

CONFLICT OF INTEREST

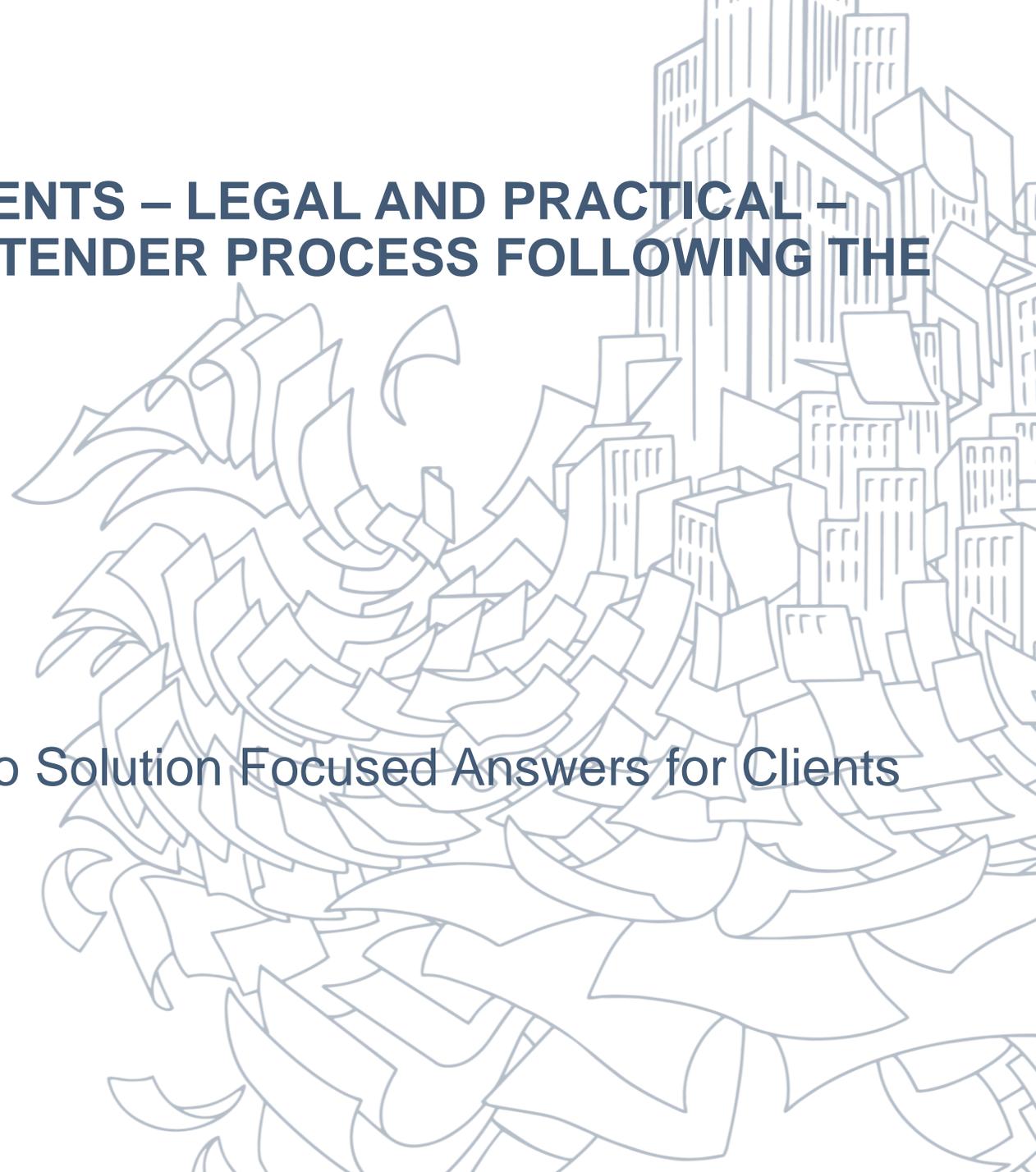
WHAT ARE THE UNRESOLVED ARGUMENTS – LEGAL AND PRACTICAL – OVER CONFLICT OF INTEREST IN THE TENDER PROCESS FOLLOWING THE SPATE OF RECENT CASES?

WHERE ARE CLIENTS AT RISK?

Jonathan Davey, Partner

Public Procurement: Shaping the Rules into Solution Focused Answers for Clients

Friday 15th November 2019



A REMINDER...

