PLA WORKING GROUP ON CONFLICTS OF INTEREST

FOREWORD

Like other active sectors, government contracting is a tight market where there are plentiful opportunities for conflicts of interest (**"CoI"**).

"Revolving door" scenarios create actual or potential conflicts. Private sector lawyers, financial or technical personnel make career changes or are seconded to the public sector, and find themselves advising on procurement issues that their previous employers would be keen to bid for. The same applies to public sector procurement professionals who move into the private sector and work on bid teams competing for a contract to be let by their previous employer.

Equally, highly integrated corporate structures can cause competition law alarm bells where associated organisations decide to bid for the same contract. In those cases both the procuring authority and private sector will want to demonstrate that the bids are autonomous, with no conflict in terms of either being aware of the contents of the other's bid.

This topic has been the subject of intense media and public scrutiny in the recent past; for example, the alleged CoI relating to bidders for HS2 contracts, and in particular the scrutiny attracted by the fact that in many cases bidder personnel responsible for tenders had recently worked at or been seconded to the awarding authority.

Time limits mean that the conflict argument may be attractive to a complainant as Authority Conflicts will often only become apparent at the end of the process; this is likely to make CoI a regular battleground between disgruntled bidders and contracting authorities. A complaint or claim based on CoI is likely to go to the heart of the process; unlike (say) a scoring error. If it is made out it has the potential to call the whole process into question, leading to the possibility that the court has no real alternative but to order a re-run of (at least) the relevant evaluation stage.

We have therefore structured this paper to look at four conflict scenarios:

Authority Conflict

A CoI arising from the circumstances of the awarding authority or its personnel (or advisers save in the context of Concession contracts); for example, because of personal relationships or financial interest.

Bidder Conflict

A situation in which a bidder is in a position of advantage when compared to other bidders by reason of prior involvement or a privileged position as regards information. This might encompass, for example, incumbent contractors or bidders who have provided preliminary consultancy support to the awarding authority

Organisational Conflict

A situation in which, as regards the award process concerned, multiple bidders/ involved parties are part of the same corporate group raising the risk of collusion and sharing of information.

Strategic Conflict

A situation in which past performance indicates that there may be concerns about a bidder's technical and professional ability to perform a contract.

This paper explains the statutory background to CoI in the field of regulated procurement. It also seeks to provide practical guidance to all those involved in Government and utilities contracting (both from the public sector and the private sector), and an opportunity to revisit practices which aid proper mitigation of CoI risk within your organisation.

A brief paper cannot hope to offer an exhaustive treatment of the subject; rather the authors' aim is to provide a practical overview of the issues involved, a summary of the key issues from case law, and guidance both by way of some worked examples, and some guidance distilled from the available materials and the collective views of the authors of this paper.

The PLA organised a seminar on this topic on 15 November 2018.

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A. INTRODUCTION TO CONFLICTS OF INTEREST

1. INTRODUCTION

1.1 The EU Treaty principle of equal treatment requires that all tenderers in a similar position be treated in the same way and subject to the same conditions unless there is objective justification for doing otherwise. Contracting authorities must therefore ensure that no actual, potential or apparent CoI affects the procurement of public contracts. Any risk of favouritism or arbitrariness on the part of the contracting authority must be precluded.

1.2 CoI were directly addressed for the first time in the 2014 EU procurement directives.

1.3 The 2014 EU procurement directives were implemented into UK law by the following sector rules:

(a) the Public Contracts Regulations 2015 (**"PCR'15"**);

(b) The Utilities Contracts Regulations 2016 (**"UCR'16"**);

(c) The Concessions Contracts Regulations 2016 (**"CCR'16"**),

together with equivalent (almost identical) legislation in Scotland.

1.4 Provisions from PCR'15, UCR'16 and CCR'16 which relate to Col scenarios are set out in schedule 1 to this paper as are recitals from the 2014 Directives which provide useful explanatory background to Col.

1.5 Obligations specific to CoI in the defence sector are not codified in the Defence and Security Public Contracts Regulations 2011 (DSCR'11). In this paper we have taken the view that contracting authorities should follow guidance set out in case law as a result of the broad principles of procurement to which they are subject at regulation 5(2) of DSCR'11:

"*A contracting authority shall—*

(a) treat economic operators equally and in a non-discriminatory way; and

(b) act in a transparent way."

1.6 We have followed the same approach in relation to Utilities, on the basis of our appraisal of the legislation set out at paragraph 2.2 of schedule 1. Any reference to contracting authorities in this paper therefore includes utilities.

1.7 Obligations specific to preliminary market engagement and bidder conflict are not codified in CCR'16. In this paper we have taken the view that contracting authorities and utilities involved in the procurement of a concession should follow guidance set out in case law, as a result of the broad principles of procurement set out at regulations 8(1) and 8(3) of CCR'16:

"(1*) Contracting authorities and utilities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*

(3) During the concession contract award procedure, contracting authorities and utilities shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others. "

B. THE FOUR CONFLICT SCENARIOS

Introduction

This section analyses in more detail the four identified conflict scenarios:

- Authority Conflict
- Bidder Conflict
- Organisational Conflict
- Strategic Conflict

1. AUTHORITY CONFLICT

1.1 This scenario covers CoI that arise during the conduct of a procurement procedure and which derive from the authority team, including external procurement advisors to the authority.

1.2 Each of the sector rules place a positive obligation on an awarding authority to take appropriate and effective measures to **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 the equal treatment of all economic operators.

1.3 There is no case law interpreting the words "prevent, identify and remedy" in a procurement law context. In this paper we interpret:

(a) "identify" as meaning to take proactive steps to unearth potential Authority Conflicts which might occur during the procurement process

(b) "prevent" and "remedy" as meaning to decide what action (if any) is required to manage the effects of the identified conflict of interest in such a way that it is either:

(i) eliminated (prevented) in its entirety or

(ii) managed (remedied) to an extent which enables continued participation of affected parties in the procurement procedure.

1.4 **How to "identify" a conflict?**

(a) Across all the sector rules, a CoI includes, but is not limited to, any situation where staff members of the contracting authority (in UCR'16 & PCR'15 this also includes procurement service providers 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 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.*" We would comment as follows:

(i) This is a non-exhaustive definition; CoI cannot be exhaustively defined. They will depend on the facts of a scenario, and whether those facts create a danger of personnel favouring or disfavouring a bidder taking part in the procurement process.

(ii) It has been held by the European Courts that the concept of CoI is objective in nature and, in order to establish it, it is appropriate to disregard the intentions of those concerned, in particular whether or not they acted in good faith.[1]

(iii) The definition focusses on personnel who are involved in the conduct of the procurement procedure or who may influence the outcome. This would include conflicting interests held by eg.:

(A) those who are directly involved in selection and evaluation and who are involved in making key decisions (including board or project board members). It may also include other personnel who are involved in managing the procurement process (even if they have no influence on the outcome) although in such a case it may be arguable that any perceived compromise of their impartiality could not affect the fairness of the competition. The obligation will not affect personnel who are not involved in the procedure at all.

