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# “Soft” market testing – the risks to competition

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White Paper Conference  
18 November 2016



# Introduction

## Topics:

- pre-market engagement
- relevant law
- the risks of unfairness
- mitigation
- procedural issues

# Pre-market engagement

*“Engaging with the market before starting the formal procurement process is best practice and helps to maximise value for money for the resulting procurement” (PPN, 9 May 2012)*

Benefits of early engagement:

- encourages market interest and stimulates competition
- gives sufficient time to authority/bidders to prepare
- helps to clarify authority’s requirements
- informs the authority about the range of solutions/options on offer
- feedback from the market about suppliers’ appetite for procurement process
- formation of consortia

# Relevant law

- Regulation 24 states that authorities must take “*appropriate measures to effectively **prevent, identify and remedy** conflicts of interest arising in the conduct of procurement procedures*”.
- Regulation 40: allows for “*market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.*”
- Authority may “*seek or accept advice*” from market participants
- Such advice may be used in the planning and conduct of the procurement “*provided that it does not have the effect of distorting competition...*”

- Regulation 41 deals with prior involvement of tenderers:
  - preliminary market consultations
  - preparation of procurement procedure
- Regulation 57(8)(f) provides for discretionary grounds for exclusion where prior involvement creates a distortion of competition which “*cannot be remedied by other, **less intrusive, measures.***”

# Article 41 – prior involvement of bidders

- Contracting authority must take “appropriate measures” to protect competition, including:
  - ensuring relevant information which is exchanged with consultees is available to all bidders
  - fixing “adequate time limits” for all bidders
- Exclusion permitted only if no other means to ensure fairness
- Bidders must be given an opportunity to demonstrate that prior involvement is not capable of distorting competition
- Regulation 84(1) report must document the steps taken by the contracting authority

# Risk to competitive process

- Timing advantages – “head start” to bidders
- Deeper understanding of authority’s requirements
- Incumbent relationship
- Ability to influence specifications
- Actual v *apparent* bias – a relationship “*which **might be perceived** to compromise their impartiality and independence ...*” in a procurement process (Regulation 24(2))
- Claimant not required to demonstrate bias (*eVigilo*)
- But there must be “real risk” of unfairness and not just “mere possibility” of conflict (*Intrasoft*)

# Mitigating risks

The following steps may help to “neutralise” the potential advantage given to consultees:

## **1. Wide consultation:**

- publication of PIN; notice on website
- industry days v “one-to-one discussions”

## **2. Disclosure**

- full disclosure of all relevant background information
- disclosure of consultees’ prior involvement

## **3. Time limits**

- extend time limits to ensure “adequate” time for bids

## 4. Information barriers

- Provisions to “*guarantee both independence and confidentiality in the drawing up of tenders*” may assist (*Assitur*)
- Note Regulation 41: “*or an undertaking related to a candidate or tender*”
- But AG in *Fabricom* expressed doubt whether there was “*any means of ensuring that the information and experience acquired during the preparatory stage will not operate to the advantage of the person concerned when he submits a tender*”

## 5. Evaluation

- Assessment of whether the bidder has in fact exploited an advantage (*European Dynamics*, case T-556/11 – bidder’s tender was relatively weak in the area where alleged to have advantage)
- Anything in the tender which a “diligent and well-informed” tenderer could not have submitted?
- Scoring should take account of any potential benefits
- Duty of fairness to all bidders – but tenderer with prior involvement “*not necessarily in the same situation*” as other bidders (*Fabricom*)

## **6. Generic specifications**

- Avoid standards/specifications geared towards capabilities of individual suppliers
- Allow wide range of solutions

## **7. Independent oversight**

- “Fresh pair of eyes” when evaluating tenders
- Independent adjudication

## **8. Exclusion**

- Case-by-case assessment
- Proportionality – exclusion only if “*no other means*” to ensure equal treatment

# Procedural issues

- Right to explain - prior to exclusion, bidder must be given an opportunity to demonstrate there has been no distortion of competition
- Authority cannot merely rely on bidder's statement that there is no conflict of interest and must assess on the facts (*European Ombudsman, Case 1005/2011*)
- Exclusion may occur at any stage of the procurement process as soon as authority "becomes aware" of conflict (Regulation 57(10))
- Regulation 84(1) audit trail

# Conclusions

- Pre-market engagement is “best practice” – but carries the risk that consultees have a head start in the process
- The Regulations balance the right of consultees to bid for the contract with the principle of equality of opportunity
- The Court has taken a fairly robust approach and requires there to be a “real risk” of unfairness before consultees can be excluded
- Exclusion is the last resort and other safeguards must be investigated to ensure fair treatment of all bidders

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