage (2)

*Natural World Products v Arc 21* [2007]

- Bent over backwards to be fair to others
- And in so doing was unfair to the advantaged bidder

*Allpay Limited v NI Housing Executive* [2015]

- Not illegitimate for a bidder to use its advantage in the market for its own benefit in a procurement.

# Market Testing and Consultation (1)

## Regulation 41

- (1) Before commencing a procurement, a contracting authority may conduct market consultation with a view to preparing the procurement and informing economic operators of the authority's procurement plans and requirements.
  
- (2) For this purpose, a contracting authority may act as it considers appropriate, including seeking or accepting advice from independent experts or authorities or from market participants.

## Market Testing and Consultation (2)

### Regulation 41

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

# Prior involvement of candidates or tenderers

## Regulation 42

- Authority must take “appropriate measures” to ensure competition is not distorted by participation of a bidder who has
  - advised the contracting authority or
  - otherwise been involved in the preparation of the procurement
- Must include
  - sharing with all bidders relevant information
  - fixing adequate time limits for receipt of tenders

## Practical Points (1)

- You cannot exclude a bidder who was involved in prior consultation or design of the bid unless there are no other means to comply with principles of procurement.
- Seriously consider market testing/design of bid: safer alternative is external, non-participating consultant.
- “Adequate time” for response should be longer than usual minimum to enable other bidders to ‘get up to speed’

## Practical Points (2)

- “Appropriate measures” is not limited to communication of information and the giving of appropriate time.
- Authority should apply its mind to what else may be appropriate to ensure transparency etc., for example issuing draft specification to bidders for comment
- Measures taken must be recorded in procurement report.

## Design of Specification (1)

- Must afford equal access to all bidders / not create unjustified obstacles to the opening up of competition.
- Must concern performance or functional requirements.
- Must allow for “or equivalent” alternatives.
- Unless objectively justifiable should not refer to specific makes, proprietary processes, trademarks, patents etc.

## Design of Specification (2)

- Must be specific :
  - European Dynamics T-461/08
  - So vague and imprecise only the incumbent could understand it

## **Staff cross-over (1)**

### Regulation 25 - Conflicts of Interest

(1) A contracting authority must take appropriate measures to 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.

(2)...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.

## Staff cross-over (2)

### Regulation 25 - Conflicts of Interest

“relevant staff members” means staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure; and

“procurement service provider” means a public or private body which offers ancillary purchasing activities on the market.

# Think one procurement ahead

- To allow a genuine competition next time, think about incumbency this time:
  - Information provision and confidentiality
  - TUPE – information and indemnities
  - Key assets and contracts
  - SPV structure
  - Authority ownership of infrastructure (and IP etc)
  - Handover and exit provisions

## **And when procuring**

- Allow time, and engage in market consultation
- Don't engage only with incumbent
- “Fresh eyes” review of the ITT (or consultation draft?)
- Consider service re-design
- Encourage SME supply chain



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