(B) personnel who contribute to the drafting of the procurement documents; and

(C) lawyers, financial and technical advisors involved in structuring the procurement and drafting the procurement documents (save, arguably, in procurements regulated by CCR'16 or the Defence and Security Contracts Regulations 2011);

(iv) Particularly after the *Counted4* High Court decision on what might constitute a "personal interest", the scope of this provision is potentially very broad – an interest may be:

(A) direct (e.g. where a relevant individual has an interest in a tendering company) or indirect (e.g. where a friend of family member of the relevant individual has an interest in a tendering company). Analysing indirect interests is a question of degree; the nature of the position which a family member or friend holds in eg a bidder company - senior executive or junior staff member; the closeness of the relationship, and the extent to which the decision to award a contract could directly or significantly affect the related person;

(B) positive towards a candidate/tenderer (e.g. where the relevant individual favours the tendering company) or negative (e.g. where the relevant individual does not favour the tendering company or favours a competitor).

(b) A perception of a CoI is sufficient for these rules to be triggered – sometimes this is referred to as ‘apparent' bias or conflict. In any case to trigger the obligation to

[1] See *Intrasoft,* Nexans *France* v *Entreprise commune Fusion for Energy* and *P Ismeri Europa v Court of Auditors.*

prevent, identify and remedy CoI there does not have to be an actual CoI, merely the perception of one).[2]

(c) In case *C-74/09 Batiments et Pont Construction SA* an evaluation committee included representatives of local construction employers and unions. The Advocate General's opinion was that, even if the committee members had the best of intentions, there was an appearance of partiality which could deter participation, and therefore distort competition.

(d) We have set out examples of financial, economic and personal conflict scenarios in the table below:

Conflict scenario
holding another public office;
being an employee, advisor, director, or partner of another business or organisation;
pursuing a business opportunity;
being a member of a club, society, or association;
having a professional or legal obligation to someone else (such as being a trustee);
owning a beneficial interest in a trust;
having received a gift, hospitality, or other benefit from someone;
owing a debt to someone;
holding or expressing strong political or personal views that may indicate prejudice or predetermination for or against a person or issue;
owning or occupying a piece of land;
owning shares or some other investment or asset;
being a relative or close friend of someone who has one of the interests set out in this table above (or who could otherwise be personally affected by a decision of the public entity).
friends work in tendering company;

[2] It is of note that the OECD Guidelines for Managing Conflicts of Interest in the Public Service (the 'OECD Guidelines') provide the following definition of "conflict of interest": (i) An *actual* conflict of interest exists when there is a conflict between a public official's public duty and his/her private interests, such as where the public official has private interests which could improperly influence the performance of their official duties and responsibilities. (ii) An *apparent* conflict of interest can be said to exist where, despite the fact that there is no *actual* conflict of interest, an impression exists that a public official's private interests could improperly influence the performance of his/her duties. (iii) A *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant official responsibilities in the future.

Conflict scenario
relevant individual lives near site of contract performance;
previous experience of working with tendering company;
evaluation team member also employed by subsidiary of a member of a bidding consortium (*Afcon)*);
specialists to be used by the successful tenderer were colleagues of experts who had assisted in preparation of the tender documents (*eVigilo*);
exchange of e-mails between a shortlisted tenderer and a technical advisor who had "observer" status on the evaluation team, and provided input to technical evaluations, but not related scoring of bids (*European Ombudsman case 642/2008);*
bias to protect professional reputation (*Counted4*);[3]

(e) Once a contracting authority has a good idea of what a CoI might look like, the issue is whether one arises. The authority should take appropriate and effective steps to identify (i) who is involved in the procurement procedure and (ii) whether they have an actual or a perceived CoI. CoI examples should be explained to relevant individuals and they should be asked to make formal declarations that no CoI exists and that they are not aware of any reason why one could be perceived to exist.

(f) Following *Counted4*, it is important to understand the concept of bias. It is possible in principle for a contracting authority to be unconsciously biased/influenced by irrelevant considerations when evaluating tenders. However, the courts have stated that any such suggestion must be expressly pleaded, and that they will be very slow (per Pill LJ) or unwilling in principle (per Jackson LJ) to find it in relation to an honest witness in the context of a careful assessment procedure (as opposed to a mere "hunch") (*Lancashire CC v Environmental Waste Controls Ltd [2011] LGR 350* and *Ocean Outdoor v. London Borough of Hammersmith and Fulham [2018] EWHC 2507*).

(g) It is appropriate to periodically review the CoI position as the procurement process evolves or as changes occur. For example, as the identity of candidates or tenderers becomes clearer, it would be appropriate to reconsider matters and renew declarations. Also as new people become involved on the authority side, as bidder consortia change or as the personal circumstances of relevant individuals evolve, the position should be reconsidered.

(h) There should be a positive obligation placed on relevant individuals to promptly flag to the authority if they consider that a new CoI arises or a new CoI could be perceived to arise. The standard selection questionnaire issued by Cabinet Office and the

[3] In the first case to consider Regulation 24 (PCR) in the UK (*Counted 4 CLG v Sunderland City Council*) the Court held (in the context of an application to lift an automatic suspension) that the phrase 'personal interest' is very broad on its face and is clearly intended to add to the other conflicts identified, namely financial and economic.

Crown Commercial Service[4] will assist contracting authorities in identifying CoI, by requiring bidders to confirm whether or not they are aware of a CoI, at the selection stage of the procurement.

(i) Please see section D for suggested best practice in identifying conflicts of interest.

1.5 **How to "prevent" a conflict?**

(a) To prevent a CoI is to ensure that having identified a potential CoI, steps are taken to ensure that the risks inherent in it do not impact the procurement. This may be achieved by removing from the process any individual who will or may in the future become conflicted or be perceived to be conflicted. Sometimes such individuals can be identified before the conflict arises – e.g. where it is known that an individual has close personal or financial connections with an entity which has made known its intention to participate in a competition.

(b) In relation to affected personnel, "appropriate action" might include:

(i) withdrawing from discussing or voting on a particular item of business at a meeting;

(ii) exclusion from a committee or working group dealing with the procurement;

(iii) re-assigning certain tasks or duties to another person;

(iv) agreement or direction not to do something;

(v) withholding certain confidential information, or placing restrictions on access to information;

(vi) transferring the official (temporarily or permanently) to another position or project;

(vii) relinquishing the private interest;

(viii) resignation or dismissal from one or other position or entity

Or, where the conflict is not significant:

(ix) taking no action;

(x) enquiring as to whether all bidders will consent to the member's or official's involvement;

(xi) imposing additional oversight or review over the official.

(c) The authority should take appropriate and effective steps to identify and circulate a list of all those who are involved in the procurement procedure, both from within its own personnel, and from private sector bidders.

[4] https://www.gov.uk/government/publications/procurement-policy-note-816-standard-selection-questionnaire-sq-template

(d) These individuals will change at different stages of the procurement. The list should therefore be reviewed and updated after the following stages:

(i) pre-procurement engagement;

(ii) bidder response to PIN;

(iii) selection of bidders who respond to Contract Notice;

(iv) bid evaluation and down selection of bidders;

(v) key governance milestones involving project board members; and

(vi) any change of professional advisors (depending on the manner in which they are instructed).

