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## EARLY CONTRACTOR INVOLVEMENT:

INSIGHTS ON UNDERTAKING  
AND CONTROLLING SUCH  
INVOLVEMENT

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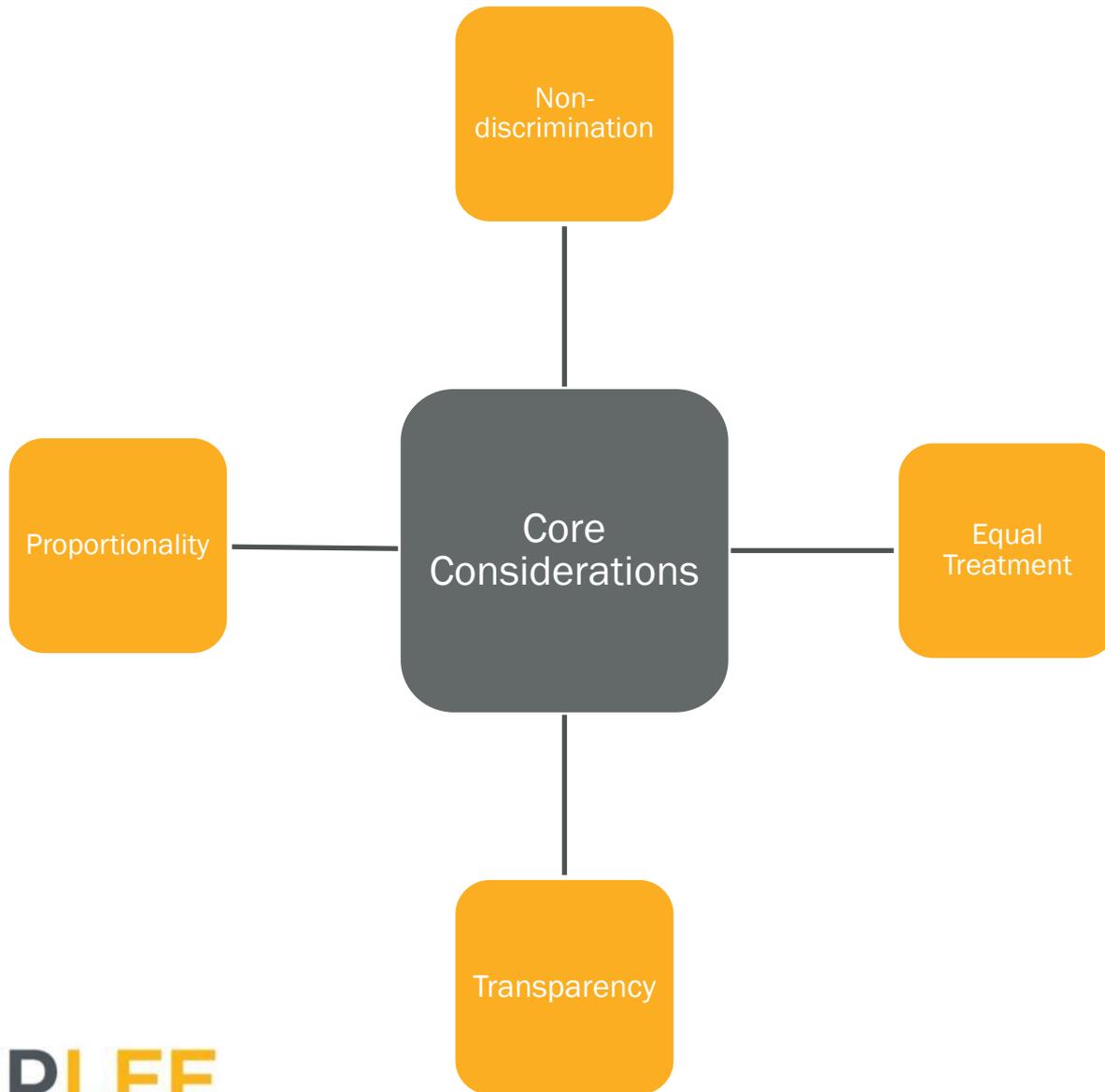
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# QUESTION?

- How do you control - and overcome - the problems with early contractor involvement, e.g. pre-market testing or specification writing, so you reap the benefits without conferring an advantage?

