

Ensuring fair competition: How do you lawfully level the playing field, specify correctly and assess bids objectively when the incumbent has a favourable position?

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Introduction

- What advantages may be enjoyed by an incumbent:
 - Knowledge and specific expertise of the contracting authority and service
 - Relationship with the authority
 - Continuity
 - Embedded products
- Examples from the case law:
 - Costs of entry
 - Unequal information
 - Award criteria

The law

- Regulation 18 Public Contracts Regulations 2015 (PCR):

"18.—(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.

(3) For that purpose, 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."

- Regulation 24:

"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."

- Regulation 42(10):

"(10) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition."

Costs of new entry

- *Dynamiki v Commission* 2008 T-345/03
- Principles:
 - (a) Equal treatment did not require neutralisation of absolutely all advantages.
 - (b) A balance must be struck between the interests involved.
 - (c) Regarding the potential advantages of a tenderer (here by virtue of a subcontract), neutralisation must be effected but only to the extent:
 - (i) Technically easy to effect;
 - (ii) Economically acceptable;
 - (iii) Does not infringe the rights of the existing contractor or tenderer.
- Application:
 - Absence of payment during 3 month running-in period did not breach equal treatment.

Costs of new entry

- *Amplexor v Commission* 28 June 2018 T-211/17
 - Permitting:
 - Entrants to claim up to 3% of contract price; and
 - The incumbent to claim up to 0.3% only of contract price,for tools and systems to transfer to the new service, was not a breach equal treatment.
- *Bromcom Computers Plc v United Learning Trust & anor* [2022] EWHC 3262 (TCC)
 - The authority's addition of a sum to the entrant's bid to cover the authority's cost of implementing a data interface (not needed by the winning bidder due to its subcontractor's interface developed under a prior contract) was the wrong approach.
 - The case was more analogous to *Amplexor* than *Dynamiki*.
 - Removal of the cost was technically easy; it had an economic justification; it did not infringe the incumbent's rights

Unequal information

- T-345/03 Europaiki Dynamiki: authority made available information on CORDIS database and Autonoky software only gradually, whereas incumbent had the information from the beginning. Claim upheld.
- T-50/05 Europaiki Dynamiki: contract for computerised system for monitoring excisable goods. Held there was no disparity of information.
- T-236/06 Europaiki Dynamiki: Information acquired through past working relationship with the authority was an 'inherent de facto advantage', not a breach of equal treatment.

Unequal information

- Unequal information can be a ground for challenge, if it makes a difference in the competition.
- Competitive advantage does not imply unequal treatment.
- Important for contracting authorities to think ahead regarding information regarding the existing service said to be confidential to the incumbent.

Award criteria

- T-461/08 Europaiki Dynamiki: obligation to demonstrate ability to provide pool of staff from own resources was too imprecise, potentially favouring the incumbent.
- T10/17 Proof IT: specifications gave sufficient information for an RWIND tenderer to understand, and any advantage was an 'inherent de facto advantage'
- C-513/99 Concordia Buses: not a breach of equal treatment that the award criteria adopted could only be satisfied by a small number of undertakings

Summary

- Contracting authorities must tread a careful line not to favour either incumbents or new entrants.
- The line is not especially narrow and there is flexibility in setting technical specifications (provided not discriminatory).
- However, advantage should be neutralised if: technically easy; economically acceptable; and does not infringe rights.
- Document the rationale.
- Think ahead to the next procurement to determine terms required now.
- Principles likely to remain relevant under the Procurement Act 2023.



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