

A&L Goodbody

Transparency – full disclosure?

White Paper - Awarding Public Contracts
Skilfully & Lawfully

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Question...

Where are the limits to transparency and full disclosure from the outset, including possible breaches of confidence and prejudicing retenders?

What does transparency mean?

Transparency

Transparency means “*that the award criteria must be formulated...in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way*”



Procurement docs

Obligation to grant **unrestricted & full direct access** free of charge to the procurement documents from the outset.

Clarity

The principle of transparency requires the subject matter of each contract and the criteria governing its award to be clearly defined



Reasons

Must explain how successful tender was advantageous by reference to **particular matters, respects, examples or facts** supporting a general assertion of relative advantage

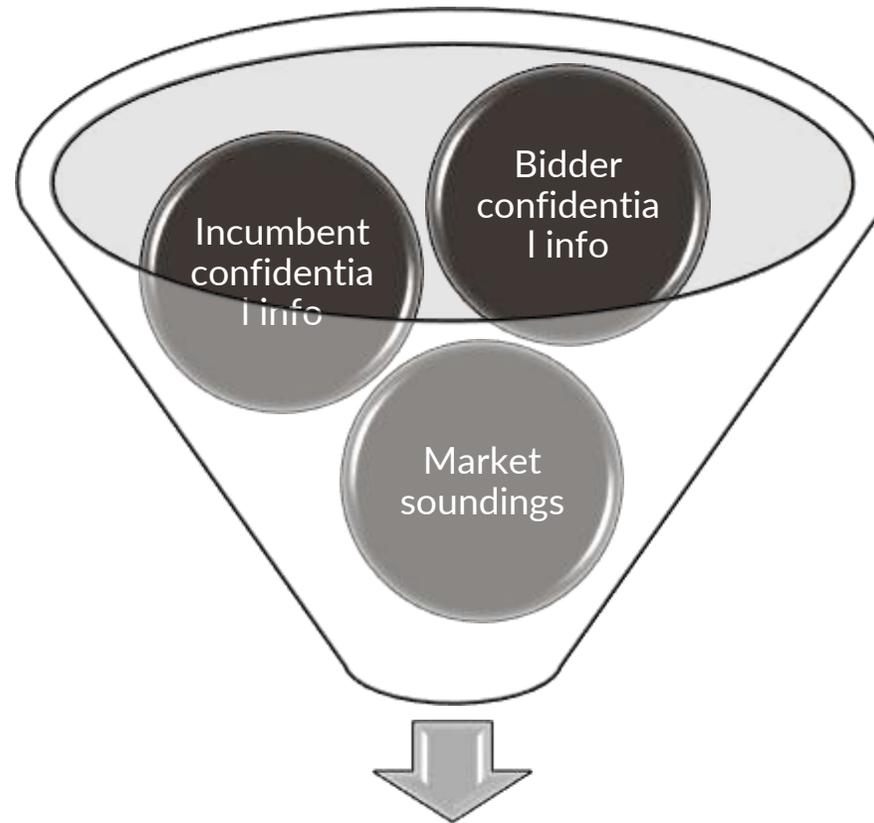
Limits to transparency & full disclosure?

Incumbent info:

"[t]he potential advantages of the existing contractor... must none the less be neutralised, but only to the extent that it is technically easy to effect such neutralisation, where it is economically acceptable and where it does not infringe the rights of the existing contractor or the said tenderer" (Case T-345/03)

Market Soundings:

If a bidder has advised in the marketing soundings or otherwise, CA must communicate relevant info exchanged (Reg. 41(2))