# What is Early Contractor Involvement?

- **OGP Guidelines** – the Directive provisions relating to **preliminary market consultations** *“allow a contracting authority to conduct market consultations with suppliers and expert bodies before the start of a procurement process which may facilitate improved specifications, better outcomes and shorter procurement times.”*
- The **European Commission** notes the importance of prior market consultation for relatively complex procurements, such as framework agreements and the procurement of innovative solutions
- **EU Directive 2014/24/EU**: suggests that preliminary market consultations have two purposes:
  - To gather information from market suppliers, and
  - To inform economic operators of procurement plans



# What are the benefits of Early Contractor Involvement?

- Ensures that a supply market exists for the product or service
- Assists with preparing specification and ensure terms are appropriate
- Incorporates strategic procurement goals/innovative solutions
- Increases competition/market awareness/avoid need for CD/NP
- Ensure sufficient number of suppliers are able to meet green criteria
- May lead to shorter procurement times, less clarifications



# What are the risks of Early Contractor Involvement?

- May create an unfair advantage for operators which are involved in the pre-procurement procedures
- Could give rise to a perception of bias/conflict of interest
- Tenderer influencing specifications or criteria
- If CA excludes someone from tendering, could challenge



# THE LAW

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# The Law:

- EU Directive 2014/24/EU: EU Procurement Directive
- S.I. No. 284/2016 - European Union (Award of Public Authority Contracts) Regulations 2016



# Recital 8 of the 2014 Directive:

- *Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition*
- The Directive regulates the use of prior market consultations
- Arrowsmith, 3<sup>rd</sup> edition, 7.60 – *“the above recital makes it clear that consultation must not have the effect of precluding competition”*
- Challenges in proving a causal link between the preliminary market consultation and resulting specification

# Regulation 40 - Preliminary market consultations

- 40. (1) *Before commencing a procurement procedure, a contracting authority may conduct market consultations with a view to preparing the procurement and informing economic operators of the authority's procurement plans and requirements*
- (2) *For the purposes of paragraph (1), a contracting authority **may seek or accept advice from independent experts or authorities or from market participants***
- (3) *The advice referred to in paragraph (2) may be used in the planning and conduct of the procurement procedure, where the use of such advice does not—*
  - *(a) have the effect of distorting competition, or (b) result in a violation of the principles of non-discrimination and transparency*

# Regulation 41 - Prior involvement of candidates or tenderers

- *41. (1) Where, in a procurement procedure, a candidate or tenderer, or an undertaking related to a candidate or tenderer—*
  - *(a) has advised the contracting authority, whether in the context of Regulation 40 or not, or*
  - *(b) has otherwise been involved in the preparation of the procurement procedure, **the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer***

*continued*

# Regulation 41 - Prior involvement of candidates or tenderers

- (2) *The appropriate measures referred to in paragraph (1) shall include—*
  - (a) *communication to the other candidates and tenderers of relevant information exchanged in the context of, or resulting from, the involvement of the candidate or tenderer referred to in that paragraph in the preparation of the procurement procedure, and*
  - (b) *fixing of adequate time limits for the receipt of tenders*
- (3) *A candidate or tenderer **shall only be excluded** from a procurement procedure under this Regulation where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with Regulation 18(1)*

# CASELAW



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

- Court considered Belgian law precluding tenderer if preparatory works carried out
- A person who participated in certain preparatory works may be at an advantage when formulating his/her tender due to the information acquired when carrying out that work
- Such a situation could potentially give rise to a conflict of interest
- Where a party was consulted with/involved in the preparation for a procurement, the CA cannot always deal with any potential violation of equal treatment by means of excluding that party
- Court concluded difference in treatment could not be objectively justified

# *Elektá v the Common Services Agency* [2011]

## CSOH 107

- The Court held that:
  1. The Contracting Authority must be entitled to decide what it wants
  2. The fact that the criteria included in the tender notice can only be met by one tenderer, or a limited range of tenderers, does not of itself contravene the principle of equality
  3. The inclusion of these criteria can only be considered discriminatory if they cannot be justified objectively having regard to the characteristics of the contract and the needs of the contracting authority