1.6 **How to "remedy" a conflict of interest?**

(a) To remedy a CoI is to relieve its effects, so that the contracting authority's capacity to make decisions, be transparent and treat all tenderers equally is not impaired. It is a reaction to a situation that has occurred. Any remedy must be effective and appropriate.

(b) There are a number of ways in which a CoI (or perceived CoI) might be effectively remedied. The extent to which relevant individuals who become conflicted during a procurement procedure should be restricted from influencing the process further will depend on the significance of the conflict. What is appropriate will depend on the circumstances of the particular procurement. It may be that the relevant individual should play no further part in the procurement procedure at all; it may be that they should simply not be involved in making decisions pertaining to the candidate/tenderer with which that individual has an interest and that adequate 'ethical walls' can be erected to deal with the situation.

(c) Consideration may also have to be given to ensuring that earlier aspects of the procurement procedure have not been tainted by the CoI. Steps may have to be taken to review what precise role the individual played, whether his or her impartiality or independence has been or could be perceived to have been compromised as a result of the conflict (or perceived conflict) and whether this had any impact on the fairness of the procedure.

(d) **Remedying conflicts - key lessons from case-law:**

(i) *T-345/03 Evropaiki Dynamiki v Commission*: when determining whether a CoI can be remedied, rather than excluding a bidder, the requirement is to actively do all that is reasonable and appropriate to find another way before coming to a final decision one way or another about bidder exclusion.

(ii) *Fairclough Building Limited v Borough Council of Port Talbot 1994 WL 1062899*: the chief architect of the Council was married to a director of a bidder for a construction project. The Council initially removed the architect from the evaluation team, but then subsequently decided to exclude the bidder because simply removing her from the team was not considered a

sufficiently effective measure in the circumstances. The court held that the decision was reasonable.

(iii) *Case T-292/15 Vakakis v Commission*: contracting authorities must be proactive in investigating CoI which become apparent during the procurement process, and must create a paper trail, with clear probative value, of the circumstances of the CoI and how it was investigated and remedied.

(iv) *AFCon Management Consultants*: When a CoI is alleged to have arisen, an authority has some discretion when determining the measures which must be taken during subsequent stages of the procedure for the award of the tender but must nevertheless act with due diligence and on the basis of all the relevant information.

Where there are reasonable grounds for suspecting collusion or conflict between an evaluation panel member and a tenderer, there may be an obligation to conduct a full investigation to see if the tenderer sought to influence the evaluation process or there was collaboration and it may not be sufficient to merely dismiss the panel member in question and conduct a fresh evaluation process. In this case, heard pursuant to the Financial Regulations,[1] the European Commission's failure to investigate was considered to be a manifest error of assessment and a breach of the principles of sound administration and equal treatment.

(v) *eVigilo*: If an 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 that 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. The onus cannot be on the unsuccessful tenderer to prove that the panel member was biased.

(vi) *Case 642/2008/TS European Ombudsman case*: (determined in relation to the Financial Regulation)[2] an observer on an evaluation panel (who had an influence on the outcome of the evaluation exercise) had previously worked for all of the shortlisted tenderers. The Ombudsman did not share the view that no CoI could exist simply because a person worked for all of the shortlisted tenderers. If an allegation of CoI arises, institutions are obliged to carry out an investigation and decide on possible action to take. In particular, if there is a conflict of interest between a member of an evaluation committee and a tenderer, the institution is obliged to act with due diligence. It has to take into account all the relevant information when it formulates and adopts its award decision. This obligation derives from the principles of sound administration and equal treatment. Failure to carry out an appropriate investigation can result in maladministration.

More detailed case law reviews are set out at schedule 2 to this paper.

1.7 **Exclusion**

(a) PCR'15. UCR'16 and CCR'16 only allow exclusion of a bidder to prevent a CoI if it cannot be effectively remedied by other, less intrusive, measures.

(b) In case *T-195/05 Deloitte Business Advisory NV v Commission* the court held that a contracting authority can exclude on the basis of a risk which has not yet materialised, but it must be a real, not merely hypothetical, risk which is found to exist following proper assessment of the facts.

(c) The "*self-cleaning*" provisions in each piece of implementing legislation relate to exclusion for the purposes of remedying a CoI. However they are drafted in the context of a "criminal offence or misconduct". A CoI is neither a criminal offence nor misconduct. Regulation 57(13) of PCR'15 (and equivalent wording in UCR'16 and CCR'16) states:

"Any economic operator that is in one of the situations referred to in paragraph (1) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion."

(d) The view of the PLA Working Group is that it is implicit in the duty to "prevent, identify and remedy" CoI (and in the broad Treaty principle of proportionality) that a bidder in relation to whom a CoI exists will work with a contracting authority to prevent, identify and remedy the CoI, and as such will have the opportunity to "self-clean" during that time. The self-cleaning provisions do not therefore apply to exclusion relating to a CoI scenario.

(e) It is also the view of the PLA Working Group that exclusion to remedy a CoI is a one-off event, and that the three year exclusion period prescribed for a discretionary exclusion scenario should not apply.

2. BIDDER CONFLICT

2.1 PCR'15 and UCR'16 (but not CCR'16) deal with a situation where a contractor (or contractor personnel) has better insight into the requirements of a procurement exercise because of a prior involvement with the awarding authority which involved that contractor in the preparation of the procurement procedure.

2.2 This may have arisen, for example, as a result of participation in a preliminary market consultation exercise or as a result of the contractor having a prior relationship with the authority (contractual or otherwise).

2.3 The onus is on the contracting authority "*to take appropriate measures to ensure that competition is not distorted*" by a contractor's prior involvement.

(a) The standard selection questionnaire issued by Cabinet Office and the Crown Commercial Service[5] will assist contracting authorities in identifying prior involvement, by requiring bidders (at the selection stage of the procurement) to confirm whether they have been involved in preparation of the tender.

(b) In case C-21/03 *Fabricom SA* [2005] ECR I-1559 a blanket rule excluding all those involved in development of the contract was held not to be proportionate. Anyone involved in pre-procurement engagement must be given the opportunity to

[5] https://www.gov.uk/government/publications/procurement-policy-note-816-standard-selection-questionnaire-sq-template

demonstrate that (a) he/she was not at an advantage, and (b) he/she had not had any opportunity to influence conditions of contract in a way favourable to him/herself.

(c) PCR'15 and UCR'16 directly address the scenario in which a candidate or tenderer (or a related undertaking) has advised the authority or been involved in the preparation of the procurement procedure that it subsequently seeks to participate in; they do not directly address other situations where more general knowledge of an authority or involvement in related authority activities[6] or other authority tenders[7] may have been gained as a result of a prior relationship.

