

# Market-testing and other forms of supplier pre-procurement involvement: avoiding the pitfalls

Kate Rees

June 2017

# The Question

---

- How do you eliminate any inference or perception of bias at the tender stage towards certain suppliers eg those who (i) participated in soft market testing or consultation; or (ii) are incumbents or project advisers who informed the specification; or (iii) have staff cross over?

# What's involved?

---

- Pre-procurement market involvement takes many forms including:-
  - Market testing questionnaires, available via OJEU
  - In-depth multilateral/bilateral meetings etc with selected contractors (usually unadvertised)
  - Paid consultancy advice to define the needs/design the process

# The Policy Background

---

- Policy makers acknowledge that outside involvement often inevitable
- Indeed HMG actively encourages procurers to engage the market in advance. See eg PPN 09/16 "Procuring Growth Balanced Scorecard":-  
*"At an early stage you should test your requirements with the supplier community in an inclusive and transparent fashion"*
- But potential for difficulties long been recognised in Directive recitals and 2014 Public/Utility Directives now contain operative provisions .....

# Legislative provisions

---

- Regulation 40 PCR: Authorities may take advice from market participants provided level playing field is maintained
- Regulation 41 PCR:-

*Where a candidate or tenderer, or an undertaking related to a candidate or tenderer (a) has advised the contracting authority ... 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"*

# Proactivity or reactivity?

---

- Tempting to ignore the problem until bid stage!
- Standard form PQQ now does require candidates to declare prior involvement and/or conflicts of interest
- But questions are confusing and only catch responding candidate in any event (not its group companies)
- And procurement is well underway (open procedure: almost finished!) by the time qualification information is returned

# Proactivity or reactivity?

---

- Problems that could readily have been forestalled at the time of the pre-procurement engagement (eg by a Chinese Wall) may be more intractable if they only come to light much later
- So consider these issues as early as possible!
- (If taking over a procurement mid way through, check who your predecessor spoke to/involved at pre-procurement stage)

# Problems and Solutions

---

- Steps necessary to create/restore a level playing field as between the supplier with prior involvement and the rest will depend on the nature of the advantage gained and whether it is material
- Authority must tread a line between doing too little (other bidders may complain re equal treatment and transparency) and doing too much (pre-involved bidder may complain re proportionality!)
- Advantages from prior involvement include .....

# First mover advantages

---

- Pre-consulted suppliers will know that a procurement is on the horizon
- Can they gain significant advantages from the head-start? Eg recruiting scarce expertise; signing exclusive deals with partners etc; buying up land around a possible development site etc etc?
- If so, avoid private discussions? Hold an advertised consultation process

# Information Advantages

---

- Consultees may acquire quite detailed knowledge of the proposed project
- Any advantage can often be eradicated by giving bidders sufficient time to consider a detailed Information Memorandum
- But may be impossible to remove the advantages of lengthy involvement via paid consultancy work etc. Some of what is learned will be intangible (but very useful for preparing good bid) eg attitude of key decision takers

# Information advantages

---

- Previous approach in some Member States was a blanket exclusion. But CJEU said precluding the possibility of a supplier seeking to show it had gained no advantage from its prior work was disproportionate. (See Fabricom (C-21/03))
- Setting up a Chinese Wall at time the consultants are appointed may be adequate
- Recent case, European Dynamics (T-556/11) tends to support this
- But check that consultants can make it work (ten person firm; single office; rudimentary IT – maybe not?)

# The ability to design the solution/the procurement process

---

- Chinese Walls won't help if the consultants/consultees have hard-wired their advantage into the procurement
- Eg recommended technical specifications that favour their solutions or drafted award criteria that favour their strengths
- Incumbents may be particularly prone to this?
- Output-based specifications may avoid the problem

# The ability to design the solution/procurement process

---

- If not, constant vigilance is required! Perhaps put draft specifications out to consultation amongst shortlisted candidates if there is time?
- If not, at least the problem is likely to be quite obvious to other bidders once the ITT is published so they will have to put up/shut up quickly!

# The ability to influence bid evaluation

---

- The existence of any form of personal/professional connection between a bidder and an evaluator or other key decision-maker is a gift to would-be challengers
- Links tend only to become known after the end of the process so limitation rarely an issue; and marking bias can so distort the outcome that even bidders way off the pace can have a go

# The ability to influence bid evaluation

---

- PCRs/UCRs' new provisions on conflicts of interest are relevant here, requiring authorities to:-

*"Take appropriate measures to effectively prevent, identify and remedy conflicts of interest ... so as to avoid any distortion of competition and to ensure equal treatment of all economic operators"* (Regulation 24(1) PCRs)

- See Afcon ( T-160/03): Commission award overturned where a clearly biased evaluator turned out to be an employee of a subsidiary of one of the winners

# The ability to influence bid evaluation

---

- But a conflict of interest may still be found even though evaluator is trying to be impartial and/or is involved in evaluation in an "independent" capacity
- See Nexans (T-415/10): two employees of ENEA held positions on governing bodies of Fusion for Energy in their capacities as renowned subject experts. No involvement in scoring but governing body required to approve award decision. Contract then awarded to consortium that included ENEA. After extensive factual enquiry, FfE eventually persuaded the Court the individuals played no part in the decision-making (but they could have saved the time/effort/delay if individuals had recused themselves?)

# Staff who change sides

---

- Authority staff who previously worked for a bidder or bidder staff who bring relevant knowledge from having worked for the Authority can both cause problems
- See Communicaid (T-4/13) Commission was able to persuade the Court that individual who had previously worked in the awarding department did not have relevant knowledge to pass on when he took employment with winning bidder (and was not involved by winner in bid preparation either)
- Same principles as before are applicable; Chinese Wall may work but bidder may not disclose existence of problem at all or until too late, and Authority may not know where departing employee is going

# Staff who change sides

---

- HS2/CH2M/Mace dispute 2017
- ( According to press reports) senior employee of HS2 actively involved in Phase 1 project management contract and in designing £170m phase 2 contract, then moved to CH2M and assisted in later stages of CH2M's bid for stage 2 contract. CH2M was then appointed winner
- HS2 seemingly unaware of its ex employee's new role
- Losing bidder, Mace, challenged for conflict of interest, breaches of equal treatment etc
- CH2M ultimately withdrew

# Staff who change sides

---

- Employee's contract with Authority may prevent him using Authority's confidential information even after termination; if not, implied duties of confidentiality are very limited
- For long-term, critical, procurements Authorities could consider express commitments upfront from relevant staff not to work for bidder, or potential bidder, in any affected capacity until after procurement is completed? But proceed with caution....
- Relevant staff exit procedures should at least try to capture destination



[www.hoganlovells.com](http://www.hoganlovells.com)

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing.. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.