



MAPLES

White Paper
Conference

Awarding Public
Contracts Skilfully and
Lawfully within the
Procurement Rules

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- How do you eliminate any inference or perception of bias at the tender stage towards suppliers e.g.
 - Participants in soft-market testing or consultation?
 - Incumbents or project advisers who have informed the specification?
 - Where there has been staff cross over?

What do the Regulations say?

- Public Service Directive, Article 40 - S.I 284/2016, Regulation 40
- Utilities Directive, Article 58 - S.I 286/2016, Regulation 65
 - CAs may conduct market consultations before procurements
 - For example, they may seek or accept advice from independent experts, authorities or market participants
 - Such advice may be used in planning and conduct of the procurement provided it does not distort competition and does not result in a violation of the principles of equal treatment and transparency

Public Service Directive, Article 41 - S.I 284/2016, Regulation 41: Utilities Directive, Article 59 - S.I 286/2016, Regulation 66:

Where a candidate, tenderer or related undertaking;

- has advised the CA, whether as part of a market consultation or not; or
- has otherwise been involved in the preparation of the procurement procedure,

the CA shall take appropriate measures to ensure that competition is not distorted by its participation

Public Service Directive, Article 41 - S.I 284/2016, Regulation 41: Utilities Directive, Article 59 - S.I 286/2016, Regulation 66:

- Such measures shall include:
 - The communication to other candidates and tenderers of relevant information and
 - The fixing of adequate time limits for the receipt of tenders
- The candidate or tenderer **shall only be excluded** where there are no other means to ensure equal treatment
- Prior to exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

Public Service Directive, Article 24 - S.I 284/2016, Regulation 24: Utilities Directive, Article 42 - S.I 286/2016, Regulation 41:

- CAs shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest so as to avoid any distortion of competition and ensure equal treatment
- The concept of conflicts covers at least 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

Public Service Directive, Article 57(8) - S.I 284/2016, Reg 57(8): Utilities Directive, Article 80 - S.I 286/2016, Reg 89:

- CAs may exclude from participation any economic operator where:
 - A conflict of interest (Reg 24) cannot be effectively remedied by other, less intrusive, measures
 - A distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure (Reg 41) cannot be remedied by other, less intrusive, measures

Prior involvement – general principles

- *Fabricom* (2005) C-21/03
 - Someone who has been instructed to carry out research, experiments, studies or development is not necessarily in the same position as someone who has not and may have an advantage or conflict of interest (e.g. may influence the tender documents)
 - Equal treatment does not require that person to be treated in the same way as any other tenderer
 - But automatic exclusion – without allowing the person to demonstrate that there is no distortion of competition - is not allowed

- *European Dynamics v European Union Intellectual Property Office* (2016) T-556/11
 - 2 potential conflicts
 - First, link between tendering company and company which drafted tender procedure. No conflict as latter company only involved 6 days before bid submission.
 - Second, winning bidder was also contractor under related contract for project management and technical consultancy. No conflict as overlap between tenders and bidder could not have derived any benefit from future position as consultant.

Principles summarised:

- The tenderer must be allowed to demonstrate that the situation involves no risk to competition.
- The existence of a conflict must lead to exclusion where that is the only measure available to avoid an infringement of the principles of equal treatment and transparency.

The Principle of Competition

The potential for framework agreements to distort competition was looked at in the following case:

Copymoore Limited V Commissioners of Public Works of Ireland – [2016]
IEHC 709

- Was a minimum turnover requirement disproportionate and discriminatory?
- Did the Framework distort competition?
- Was the requirement for SMEs to form consortia in breach of competition?

The Principle of Competition

Public Service Directive, Article 18(2) - S.I 284/2016, Reg 18:
Utilities Directive, Article 36(1) - S.I 286/2016, Reg 35:

- The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

The Ability to use Discretion / Requirement for Proportionality

- Late submission of tenders
 - *BAM Consortium v NTMA* [2016] IEHC 546
- “CA’s must apply the General Principles when considering whether to accept late or omitted documents or when raising queries after the tender date or when availing of any discretion of this nature afforded to it under the applicable tender rules”
- There is an obligation to apply the principle of proportionality.

Level the playing field

- If you know incumbent/contractor or those who participated in a market consultation have greater knowledge than potential candidates and tenderers:
 - Explain prior work in tender documents
 - Answer clarification questions clearly
 - Allow sufficient time for other bidders to prepare tenders

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