

Conflict of Interest

The White Paper Procurement Conference
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Millshire DC

- ▶ ...is considering a deal to redevelop a town centre site. Freda is likely to be a key member of the evaluation team. What is your advice if:

Freda lives close to the site?

Freda objected to a previous development on the site?

Freda is a member of the Civic Society, which is known to be against redevelopment?

Freda is godmother to 3 of the children of the CEO of a likely bidder?

Freda's cousin owns a shop which may be affected by the proposed redevelopment?

- ▶ ...will shortly have to start the process to relet a major IT outsourcing contract; Tim has been managing the contract and is one of very few people at MDC who understands the contract and the systems; the incumbent is AG Computing, and MDC knows they are interested in participating in the competition. But the relationship between MDC and AG Computing has been a tempestuous one, and Tim and Andy, the lead for AG Computing on the project, have an antagonistic relationship. What is your advice as regards Tim's role?

HS2 in the Press

HS2 scraps contract over conflict of interest claims
Financial Times, 29 March 2017

**Whitehall alarm
over HS2
contract row**
Building, 29 March 2017

**HS2 firm quits amid
'conflict of interest' fear**
Metro (UK), 30 March 2017

**Mace goes on
attack over
HS2 tender**
The Times, 21 April 2017

Mace criticises HS2 process as seriously flawed
City A.M., 4 April 2017

**HS2 Ltd vows to 'tighten up' procurement
process after conflict of interest row**
Belfast Telegraph, 19 April 2017

Types of conflict

- ▶ *“A conflict of interests in public procurement procedure which is not properly addressed...leads to the breach of the principles of transparency, equal treatment and/or non-discrimination” (OLAF Guidance)*
- ▶ Different types of conflict:
 - ▶ Authority Conflict – like Fred and Tina
 - ▶ Bidder Conflict – prior involvement or privileged position as regards knowledge
 - ▶ Organisational Conflict – multiple bidders/ involved parties from the same group
- ▶ Tension between:
 - ▶ Avoiding conflicts; and
 - ▶ Not rushing to exclude bidders
- ▶ Principal focus today on Authority Conflict

Reminder – the PCR and conflict (1)

- ▶ Issue not new, but now expressly referenced in Directive: principally, Recital 16 and Reg 24:
 - ▶ “(16) Contracting authorities should make use of all possible means at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflicts of interest.”; and
 - ▶ Reg 24: duty on CA to “take appropriate measures”: active, not passive
- ▶ Parallel provisions in UCR and CCR, but latter expressly refers to combatting fraud, corruption and favouritism, and states that measures taken on conflict should not go beyond what is necessary to prevent/eliminate conflict
- ▶ To “effectively prevent, identify and remedy conflicts”:
 - ▶ how much due diligence is required? (-remember Fred!)
 - ▶ Note, it’s conflict not bias (cp Traffic Signs (NI) (2011))

Reminder – the PCR and conflict (2)

- ▶ Inconsistency here between preventing distortions arising from conflicts (Recital 16) and preventing conflicts (whether distortive or not)?
 - ▶ Regs 57, 58 and reporting under Reg 84
 - ▶ In the HS2 example, is it incumbent on HS2, for example, to place restrictive covenants on outgoing executives, and to enforce them? (cp civil servants)
- ▶ Conflict defined so as to include:
 - ▶ Direct or indirect conflict
 - ▶ Financial, economic or other personal interest
 - ▶ Perceived to compromise impartiality and independence
 - ▶ Covers staff and service provider personnel

Reminder – the PCR and conflict (3)

- ▶ Remember also Reg 41 (prior involvement):
 - ▶ CA to take proactive measures; exclusion only as last resort; prior opportunity to prove no distortion as a result of involvement;
 - ▶ Compare Reg 24: “*appropriate measures to prevent, identify and remedy*”: would the same factual situation be answered differently under these different provisions?
- ▶ Also, caselaw on multiple bidding entities in same group (Serrantoni / Assitur, European Dynamics (T-556/11))

Some key questions

- ▶ What is the extent of the Authority’s obligation? How proactive does it need to be?
- ▶ Is there a broad “margin of discretion” in relation to conflicts?
- ▶ Meaning of seemingly broad phrase:
- ▶ *“directly or indirectly...financial, economic or other personal interest which might be perceived to compromise their impartiality and independence” (my emphasis):*
 - ▶ What is indirect?
 - ▶ How broad are the other interests?
 - ▶ Is perception sufficient?
- ▶ Staff or service provider personnel: what about legal and other advisers?