(d) The mere finding that a tenderer is related to another group company which was involved in the preparation of a tender is not sufficient for the contracting authority to automatically exclude the tenderer from the procedure, without checking whether that relationship actually impacted on its conduct. The tenderer must be allowed to demonstrate that that situation involves no risk whatsoever for competition between tenderers.[8]

(e) Where a candidate/tenderer (or related undertaking) has prior involvement in the procurement procedure, the authority has some discretion in deciding what measures is should take to ensure that competition is not distorted by its participation[9], and these should be 'appropriate' in all cases. What is sufficient will depend on the circumstances of each case .The example given in the legislation is that there could be communication to the other candidates/tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate/tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders.

(f) Awarding authorities are under no duty to exclude where it is possible to show that the situation had no impact on their conduct in the context of the tender procedure (*Nexans France v Entreprise commune Fusion for Energy, EU:T:2013:141*).

(g) preparatory work only creates a real risk of a conflict of interest where it relates to the same contract, for which the person responsible for producing it then bids (*Fabricom*).

(h) Where documents are prepared in the course of another tendering procedure, and chosen subsequently by the contracting authority as a reference for part of the activities in a different tendering procedure, these will only be considered to be preparatory works if it can be shown objectively and specifically, first, that those documents had been prepared in the light of the tendering procedure at issue and, secondly, that they had given the applicant a real advantage. (*Intrasoft International SA v Commission. Case T-403/12)*

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6 For example, see circumstances in *Deloitte Business Advisory* v *Commission.*

7 See *Intrasoft*, which indicates there may be less of a concern if the prior involvement was not with the procurement the economic operator seeks to participate in, but with some unrelated procurement process of the authority which has not given the operator a real advantage.

8 See *European Dynamics Luxembourg SA and Others v European Union Intellectual Property Office*

9 See *Nexans France v Entreprise – an example of a case where the Court found that prior involvement had yielded no advantage.*

More detailed case law reviews relating to bidder conflict are set out in schedule 2 to this paper.

2.4 **Exclusion**

(a) PCR'15 and UCR'16 allows exclusion of bidders as a last resort if prior involvement of a bidder distorts competition and cannot be remedied by other less intrusive measures.

(b) On the one hand, an authority may find itself challenged by a candidate/tenderer where an attempt is made to exclude that operator from the procedure (on the basis that the authority has not done enough to keep it in the process and ensure equal treatment); alternatively, other participants in the procedure might challenge any on going participation of that candidate/tenderer on the basis that there is a breach of the principle of equal treatment.

(c) Awarding authorities who engage with market participants in advance of a procurement procedure must be mindful of these issues; this may influence what information they disclose to or seek from such operators.

(d) Any entity considering early engagement with an authority should also be wary of the information that they seek as part of that exercise and consider what bearing this might have on the position of the authority in any future procurement procedure. Such an entity may wish to obtain some clarification as to how the authority might manage any potential conflict issue before the engagement commences.

(e) Exclusion is only justified where conflict of interest has been established after examination of a tenderer on a case by case basis. An automatic exclusion would deprive the candidate/tenderer/applicant of the right to present supporting evidence which might remove all suspicion of a conflict of interest. (paragraph 2.3.6 of the Practical Guide on the Financial Regulation as recited in *Intrasoft*)]

(f) The drafting of the "self-cleaning" provisions at PCR'15 regulations 57(13)-(17) could be construed as applying after a contracting authority has taken the decision to exclude as a result of a CoI scenario arising from prior involvement. Regulation 57(13) states:

"*Any economic operator that is in one of the situations referred to in paragraph (1) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.*"

(g) The view of the PLA Working Group is that it is implicit in the duty "to take appropriate measures to ensure that competition is not distorted" (and in the broad Treaty principle of proportionality) that a bidder which has been involved in the preparation of a procurement will work with a contracting authority to take appropriate measures, and as such will have the opportunity to "self-clean" during that time. The self-cleaning provisions do not therefore apply to exclusion for bidder conflict.

(h) It is also the view of the Working Group that exclusion to remedy distortions of competition as a result of prior involvement is a one-off event, and that the three year exclusion period prescribed for discretionary exclusion would not apply.

3. ORGANISATIONAL CONFLICT/COLLUSION

3.1 Where two or more organisations are part of the same group of companies, or are subject to the same managerial control, there is a risk that they understand the content of the other bid or bids, or that they have colluded in deciding how to scope their bids, and that consequently their behaviours in connection with the bid process have the effect of distorting competition:

3.2 PCR'15, UCR'16 and CCR'16 (and see part III C Annex 2 of ESPD Implementing Regulation) provides that a contracting authority may exclude where it "*has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition*"

3.3 In case *C-531/16 Specializuotas Transportas* A and B submitted tenders for a municipal waste disposal contract. B won. Both A and B are subsidiaries of C. B declared its participation to be autonomous of any connected persons. A disappointed tenderer challenged on the basis that there was potential intra-group collusion for award of a public contract, which the contracting authority had not properly evaluated. The case raised the following issues:

(a) Are connected tenders under a duty to disclose the relationship between them? - No, pursuant to the procurement directives, but they will be asked whether they have "entered into agreements with other economic operators aimed at distorting competition" in the ESPD.

(b) How must a contracting authority proceed when it suspects related tenderers? - an active role is expected of a contracting authority in determining whether bids are separate, although it does not necessarily need to contact relevant tenders – "The decisive factor is, rather, that the contracting authority is in a position to conclude that the simultaneous participation of those related operators does not jeopardise competition. "

(c) Does inactivity by a contracting authority provide grounds for challenge? - a decision to allow related tenderers to participate in a procurement must be based on "objective soundness" – underpinned by sufficient evidence. Where a contracting authority is aware of the existence of links between tenderers a high level of diligence is required – "the active role expected of it, as a guarantor of effective competition between tenderers, should normally lead it to make certain that the tenders submitted by those tenderers are separate."

3.4 Proportionality decrees that those identified as involved in potential collusion must be given the opportunity to show that their tenders were drawn up independently, and that there was therefore no risk of influencing competition between bidders (*Serrantoni v Commune di Milano case C-376/08)*

More detailed case law reviews relating to organisational conflict are set out in schedule 2 to this paper.

4. STRATEGIC CONFLICT

4.1 PCR'15 regulation 58(17) refers to "*conflicting interests*" of bidders "*which may negatively affect the performance of the contract*" and, where this is the case, allows a contracting authority to "*assume*" that a bidder does not possess the required "*professional abilities*". It is debatable whether this amounts to a CoI in the sense considered in this paper, but some comment is set out below.