- PLA Working Group paper on Col: <https://www.procurementlawyers.org.uk/working-groups/completed-projects/> (4.6.19)
- Slides from previous White Paper talk (17.11.17) [[Conflict of Interest 17 Nov 2017](#)]
- High bar set by recitals to PSD:

“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. This could include procedures to identify, prevent and remedy conflicts of interests.”

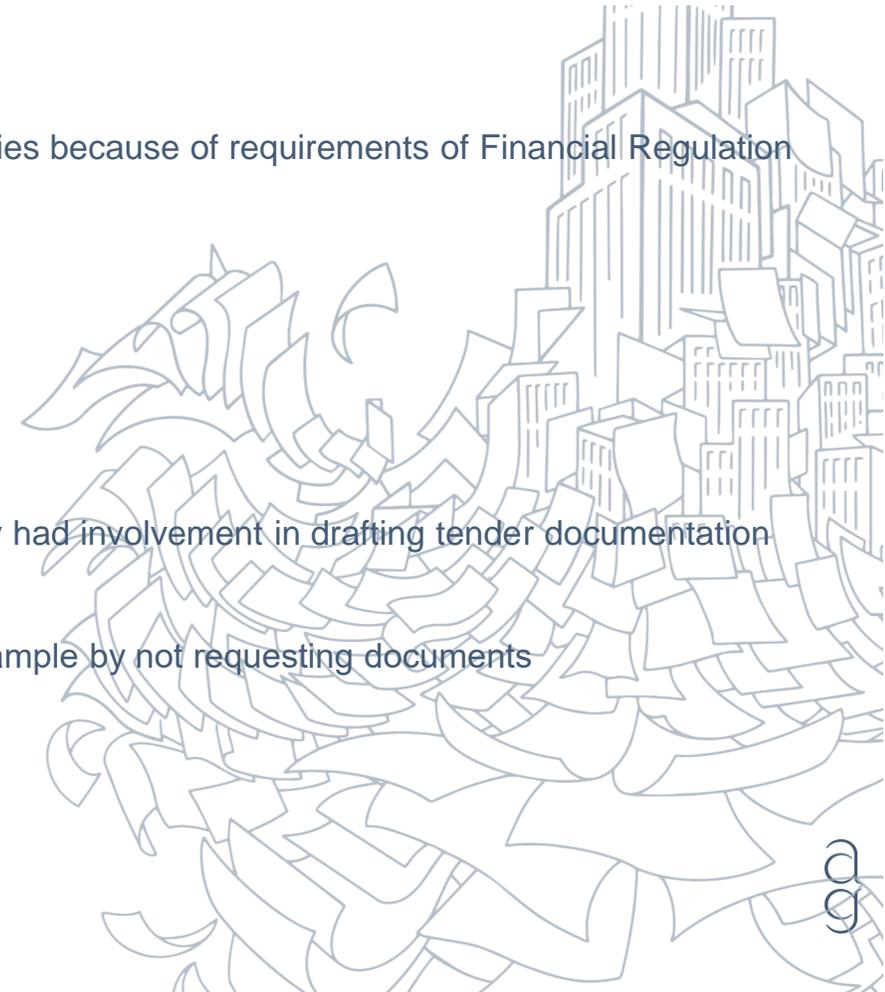
and the PCR:

“Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators”; and

“the concept of conflicts of interest shall at least cover 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 in the context of the procurement procedure.”

RECENT CASES (1)

- General Court decisions:
 - General comment: Financial Regulation vs PCR/UCR/CCR
 - Sopra Steria SA v European Parliament (9.4.19) **FR CASE**
 - various lots; Steria and Sopra entities bidding and the groups merged
 - despite an offer to withdraw from a conflicting lot, Parliament was right to exclude all entities because of requirements of Financial Regulation
 - temporal aspect didn't save the day: caution around mergers
 - Vakakis Kai Syner Gates v European Commission (28.2.18) **FR CASE**
 - complaint regarding contracts to set up Albanian food safety agency
 - EU Delegation had committed a breach of equal treatment obligation:
 - decision sets a high bar for contracting authorities: an employee of a bidder had allegedly had involvement in drafting tender documentation which may have conferred an advantage – did he have “*inside information*”?
 - failed “*to carefully and impartially examine all the elements precluding [a Col]*”, for example by not requesting documents
 - needed to investigate sufficiently to “*conclusively exclude existence of a Col*”
 - “*manifest and serious breach*”



RECENT CASES (2)

- Specializuotas Transportas UAB (17.5.18) - reference from Lithuanian SC:
 - complaint that two tenderers (including winner) were linked
 - were they obliged to reveal links? No, unless required by national legislation or tender conditions
 - lesson: impose an express obligation in ITT/ITN/ITCD
 - proactive duty on CA's confirmed (confirming eVigilo)
 - mere finding of control relationship insufficient grounds for exclusion