Counted4 v Sunderland CC (TCC) (18 December 2015)

- ▶ Application to lift automatic suspension denied; issue of conflict arose in the context of whether there was a serious issue to be tried (HELD: yes)
- ▶ Facts: Key member of SCC's personnel; claimant argued that he was conflicted by reason of having acted as contract manager for existing contract, and as a result of tensions in managing that contract and past complaints
- ▶ Reg 24 "*other personal interest*" very broad, and clearly intended to be additive to "*financial [or] economic*"; arguably, it means "*anything pertaining to the relevant individual*"
- ▶ Arguable in the context of "grave" problems with an individual that his "*personal interest in protecting his professional reputation and/or role at the Defendant by awarding a new contract to someone other than the Claimant might be perceived to compromise [his] impartiality and independence.*"

Some points from the EU caselaw (1)

- ▶ NB decisions on “old” directives or Financial Regulation
- ▶ Intrasoft (T-403/12):
 - ▶ Bidder conflict: did involvement in a prior linked project give rise to a Col?
 - ▶ “No absolute obligation to exclude... where... possible to show no impact on their conduct ...and entails no actual risk [of distortion]”; but
 - ▶ “mere possibility of a conflict ...cannot suffice”; but
 - ▶ “exclusion is essential ...where there is no more appropriate remedy”
 - ▶ Case suggests (at least as regards bidder conflict and the Financial Regulation) that specific examination of the tender is required
- ▶ eVigilo (C-538/13):
 - ▶ Significant connections between tenderer and experts appointed by the CA; national courts had rejected Col complaint on basis bias was not proved
 - ▶ Held: obligation on CA “to determine the existence of possible Col and to take appropriate measures to prevent... detect... and remedy them”
 - ▶ Complainant not required to provide tangible proof of bias

Some points from the EU caselaw (2)

- ▶ The fact a potentially conflicted person:
 - ▶ isn't part of the Evaluation Committee; or
 - ▶ has worked for all shortlisted biddersis not the end of the matter; and
- ▶ If no choice but to use a person with a conflict (Tim and Andy?) should take “*special measures*” to avoid conflict (eg non-disclosure of bidders' names, as asserted by HS2)

(all from *Ombudsman Decision 642/2008/TS*)

Some concerns, and some practical guidance for Authorities (1)

- ▶ As The Millshire examples show:
 - ▶ The dividing line between conflict concern and no concern may be hard to draw, and is subjective
 - ▶ While some Authority Conflicts will be readily apparent (Tim and Andy), some may not be (property interest; conflicting external interest; property ownership)
- ▶ Time limits mean that the conflict argument may be attractive to a complainant as it will often only become apparent at the end of the process
- ▶ Proactivity required:
 - ▶ Seek, and maintain up to date, Declarations from evaluators and others involved (from within and outside the Authority), and from bidders
 - ▶ Due diligence, including checking declarations of no conflict?
 - ▶ System for reporting conflicts?
 - ▶ Restrictive Covenants?
 - ▶ Reserving right to exclude and enforcing it in appropriate circumstances: ‘damned if you do and damned if you don’t’: inaction has been described as ‘maladministration’

Some concerns, and some practical guidance for Authorities (2)

- ▶ Problems in small markets/ markets with limited number of players (like HS2?) and where Authority is thinly staffed (eg post-outsourcing?)
- ▶ Carefully-worded declarations of no conflict required: see *Ombudsman Decision 642/2008/TS*
- ▶ Following some of the (non-binding) guidance which exists probably a useful tool to demonstrate appropriate approach (see next slide)
- ▶ Training
- ▶ Renewing declaration of conflicts at appropriate points in process (eg when list of bidders announced), especially in long-running processes and when personnel changes happen

Some Guidance...

- ▶ EU Services Guidance on Common Problems in ESIF-funded Projects:

http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_public_proc_en.pdf

- ▶ OLAF Practical Guide (2013, so pre-dates Directives) “*Identifying conflicts of interests in public procurement procedures for structural actions: A practical guide for managers*”: suggests reactive measures, but some helpful material, includes:
 - ▶ model declaration;
 - ▶ use of data mining programs to identify potential concerns;
 - ▶ practical examples; and
 - ▶ deals with DD;
- ▶ OECD: “*Managing Conflict of Interest in the Public Service’ OECD Guidelines and Country Experiences*”
<http://www.oecd.org/corruption/ethics/48994419.pdf>
- ▶ European Commission's 2014 Anti-corruption report (includes stats on Col):(https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf)

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