4.2 We have found limited comment on regulation 58(17). Early commentary on the 2014 Directives by Albert Sanchez Graells stated:

"*Interestingly enough, Article 58(4) includes a rule against conflicts of interest disguised as a requirement of professional ability (which seems to stretch the concept, at least if taken on its ordinary meaning). Indeed, it establishes that 'A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract' (emphasis added). The same is established in Regulation 58(17) PCR2015. ….However, more clarification should have been provided as to the type of conflicts of interest that justify the exclusion of the economic operator on the basis of its lack of professional ability.*"

4.3 The PLA Working Group would like to offer for discussion the following scenarios:

(a) Material litigation in which the bidder is involved;

(b) Significant contracting with the contracting authority and/or other arms of Government authority and/or other arms of Government, which, might indicate that the bidder is "overstretched";

(c) Queries coming to light in connection with a bidder's past performance on previously procured government contracts;

(d) Investigation into the government's handling of the collapse of Carillion: at the point of liquidation, Carillion had around 420 contracts with the UK public sector including direct contracts, sub-contracts and special purpose vehicles to deliver private finance schemes. This appears to be a past performance issue, and something which would interface with the Government's Strategic Supplier Risk Management Policy.[10]

[10] See https://www.gov.uk/government/publications/strategic-suppliers

C. TWO CASE STUDIES

1. BIDDER CONFLICT

1.1 Outstanding County Council (OCC) embarked on a five to 10 year regeneration programme of several local communities within its area in 2016, including the design and construction of schools, town centre developments, roads and other infrastructure. To accomplish this complex objective, OCC entered into a number of strategic contracts and framework arrangements in early 2016, which include:

(a) a strategic support partnership with HFP Limited (HFP) a multinational, multidisciplinary construction design consultancy;

(b) two design and construct delivery partnerships (DPs) with:

(i) an unincorporated joint venture made up of HFP and Compact Limited (a national building contractor) (HCJV), and

(ii) Meteor Construction Ltd (Meteor), a national engineering and construction contractor.

(c) a strategic building maintenance contract with CleanUp Ltd. (CleanUp) for non-capital works and ongoing maintenance of built infrastructure (old and new).

1.2 In November 2016, OCC received a special EU matched-funding grant for the construction of a new eco-village with schools, roads, and all other necessary infrastructure required (the Eco Village Project). The rules of the grant did not permit OCC to simply package the deal to its existing contracted partners, but required OCC to undertake an open, competitive procurement to select a contractor or contractors for the design, construction, and ongoing maintenance of the project. To enable OCC to publish a good and robust technical and commercial specification, OCC engaged HFP, its existing strategic support partner, who have worked extensively on the project to create preliminary designs (now concluded), outline specifications (completed), and inputted into a commercial model for the proposed tender exercise. In undertaking this work, HFP has had to engage a small number of specialist firms to feed into the design and models, including CleanUp and HFP Pixels Ltd, a sister company of HFP. HFP is to be retained as an ongoing adviser to OCC through the tender process to award.

1.3 OCC's Commercial Director, Charlene Fox, who worked on putting all of the strategic contracts in place and on contract lifecycle transactions through mobilisation and project commencement of those contracts, and was involved heavily with the Eco Village Project, has recently resigned. She has made it known that she is off to work in the interim market as a consultant and that her first engagement is as an Interim Bid Director at Bob Builders Ltd, a national engineering and construction contractor.

1.4 Following publication of the relevant Contract Notice in December 2017 and during the SQ period, the following facts came to the attention of the procurement lead:

(a) HFP has linked up with Meteor to tender for the project, with Meteor as main contractor, but HFP as a declared design consultant/subcontractor. A Director of HFP has indicated that he had previously been in discussions with another director (yet unnamed) of OCC about the fact that HFP will be involved in some capacity with

Meteor on a tender for this project. It has not been possible yet to ascertain who the OCC director is;

Can Meteor as an incumbent long term design and build contractor of OCC be permitted within the rules to participate in the Eco Village Project tender, with or without HFP which is not only another incumbent strategic partner of OCC, but also had prior direct involvement in various aspects of the Project, and is to continue working as an adviser to OCC through the tender process?

(b) HCJV, the existing HFP and Compact joint venture; has expressed an interest in tendering for the project;

Can the HCJV as an incumbent long term design and build contractor of OCC be permitted within the rules to participate in the Eco Village Project tender, especially with one of the JV partners (HFP) in its separate capacity as incumbent strategic partner of OCC, having had prior direct involvement in various aspects of the Project, and continuing to work as an adviser to OCC through the tender process?

Does HFP's participation as subcontractor to Meteor in one potential bid preclude HFP's participation in a separate bid as a JV partner in HCJV?

(c) Two of the individual specialist consultants from HFP Pixels engaged by HFP in the early stage work on the project, have recently left HFP Pixels to work for a rival outfit, Champion Designs (Champion). Champion is bidding for the project as part of a consortium that includes competitors of both HFP and Compact, but none of these consortium members have an existing relationship with OCC;

Does the prior involvement of the HFP Pixels' specialist consultants have any implications for the participation of Champion in the Eco Village Project tender having regard to the role HFP Pixel played working as subcontractor with HFP in the development of the Project and the procurement documents?

(d) Bob Builders has also expressed an interest in tendering for the project as part of a consortium of SME construction industry companies.

Can Bob Builders be allowed to participate in the Eco Village Project tender, in view of OCC's Commercial Director, Charlene Fox's, imminent move from OCC to Bob Builders as Bid Director who will be responsible for Bob Builders bid for this Project?

1.5 Circumstances in public procurement that could generate potential bidder conflicts of interest generally give rise to some or all of four interrelated practical legal issues. These are:

(a) Incumbency – potential advantage or conflict of interest arising from incumbency of a particular economic operator;

(b) Prior Involvement – potential advantage or conflict of interest from prior involvement of an economic operator in the preparation for and/or in the procurement process;

(c) Privileged Knowledge – potential advantage or conflict of interest arising from a position of privileged/better knowledge by a particular economic operator (which also generally affects issues (a) and (b) above) arising from circumstances such as

involvement in a prior abandoned procurement; prior employment relationships; other non-employment relationships, etc.; and

(d) Organisational Conflict – potential for conflict of interest from multiple bids by or involving the same or related economic operators and/or economic operators involved with the bids of different bidders/bidding groups.

1.6 **Creating a level playing field**

(a) The experience and expertise of a potential bidder acquired by that bidder as a contractor under an existing contract with the same contracting authority (i.e. incumbency) or acquired through any other relationship with the contracting authority) is, without doubt, capable of distorting competition, and creates the need by affected contracting authorities to seek to "create a level playing field". The Directives do not, however, make specific provision dealing with the de facto or perceived advantage of incumbency, so it falls back on the fundamental principles of transparency and equal treatment and the courts to deal with these circumstances.

(b) Having regard to these principles and decisions of the courts, it is clear that the potential advantages that an existing contractor may have when participating in a procurement for renewal of the same or similar contract must generally be neutralised. It is also clear that "*the principle that tenderers should be treated equally does not place any obligation upon the contracting authority to neutralise absolutely all the advantages enjoyed by a tenderer*" (*Evropaiki Dynamiki v Commission - Case T-345/03*). If it were the case that all advantages (real or perceived) of an incumbent contractor had to be neutralised, almost every incumbent contractor would have to be excluded from new tendering procedures for the same or similar contracts on that ground alone.