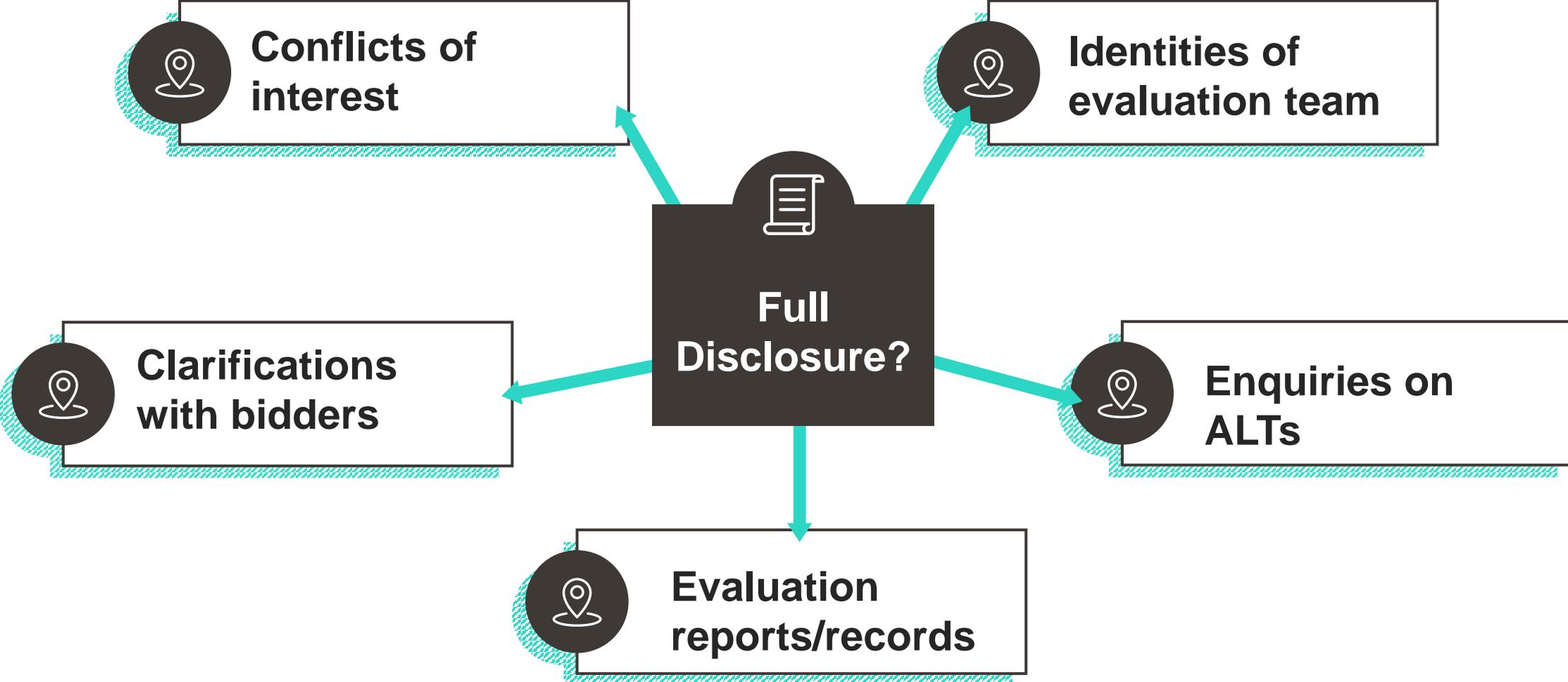


Bidder Confidential Info:

Must not disclose info which has been designated as **confidential**, including, but not limited to technical or trade secrets and the confidential aspects of tenders (Reg. 21)

"...the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent

Information routinely not fully disclosed



Confidential Information

Confidentiality obligation

1

“the principal objective of the EU rules on public procurement is the opening-up of public procurement to undistorted competition... and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures...” Klaipedos C-927/19, para 115

Genuine confidentiality

2

*“the contracting authority cannot be bound by an economic operator’s mere claim that the information submitted is confidential. **Such an operator must demonstrate the genuinely confidential nature of the information which it claims should not be disclosed, by establishing, for example, that that information contains technical or trade secrets, that it could be used to distort competition or that its disclosure could be damaging to that operator**”* Klaipedos C-927/19, para 117