RECENT CASES (3)

- English courts: *Ocean Outdoor v Hammersmith & Fulham* (TCC) (28.9.18):
- Alternative claim based on Col
- W was H&F's service provider on the basis of a framework agreement
- C worked for W but had previously worked at OO, with whom he had a tetchy relationship (“*irreconcilable differences*”)
- OO informed H&F of the Col in vague terms
- HELD: commercial information held by C no longer pertinent; insufficient evidence before the Court that “*there was a real danger of bias*”; “*it would have been improper for the Council to act on unsubstantiated rumours*” (but was it not then put on notice to investigate?) (cp *Counted4 v Sunderland*). Late argument re actual bias also rejected.

SOME DUSTY CORNERS

- What is Reg 58(17) about? NB not in Reg 24, and refers to “conflicting interests” rather than Col
- CCR Reg 35 differs from PCR/UCR:
 - Covers fraud and corruption as well as Col
 - Reg 35(2): measures adopted as regards Col “*shall not go beyond what is strictly necessary*” to prevent or remedy Col
 - “*Staff members*” does not include PSP’s personnel – why not?
- Remember Reg 84 and the obligation to record “*conflicts of interests detected and subsequent measures taken*”
- PPN 01/19:
 - Requires in-scope organisations to take appropriate measures to avoid and remedy Col
 - Deals specifically with prior involvement of a bidder

SOME SCENARIOS TO CONSIDER: (1) HIRST CC

- A is the incumbent in an outsourcing agreement with Hirst CC
- Mr B has been the lead on operation of the contract for Hirst
- Mr B has had an antagonistic relationship with A and with its lead Mr P; on one occasion this led to A making a formal complaint to the Chief Executive of Hirst CC
- The outsourcing agreement is now being retendered
- Is there a Col if Mr B has a lead role (for example in evaluating bids)?
- If there is, what steps would you advise Hirst CC to take to deal with it, given that Mr B has irreplaceable knowledge and experience?

SOME SCENARIOS TO CONSIDER: (2) UTILICORP SURPLUS LAND REGENERATION

- Utilicorp owns valuable land which is now surplus to operational requirements and it has decided to seek a developer partner to effect a lucrative redevelopment
- You are Utilicorp's in-house lawyer and you decide to ask some very broad-ranging questions of those who will be involved just to try to ensure that there will be no Col
- Totis Builders, Ciara Builders and Coulson Builders are likely bidders
- You discover the following: which (if any) is potentially a Col?
 - Harriet will be a lead evaluator; she used to work for Coulson and still has a small number of shares in them through an employee share ownership trust (sub 1%); many of her close friends are senior people at Coulson
 - George's family are large local landowners; a family trust owns land adjacent to U's site and it could increase in value significantly if the development proceeds. He hasn't volunteered this, but one of George's rivals has mentioned it
 - Peter is married to the development director of Totis; she is likely to be the lead on their bid

SOME SCENARIOS TO CONSIDER: (3) BIDCO

- Bidco is part of a large conglomerate; its ultimate parent is Holdco
- Bidco has responded to an OJEU advert for a major services procurement being run for the Department for Administrative Affairs (DAA); Bidco is interested in one of the lots
- Bidco is informed by DAA that a JV in which Holdco owns 50% of the shares has also bid for the same lot; is your advice to Bidco:
 - That it can proceed?
 - That it can't proceed unless DAA gives its approval or the JV withdraws?

WHAT DO THESE SCENARIOS TELL US?

- Col is a very broad concept; how many ca's ask broad enough questions?
- Failing to “*effectively prevent, identify and remedy*” Col is a breach of PCR/ UCR /CCR, but:
 - High bar
 - spotting Col may not be easy
 - consequences of a Col becoming apparent (especially late on) may be catastrophic!
 - resource-constrained ca's may run out of bodies
- Powerful issue in the hands of a challenger:
 - fundamental issue
 - timing

CONFLICT OF INTEREST

WHAT ARE THE UNRESOLVED ARGUMENTS – LEGAL AND PRACTICAL – OVER CONFLICT OF INTEREST IN THE TENDER PROCESS FOLLOWING THE SPATE OF RECENT CASES?

WHERE ARE CLIENTS AT RISK?

Jonathan Davey, Partner

Public Procurement: Shaping the Rules into Solution Focused Answers for Clients

Friday 15th November 2019

