

# Early contractor involvement – problems and solutions

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**WHITE PAPER CONFERENCES**

June 2021

# Benefits of Pre-market testing and Involving Contractors in Specification Writing



- Generate interest in the procurement and market awareness
- Understand what the market is able to deliver
- Understand market's view on risk allocation eg willingness to commit to a fixed price
- Gather innovative ideas on a solution or feedback on deliverability of a proposed solution
- Help in scoping out and defining the requirement
- Encouraged by CCS eg July 2020 guidance on virtual market engagement



- Tenderer gets an informational advantage from 1 to 1 talks with authority
- Tenderer involved in specification or criteria could influence these in its favour
- Conflict of interest where tenderer involvement creates apparent bias
- Authority excludes tenderer who then challenges
- Challenge from unsuccessful tenderer if no action taken

# Regulatory Framework (1)

## Public Contracts Regulations 2015



40.—(1) Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

# Regulatory Framework (2)



41.—(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer—

(a) has advised the contracting authority, whether in the context of regulation 40 or not, 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.

...



41. (2) Such measures shall include—

(a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure; and

(b) the fixing of adequate time limits for the receipt of tenders.

(3) The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with regulation 18(1).

42. ... (10) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(11) ...the technical specifications shall be formulated in one of the following ways: ...

(b) by reference to technical specifications ....

but each reference shall be accompanied by the words 'or equivalent.'

# Regulatory Framework (4)



24.—(1) 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.

(2) For the purposes of paragraph (1), 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.

(3) ...“relevant staff members” means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure;

# Relevant caselaw (1)

## Involvement in preparatory work



*Fabricom SA v Etat Belge* C-21/03 and 34/03

“29 Indeed, a person who has participated in certain preparatory works may be at an advantage when formulating his tender on account of the information concerning the public contract in question which he has received when carrying out that work. ...

30. Furthermore, that person may be in a situation which may give rise to a conflict of interest in the sense that, ... he may, without even intending to do so, where he himself is a tenderer for the public contract in question, influence the conditions of the contract in a manner favourable to himself. Such a situation would be capable of distorting competition between tenderers.

... 33. In that regard, it must be held that a rule such as that at issue in the main proceedings does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case the problems referred to in paras [29] and [30] of the present judgment do not arise.”

# Relevant caselaw (2)

## Technical specifications



*Elekta v the Common Services Agency* [2011] CSOH 107

“[14] A number of points seem to me to emerge from that. The first is that the contracting authority must be entitled to decide what it wants, what is the subject matter of the procurement which it seeks to obtain ... Second, the fact that the criteria included in the tender notice can only be met by one tenderer, or a limited range of tenderers, does not of itself contravene the principle of equality. And third, that the inclusion of these criteria can only be considered discriminatory if they cannot be justified objectively having regard to the characteristics of the contract and the needs of the contracting authority.”

# Relevant caselaw (3)



## *Intrasoft v Commission* (T-403/12)

“76 The awarding authorities are under no absolute obligation to exclude systematically tenderers in a situation of a conflict of interests, such exclusion not being justified in cases in which it is possible to show that that situation had no impact on their conduct in the context of the tender procedure and that it entails no actual risk of practices liable to distort competition between tenderers. On the other hand, the exclusion of a tenderer where there is a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency ....”

# Relevant caselaw (4)



*eVigilo Ltd C-538/13* [2015] 3 WLUK 337 (Court of Justice 12/3/2015)

“44. Thus, if the unsuccessful tenderer presents objective evidence calling into question the impartiality of one of the contracting authority’s experts, it is for that contracting authority to examine all the relevant circumstances having led to the adoption of the decision relating to the award of the contract in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.

46... Thus, it is for national law to determine whether, and if so to what extent, the competent administrative and judicial authorities must take into account the fact that possible bias on the part of the experts had no effect on the decision to award the contract.”

## Relevant caselaw (5)



*European Dynamics v EUIPO* T-556/11 (General Court 27 April 2016)  
Alleged that successful tender had a conflict as its consortium included company which drafted the tender spec. In fact, PWC Spain was part of the consortium whereas PWC UK and Belgium drafted tender spec. EUIPO investigated (wrote to PWC) - satisfied that no risk of distorting competition through leakage of confidential information (PWC Spain involved only 6 days pre tender). Not plausible to suggest that spec. could have been drafted with a view to benefiting PWC Spain.

“44....EUIPO checked and demonstrated to the requisite legal standard that such a conflict of interest could not affect the conduct of the tendering procedure and its outcome.”

See Arrowsmith at 14-79 and 17-05, Vol 2:

“Where a conflict is discovered before a decision is made, a duty will thus arise to deal with conflicts in accordance with the principle of proportionality, which will generally involve removing the decision-maker in preference to excluding the economic operator.”

But if not discovered until after decision taken may need to retake decision.

“... the principle of proportionality will require that measures do not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified, one aspect of which is a rule that economic operators cannot be excluded where the conflict can be remedied by less intrusive means than exclusion.”

See also *Bechtel Ltd v HS2 Ltd* [2021] EWHC 458 (TCC) at [312]

# How to Control and Overcome Issues (1)

## Market testing



- Script and minute market engagement meetings
  - Audit trail of communications
- Advertise the opportunity for 1 to 1 meetings
  - Specify the type of suppliers you want to engage with
  - Can produce a draft requirement/contract
  - Can create an account on [GOV.UK Notify](#).
- If considering use of a solution proposed by a potential tenderer
  - Approach with scepticism and get a 2<sup>nd</sup> opinion
- Fully document all decisions taken based on market testing and reasons

# How to Control and Overcome Issues (2)

## Specification writing



- Where possible, do not engage a potential tenderer to draw up your spec. and award criteria
  - Or do so on the basis that they agree not to participate
  - Consider engaging experts/consultants instead
- Team-working with independent experts
- Confidentiality agreements
- Chinese walls within tenderer
- Ensure information shared is available to all tenderers
- Adequate time given to other tenders to submit bids
- Any spec. which could favour a tenderer must be objectively justified – all the more if they drew it up!

# How to Control and Overcome Issues (3)

## Managing conflicts



- Identify and manage internal conflicts of interest
- Documented process in place with accountabilities and full record keeping
  - Wide definition of COIs based on Reg 24
  - Direct or indirect personal, financial or other interests which might be perceived to compromise impartiality
- Require COI declarations from all employees, consultants and contractors involved in procurement
  - Investigate any potential actual or perceived conflicts
  - Consider removal of conflicted persons from tender process, limit their involvement or checks and safeguards

# How to Control and Overcome Issues (4)

## Managing conflicts



- Don't rely on the tenderers to identify COIs
  - But do define COIs and require a declaration
- Don't have a blanket tenderer exclusion rule
  - Investigate, assess and manage where possible
- Do act in a proportionate manner
  - Relevant to consider whether there is any potential effect on the procurement outcome
- Do document everything
  - Essential to show transparency and due process - required by Regs 41 and 84

- Tenderer engagement and particularly to draft the spec. can be beneficial but fraught with difficulties
- Robust processes need to be in place to identify and manage conflicts and these must be followed
- Assess potential for distortion of competition
- Easier to deal with issues up front rather than after contract award
- Margin of discretion, but act in proportionate manner and document everything
- Often litigated ...