(c) In *Natural Worlds Products Limited v Arc 21 [2007] NIQB 19* – the court was clear in finding that an evaluator "*mistakenly thought the reality of the situation, i.e. that the plaintiff [incumbent contractor] had an important advantage over other bidders... conveyed an unfair advantage over other bidders. It did not. In bending over backwards to be fair to others [i.e. in the evaluation process] he was unfair to the plaintiff.*"

(d) Seeking to neutralise the advantage is, therefore, generally only mandatory to the extent:

(i) it is technically feasible to effect such neutralisation;

(ii) it is economically acceptable for the contracting authority; and

(iii) it does not infringe the rights of the incumbent contractor itself as a potential bidder.

(e) The provision of technical and other necessary tender information known to a potential bidder (whether by incumbency, prior involvement, of some other position of privileged knowledge) is absolutely critical to any attempt at levelling the playing field. The court in *Evropaiki Dynamiki v Commission (Case T-50/05)* set out four considerations in this regard:

(i) Did one or more tenderers have information which others did not?

(ii) If so, was the relevant information useful for formulating the tenders?

(iii) If so, was the disparity in respect of the useful information brought about by a procedural defect by the authority?

(iv) If so, but for the defect could the tendering procedure have had a different outcome?

(f) Accordingly, in *Evropaiki Dynamiki v Commission (Case T-345/03)*, the late provision of technical information (known to the incumbent) was considered unlawful; whilst in *Evropaiki Dynamiki v EIB (Case T-461/08)* a lack of precision in formulating award criteria was also considered as possibly having the practical effect of favouring the incumbent contractor.

(g) The express rules in regulation 41 PCR'15 regarding prior involvement of bidders echo these positions of case law regarding incumbency. Whether the prior involvement was by engagement in a preliminary market consultation or in the preparation of the procurement procedure (e.g. the provision of professional advice on the content of a technical specification or on the structuring of the procurement process) the contracting authority is required to take 'appropriate measures' to ensure that competition is not distorted by the participation of that potential bidder (i.e. to seek to "create a level playing field"), and such 'appropriate measures' include, at the very least:

(i) providing all potential bidders all of the relevant information exchanged or arising from the prior involvement – this requirement is an attempt to neutralise any potential advantage that an economic operator with prior involvement may have;

(ii) fixing adequate time limits for the receipt of tenders – this requirement aims to ensure that the time limits set are not too short, which could be advantageous to an economic operator with prior involvement and knowledge.

(h) These measures are, of course, only a starting point and not exhaustive.

1.7 **Exclusion of Bidder for Conflict**

(a) One of the "appropriate measures" that a contracting authority may consider and take, of course, is to simply exclude the problematic bidder. However, it is not permitted for a contracting authority to automatically exclude from a tender procedure a potential bidder that has had prior involvement in the contract the subject of the procurement, or because that potential bidder is the incumbent, or otherwise has prior privileged knowledge of the contract. A potential bidder that has had prior involvement may only be excluded from a tender procedure where there are no other means to ensure compliance with the principle of equal treatment of bidders.

(b) The requirement is to actively do all that it is reasonable and appropriate to do (See: *Evropaiki Dynamiki v Commission – Case T-345/03*) to find another way before coming to a final decision one way or another about bidder exclusion.

(c) However, the exclusion of a bidder where there is in fact a conflict of interests is essential where there is no more appropriate measure to avoid any breach of the

principles of equal treatment of tenderers and transparency (*Nexans France v Enterprise commune Fusion for Energy – Case T 415/10; Intrasoft – Case T403/12*).

(d) In *Ecoservice projektai* (formerly "Specializuotas transportas") (Case C-531/16), decided by reference to EU and Lithuanian law existing prior to the introduction of the conflict of interest provisions in the PCR, the CJEU concluded that:

"failing any express legislative provision or specific condition in the call for tenders or in the tender specifications governing the conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority;

"the contracting authority, when it has evidence that calls into question the autonomous and independent character of the tenders submitted by certain tenderers [including related tenderers submitting separate offers], is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and independent. If the offers prove not to be autonomous and independent, Article 2 of Directive 2004/18 precludes the award of the contract to the tenderers having submitted those tenders."

1.8 **Some Practical Application**

(a) None of the 4 scenario questions set out in the case facts above provides sufficient grounds to simply exclude the affected bidders from the tender process, either because of 'perceived' conflict or 'perceived' advantage over other bidders as it is clear from the language of the Directives and the cases that exclusion is the last resort. However, OCC does have a statutory obligation to consider any potential conflict or possible advantage (and the overriding duty, of course, to treat all bidders equally) and the discretion to exclude such a bidder where a potential conflict or a possible distortion of competition cannot be remedied by other measures. As with all exercises of discretion though, OCC has a general duty to exercise the discretion properly (i.e. with due care and diligence), reasonably and rationally.

(b) There are no simple answers. No matter what OCC does to mitigate against any real or perceived distortion of competition, there will always be some element of distortion of competition in such cases, including the risk of allowing potentially good bids by the affected bidders weighed against the risk of losing other good bidders who are put off by their perception of an ‘unfair' advantage to some bidders notwithstanding any appropriate measures OCC may consider it has taken. It is also noteworthy that the fact that EU grant funding is part of the project in this case scenario means there is a likelihood of complaints not only from potential bidders/bidders, but from the Commission itself.

(c) Examples of some appropriate measures which a contracting authority could take include:

(i) Clearly requiring in the tender documents that all potential bidders identify any connections they may have to other bidders, or to entities connected with the contracting authority itself and/or members/staff of the contracting authority;

(ii) Eliciting a properly constructed Chinese wall/ring-fence under a specific ethical walls agreement from the relevant bidders;

(iii) A written description of how the affected bidder(s) will actually provide physical and logistical separation, i.e. addressing all methods of communication such as phone, email, post, and face to face communications, to make sure no communication occurs between those with privileged knowledge and the bid team;

(iv) Obtaining a written commitment to continue to comply with the confidentiality provisions for information as set out in any existing contracts;

(v) Express permission for the contracting authority to be able to use and, if necessary, share with other bidders all the information provided as part of and/or related to the prior work undertaken by the bidder with prior involvement notwithstanding any obligations of confidentiality under the contracting authority's contract with that previously involved bidder (including, for example, such information as names and roles of the specific individuals involved in the prior work)[11];

(vi) Obtaining written confirmation from the affected bidder(s) not to use any confidential information to which that bidder(s) may have had access previously to assist in the preparation of the bidder's responses during the procurement process;

(vii) An indemnity for any costs incurred by, or damages awarded against the contracting authority if, following conclusion of the procurement, it turns out the ethical walls was breached, confidential information was improperly used, etc.;

(viii) A written express acceptance by the affected bidder(s) that they will be immediately excluded from the procurement if the ethical wall is subsequently breached; confidential information is improperly used, etc.

2. AUTHORITY CONFLICT

2.1 Old Town Council (**"Council"**) is intending to run a procurement process to award a contract for repair and maintenance services. The services are currently provided by Shoddy Limited, with the services managed by Jane. Jane has repeatedly expressed dissatisfaction about the way in which Shoddy performs under the contract, and the relationship is not good. Shoddy has already indicated that it doesn't think Jane can consider a tender from it with true impartiality. Jane is the person in the Council with the best understanding of the services and feels she should be on the evaluation panel. The other evaluators are going to be Steve and Tania, whilst Laura is the Procurement Manager (but not an evaluator).

