

Eliminating problems with prior involvement

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- How do you eliminate any inference or perception of bias at the tender stage towards suppliers e.g.
 - Participants in soft-market testing or consultation?
 - Incumbents or project advisers who have informed the specification?
 - Where there has been staff cross over?

What do the Regulations say?



Regulation 40:

- CAs may conduct market consultations before procurements
- For example, they may seek or accept advice from independent experts, authorities or market participants
- Such advice may be used in planning and conduct of the procurement provided it does not distort competition and does not result in a violation of the principles of equal treatment and transparency

Regulation 41:

- Where a candidate, tenderer or related undertaking
 - Has advised the CA, whether in the context of Reg 40 or not or
 - Has otherwise been involved in the preparation of the procurement procedure,

the CA shall take appropriate measures to ensure that competition is not distorted by its participation

- Such measures shall include:
 - The communication to other candidates and tenderers of relevant information and
 - The fixing of adequate time limits for the receipt of tenders

- The candidate or tenderer shall only be excluded where there are no other means to ensure equal treatment

- Prior to exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

Related issue, Regulation 24:

- CAs shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest so as to avoid any distortion of competition and ensure equal treatment
- The concept of conflicts covers at least any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence

Regulation 57(8):

- CAs may exclude from participation any EA where:
- (e) A conflict of interest (Reg 24) cannot be effectively remedied by other, less intrusive, measures
- (f) A distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure (Reg 41) cannot be remedied by other, less intrusive, measures

- *Fabricom* (2005) C-21/03
 - Someone who has been instructed to carry out research, experiments, studies or development is not necessarily in the same position as someone who has not and may have an advantage or conflict of interest (e.g. may influence the tender documents)
 - Equal treatment does not require that person to be treated in the same way as any other tenderer
 - But automatic exclusion – without allowing the person to demonstrate that there is no distortion of competition - is not allowed

- *European Dynamics v European Union Intellectual Property Office* (2016) T-556/11
 - 2 potential conflicts
 - First, link between tendering company and company which drafted tender procedure. No conflict as latter company only involved 6 days before bid submission.
 - Second, winning bidder was also contractor under related contract for project management and technical consultancy. No conflict as overlap between tenders and bidder could not have derived any benefit from future position as consultant.

➤ Principles summarised:

- The tenderer must be allowed to demonstrate that the situation involves no risk to competition.
- The existence of a conflict must lead to exclusion where that is the only measure available to avoid an infringement of the principles of equal treatment and transparency.

- Do you need it?
 - *“At an early stage you should test your requirements with the supplier community in an inclusive and transparent fashion”*
(Cabinet Office, PPN 09/16)

- Do it openly

- Report results in tender documents

- Allow sufficient time for other bidders to understand the issues

- Think carefully about authors: in-house, consultants (and not potential tenderers)?
- But risk of movement of staff and advisers
- Allow sufficient time for others to understand the issues

How do you deal with :

- An incumbent/similar with encyclopaedic knowledge?

- Staff who move jobs?
 - *Communicaid* (2013) T-4/13R
 - *Nexans* (2013) T-415/10

Be prepared:

- Level the playing field
- Ask the question
- Set and apply clear procedures/rules

Level the playing field



If you know incumbent/A.N. other has greater knowledge:

- Explain prior work in tender documents
- Disclose prior work?
- Answer clarification questions clearly
- Allow sufficient time for other bidders to prepare tenders

Ask the question



If you don't know, ask the question:

- Crown Commercial Service, PPN: Standard Selection Questionnaire (8/16) includes relevant questions:
 - Aware of any conflict of interest within the meaning of Reg 24 due to the participation in the procurement procedure?
 - Been involved in the preparation of the procurement procedure?

Set and apply clear procedures



Decide what to do in advance:

- Explain the problem
- Set out the procedure to be followed by bidders who have prior involvement/potential conflicts
- Explain the need for bidders to review the situation during the procurement
- Identify the sort of measures which may be appropriate e.g. Chinese walls, conflict of interest declarations
- Set out discretion to disqualify

- Be prepared
 - Level the playing field
 - Give other bidders sufficient information and time
 - Set and apply clear procedures
- Expect the worst!

Thank you for listening

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