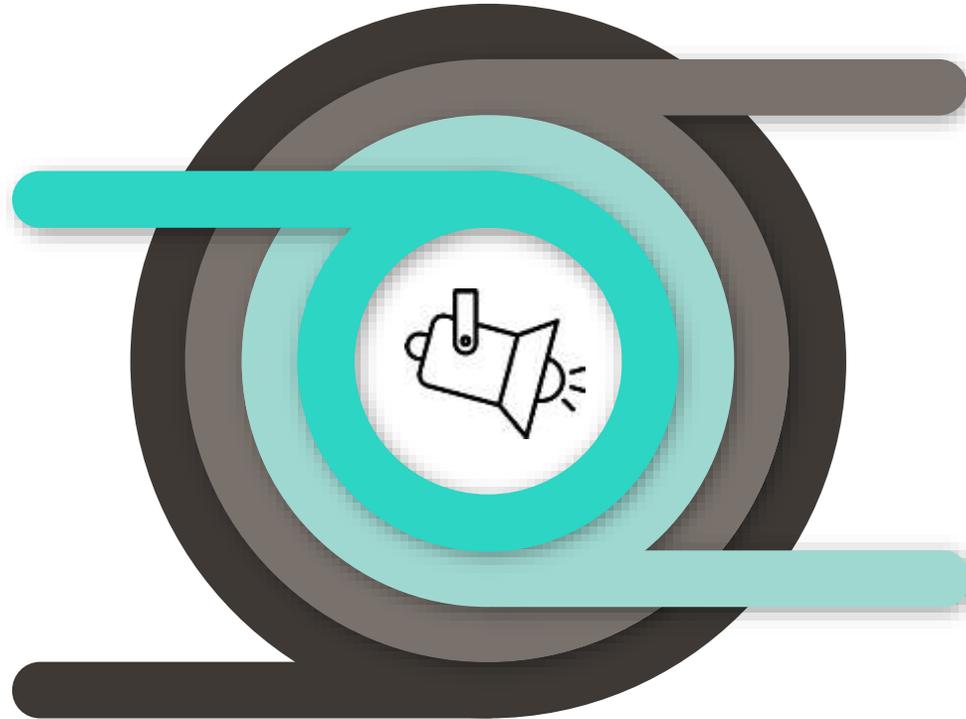
Procurement Proceedings

Effective Review

Member States must have measures to ensure that procurement decisions may be reviewed effectively and, in particular, as rapidly as possible (Art. 1, Directive 89/665)

Fair Hearing

Right to an effective remedy and to a fair hearing (Art. 47 of the EU Charter of Fundamental Rights)



Grounds

Requirement to state the **grounds** upon which each relief is sought in procurement proceedings (Order 84A, Rule 3(1)(xiii), Rules of the Superior Courts)

Trade Secrets

EU law right to protection of trade secrets (Varec, C-450/06); Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets)

Balancing act...

*It follows that in the context of a review of a decision..., the adversarial principle **does not mean** that the parties are entitled to **unlimited and absolute access** to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that **right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.***

Varec, C-450/06, para 51

To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets Varec, C-450/06 para 53

Word Perfect – Discovery Principles

01 Confidentiality

The fact that information may be confidential is not, in and of itself, a barrier to its disclosure

02 Balance

Balance between extent to which discovery of a category of document may give rise to disclosure of confidential info and the extent to which it may be reasonable to anticipate that the info may be important to a just and fair resolution of the proceedings

03

03 Sustainable claims

May be disproportionate to direct discovery involving the disclosure of confidential info where no credible basis for a sustainable claim - extent to which adequate reasons have been given may be relevant

04

04 Trial Judge

Trial judge may be in a better position to identify whether disclosure of confidential info is necessary to enable a fair result

Case law

Confidential Information

- *Klaipedos* (C-927/19, ECLI:EU:C:2021:700)
- *Varec* (C-450/06, EU:C:2008:91)

Incumbency Advantage

- *Proof IT* (Case T-10/17, ECLI:EU:T:2018:682)
- *Evropaiki Dynamiki* (Case T-345/03, EU:T:2008:67)

Discovery

- *Word Perfect v. Minster for Public Expenditure & Reform* [2020] IESC 5 (25/09/20)
- *BAM PPP v. NTMA* [2015] IECA 246



Thank you