# *eVigilo Ltd* C-538/13 [2015] 3 WLUK 337

- The CJEU held - *an unsuccessful tenderer is not required to provide tangible proof of an expert's bias, need only show objective evidence calling into question the impartiality of a CA's experts*
- CJEU affirmed that CAs are under a **duty to determine if conflicts of interest exist and to take appropriate measures to ensure they are prevented, detected and remedied**
- Failure to demonstrate- a strong indication that the evaluation was unlawful
- High threshold for CAs - a disgruntled supplier contending bias need only show objective evidence of bias to demonstrate a tender evaluation was unlawful

# Consultant Connect Ltd v NHS [2022]EWHC 2037 (TCC) July 2022

Main questions before Court were around “standing”, use of framework agreements, transparency, equal treatment, conflicts of interest/bias

- Framework and non-framework members were asked to give a product demonstration on which they were scored and evaluated
- Court said to determine if permitted market consultation under Article 40, ***“the Court must ascertain objectively its true character. The label put on it .... is not conclusive..... Calling it a market testing exercise will not absolve the contracting authorities from their obligations of transparency and equal treatment”***
- Held that this was not market testing and had the effect of distorting competition in breach of Article 40(3).

# HOW TO CONTROL AND OVERCOME ISSUES



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# General Considerations

- EC GPP Training Toolkit Market Engagement provides guidance on when to engage the market, they list “***Criteria for Market Engagement***”
  - How complex is the product/service?
  - How complex is the market?
  - How mature is the market?
  - What is the scope for innovation?
  - What is the value of the contract?
  - What is the balance of knowledge between buyer and supplier?

[https://ec.europa.eu/environment/gpp/index\\_en.htm](https://ec.europa.eu/environment/gpp/index_en.htm)

# General Considerations

- **Browne and McGovern**, para 8.37 - *“if a public body embarks on a consultation procedure prior to the procurement process, this will be subject to general principles of natural and constitutional justice.”*
- **Arrowsmith**, para 7.60 - *“ the possibility for such discussions was more important prior to competitive dialogue which provides a more flexible procedure for the award of complex projects”* .
- **EC GPP Training Toolkit “Market Engagement”** - *“where market engagement is carried out prior to a formal tender, it is permissible to only contact certain suppliers.... to avoid any unfair advantage.... all information provided by the contracting authority..... should be made available within the procurement documents”* .

# General Considerations

- **Arrowsmith, 7.62** – *“that there is a strong argument to justify limited consultations based on the added value of such consultations from the greater investment in the consultation process by consultees which can result from limited consultations.”*
- **Arrowsmith, 7.62** – *“It is advisable for an authority conducting discussions with any firms to provide systematically for the public availability of any information that it provides to participants in the discussions”.*

# General Considerations



- Imperative to **retain records** from market engagement meetings from an audit perspective or where a decision may be the subject to a future appeal, be able to **provide reasons for any decisions**
- If holding market engagement meetings, ensure that any 1-to-1 meeting opportunities are advertised in a fair manner
- If seeking to use a decision which stemmed from a market engagement meeting, tread carefully!
- Useful to seek a second opinion

# Conflict Management – Regulation 24

- (1) - 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
- (2) For the purposes of this Regulation, “conflicts of interest” includes any situation where a relevant staff member **has directly or indirectly a financial, economic or other personal interest which might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure**

# Conflict Management

- **“Relevant staff member”** = a staff member of the contracting authority or a procurement service provider acting on behalf of the contracting authority who is involved in the conduct of the procurement procedure or may influence the outcome of that procedure
- Keep a record of all identified and potential conflicts of interest
- Seek conflict of interest declarations from employees, consultants and contractors involved in the procurement process
  - Again, useful from audit perspective or where a decision may be the subject to a future appeal
- Do not rely on tenderers to identify conflicts

# Specification Requirements



- Preferable to draft your own specification and award criteria independently
- If assistance is required – seek it from independent experts who will not participate in the tender process, consider confidentiality/Chinese walls in tenderer if necessary
- Must objectively justify any specification details which could advantage a particular tenderer
- Ensure that tenderers are given sufficient time to submit bids

# CONCLUSIONS

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# Conclusions

- Early contractor involvement is voluntary
- Can be very beneficial but be careful to avoid traps!
- Put in place a robust process if engage in it, retain records, manage conflicts
- Good news is that less litigation compared to tender evaluation/award and debriefing!

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Q&A /  
Thank you

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