2.2 The other bidders who have responded to the OJEU notice include Fixers Ltd. Steve has declared that he worked for Fixers Ltd until he joined the Council two years ago, and still goes for a drink with his former colleagues occasionally. Laura has declared that she has a

[11] Though note regulation 21 PCR'16.

small shareholding in Fixers Ltd and has asked for guidance on whether she can remain involved in the process.

(a) Can Jane be permitted to remain on the evaluation panel?

(i) In *Counted 4 v Sunderland City Council*, the incumbent argued that the contract manager/evaluator was biased against it. Mrs Justice Carr accepted that it was arguable that the definition in PCR' 15 regulation 24, which includes "other personal interest" was broad enough to include a situation where the evaluator had a personal interest in maintaining their professional reputation and/or in keeping their job. That case never went to trial so we are not able to draw any more inference other than that the wording is at least possibly broad enough to encompass a previous poor working relationship.

(ii) That case related to a particularly poor relationship, to the extent that the incumbent had complained to its customer about the behaviour of the contract manager. It should be considered in that light. That said, given that the incumbent has already raised concerns, there is still at least the potential for a perceived conflict of interest, particularly in light of the *Counted 4* case. If it is not vital for Jane to be involved in the evaluation then for that reason it is likely to be easier and safer for her not to be.

(iii) If it would be very helpful for Jane to be involved, the Council needs to explore whether it can neutralise any perceived conflict. The European Ombudsman has suggested that it may be possible to anonymise the responses for example. Alternatively, it may be possible to institute a particularly robust evaluation methodology and moderation process to ensure that evaluation has been undertaken in line with that evaluation methodology, which in many circumstances may be sufficient.

(b) Can Steve be permitted to remain on the evaluation panel?

(i) Again, there is a perceived conflict of interest because of Steve's previous employment. The European Ombudsman set out that "*conflicts of interest may be all the more likely to arise where someone has worked for many of the parties involved in a tender*", either because they have a positive or negative sentiment.[12] Again, the Ombudsman suggests that in such circumstances it might be possible to anonymise the responses to remove any perception of a conflict.

(ii) The case law in this area is likely to be difficult to apply in some small industries where evaluators are likely to have worked for other firms. An alternative option could be to reveal the disclosed conflict to the other bidders and allow them the opportunity to express a concern. Doing so would both help with the perception that an authority was trying to hide a potential conflict and also set the 30 day limit running for any challenge.

(c) What role can Laura play in the process?

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12 Ombudsman 642/2008 TS v Commission

Laura clearly has a financial interest in Fixers Ltd being successful in the competition. Even though she is not part of the evaluation panel, there are many other ways in which she could influence the result. That would include through the preparation of the specification, the preparation of the evaluation methodology, the way in which bidder meetings/interviews/site visits are conducted etc. These are all matters in which the procurement manager is likely to have a role, or at least oversight/input. It seems very difficult for Laura to play any role in the process without bringing into play a conflict of interest, and she should excuse herself until the decision has been made.

D. SOME PRACTICAL GUIDANCE FOR AUTHORITIES

1. A PROACTIVE GENERAL APPROACH

Authorities cannot do nothing; they have a duty to identify and manage CoI. Authorities must ensure effective governance structures are placed at the heart of their organisation, including the following:

1.1 Establish/review an ethical code of conduct, as part of policies on tendering and standing orders.

1.2 Ensure standard templates are available for reporting conflicts.

1.3 Establish a system for reporting conflicts, which includes a named individual to whom staff can report.

1.4 Consider terms of employment for contractors and key long term advisors (including restrictive covenants as regards post-termination engagement and an annual refresh of "no conflict" declarations).

1.5 In employment contracts for authority staff, consider whether post termination restrictions are appropriate.

1.6 Maintain a register of member and employee assets and interests.

1.7 Provide training to those who will regularly be involved in conflict governance structures and buying processes.

2. STARTING A NEW PROCUREMENT

2.1 Establish an internal governance structure for the procurement, and set out a decision tree describing the lines of communication which are to be followed for reporting potential conflicts of interest - eg from back office drafting and review personnel, to members of the evaluation team to members of the review panel responsible for making final decisions in relation to the procurement.

2.2 Create a table which includes a list of the names of all individuals who will be involved in running the procurement (from within and outside the contracting authority), and require each of those individuals to:

(a) complete a template conflict of interest form,

(b) cross reference relevant entries on the Authority's register of member and employee assets.

(c) As a result of case law on subconscious bias (eg *Counted4* and *Traffic Signs* - see schedule 2 to this paper) list all other contracts which the relevant individual has worked on either during the procurement or operational phase of the contract.

2.3 Identify a named individual on the review panel to whom CoI templates must be sent, and who will be responsible for managing reported CoI

2.4 Require all members of the established governance structure to read or re-read the contracting authority's ethical code of conduct, and to review the Contracting Authority's register of member and employee assets.

2.5 Task a specific committee with responsibility for implementing and write a conflict of interest review policy for the purposes of the procurement, to be followed at each key stage of the procurement and to ensure that conflict of interest declarations are kept up-to-date.

2.6 Ensure there are clear and well communicated processes in place to help staff understand what they need to do in order to declare an interest. If the conflict is identified in a formal meeting, it should be recorded in the minutes of the meeting; if a member of staff is concerned about a CoI indicate to whom he/she should report it. Explain the governance structure to managers, so that they can report CoI to the relevant named individual on the review panel.

2.7 Develop the following standard form declarations:

(a) For staff to disclose financial and personal CoI

(b) For completion by bidders when responding to the Request for Proposals to include

(i) Declaration of non-collusion;

(ii) Confidentiality declaration; and

(iii) Chinese wall confirmation.

2.8 Direct the evaluation team to take active steps to label potential conflicts of interest early on in the procurement process. Make it clear that there is no question of a lack of faith in the member or official concerned, or that he/she has taken advantage of the situation for the personal benefit. Col are facts of life.

2.9 Err on the side of openness.

2.10 Maintain a register of declarations and ensure that it is up-to-date:

(a) At the start of each stage of the procurement - pre-procurement engagement, preparation of procurement documentation, publication of contract notice, bidder selection, bid evaluation, final negotiations with preferred bidder, contract mobilisation

(b) On any change to consortia members

(c) On any change to members of the evaluation team

2.11 In the internal governance structure for the procurement, specify a named individual who will take up the process of determining how to remedy or mitigate a conflict of interest - once it has been reported to the Evaluation Panel from the Evaluation Team

2.12 In the event a conflict arises, keep written, detailed records recording how the situations has been identified and managed as part of the procurement process.

3. BEST PRACTICE APPROACH TO BIDDER CONFLICT

3.1 This requires a clear paper trail, and the following measures:

(a) Where the procurement involved is above threshold, issue a Prior Information Notice in the Official Journal - to inform the widest possible number of market players of the contracting authority's intentions.

(b) Scope the rationale behind the contract and the likely value/size of the contract as clearly as possible in the PIN, and include the same information on the authority's website.

(c) Explain in the PIN that any information a supplier shares could be used to assist drafting a specification for the subsequent procurement, may be subject to Freedom of Information requests and will not be treated as confidential or contractual.

(d) Set up open days for potential bidders, and provide standard presentations so that all bidders are provided with the same information.

(e) Consider requiring bidders to complete standard questionnaires on how they would approach the project.

(f) Standardised processes can only go so far when seeking innovation. Where face-to-face meetings take place, ensure that:

(i) No one supplier is provided with more information than another

(ii) All potential suppliers are given this opportunity

(iii) a "debriefing" template is developed, listing questions asked and responses given, to prove to bidders that their views were taken into account in the same way.

(g) Once all market consultation information has been collated, ensure that the ensuing procurement is not scoped so that it favours or precludes one potential supplier or a group of potential suppliers, and that any information provided pre-procurement is also included for all bidders who take part in the ultimately advertised procurement documents.

4. SOME GUIDANCE…

The following detailed guidance exists. Contracting authorities may want to refer to them when developing policies and procedures for their own particular circumstances.

4.1 EU Services Guidance on Common Problems in ESIF-funded Projects:

http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_public_proc_en.pdf

4.2 OLAF Practical Guide (2013, so pre-dates Directives) "Identifying conflicts of interests in public procurement procedures for structural actions: A practical guide for managers": suggests reactive measures, but some helpful material, includes:

(a) model declaration;

(b) use of data mining programs to identify potential concerns;

(c) practical examples; and

(d) deals with DD

4.3 OECD: "Managing Conflict of Interest in the Public Service' OECD Guidelines and Country Experiences" (http://www.oecd.org/corruption/ethics/48994419.pdf) - This guidance evolved from a study of national conflict of interest policy across OECD countries. It sets out high level guidance on developing and managing a conflict of interest policy framework, and provides case studies derived from practice in Australia, Canada, Poland, France, the United States, New Zealand, Portugal and Germany.

4.4 European Commission's 2014 Anti-corruption report (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf): This report was issued in the context of the Europe 2020 Growth Strategy, acknowledging that increasing employment levels, productivity and social cohesion will depend as much on institutional factors such as good governance as it will on other growth initiatives. It notes that "politicisation of recruitment for mid management" raise the risks of conflict of interest, weaken control mechanisms and affect the credibility of the public administration as a whole. As a result of the report all EU countries have designated a national contact point to facilitate information exchange on anti-corruption policy, and in 2015 the EU Commission launched the anti-corruption experience-sharing programme. The report includes a section on public procurement and its role in detecting fraud and corruption. It quotes the 2014 Eurobarometer "Business attitudes towards corruption in the EU" survey which states : "The main reasons companies have not taken part in a public tender/procurement process in the last three years are the bureaucratic processes (21%) and criteria that seem to be tailor-made for certain participants (16%). More than four out of ten say that a range of illegal practices in public procurement procedures are widespread, particularly specifications tailor-made for particular companies (57%), conflict of interests in bid evaluation (54%), collusive bidding (52%) and unclear selection or evaluation criteria (51%)."

4.5 Practical Guide to Contract Procedures for EU External Actions drawn up by the Commission services for the detailed implementation of financial aid to third countries

SCHEDULE 1: LEGISLATION

Authority Conflict

1. Recitals in the 2014 Directives

Public Sector Directive 2014/24/EU recital 16 states:

"*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.*"

Utilities Directive 2014/25/EU recital 26 states:

"*Contracting authorities should make use of all possible means at their disposal under national law in order to prevent distortions in procurement procedures stemming from conflicts of interest. This could include procedures in order to identify, prevent and remedy conflicts of interests*."

Recital 61 of the Concessions Directive 2014/23/EU is slightly different. It states:

"*In order to combat fraud, favouritism and corruption and prevent conflicts of interest, Member States should take appropriate measures to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers. Such measures should in particular aim at eliminating conflicts of interest and other serious irregularities.*"

2. Implementing legislation

2.1 Public Contracts Regulations, 2015 (PCR'15)

Regulation 24 sets out a Contracting Authority's duties in relation to conflict of interest:

"*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) In paragraph (2)

"*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; and*

"procurement service provider" means a public or private body which offers ancillary purchasing activities on the market."

Regulation 57(8)(e) provides discretionary grounds for exclusion in the event of a conflict of interest:

"*(8) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:—...*

(e) where a conflict of interest within the meaning of regulation 24 cannot be effectively remedied by other, less intrusive, measures;"

2.2 Utilities Contracts Regulations, 2016 (UCR'16)

In UCR'16 obligations in connection with conflicts of interest appear to be limited to Contracting Authorities - ie no obligations are imposed on Public Undertakings or entities which operate on the basis of "*special or exclusive rights*". This is reflected both in the recitals to the Utilities Directive (see above), and in its operative provisions.

Regulation 42(1) of UCR'16 states: "*Utilities that are 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 ..."*

Particularly as CCR'16 imposes COI obligations on contracting authorities and utilities, and in the light of growing concerns over the effect of conflicts of interest in both the public and private sectors, we consider that it would be imprudent for Utilities (other than Contracting Authorities) not to take steps to prevent, identify and remedy conflict of interests. The legal basis for doing so would be the general principles of procurement at regulation 36(1) of UCR'16 which states: "Utilities *shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner*." A utility fails in its obligation to treat economic operators equally if members of staff involved with the procurement may favour one bidder over another due to financial / personal interests

The definition of conflicts of interest in UCR'16 is identical to that used in PCR'15. Regulation 80(1) of UCR'16 permits use of the exclusion grounds listed in regulation 57 of PCR'15, without itself specifically listing them.

2.3 **Concession Contracts Regulations, 2016 (CCR'16)**

Regulation 35 of CCR'16 also refers to combatting fraud, favouritism and corruption, but does not expressly refer to procurement service providers. It states:

"*35.—(1) Contracting authorities and utilities shall take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession contract award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.*

(2) The measures adopted in relation to conflicts of interest shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified.

(3) For the purposes this regulation, 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 concession contract award procedure.

(4) In paragraph (3), "relevant staff members" means staff members of the contracting authority or utility who are involved in the conduct of the concession contract award procedure or may influence the outcome of that procedure."

Regulation 38(16)(d) of CCR'16 permits discretionary exclusion in the context of a conflict of interest:

"*(16) A contracting authority or utility may exclude from participation in a concession contract award procedure any economic operator in any of the following situations— ...(d) where a conflict of interest within the meaning of regulation 35 cannot be effectively remedied by any other, less intrusive, measures;*"

3. Bidder conflict

3.1 Recitals

See below under Technical and professional ability "Conflict"

3.2 Implementing legislation

Regulation 41 Public Contracts Regulations, 2015

"*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 [preliminary market engagement] 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.

(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).

(4) Prior to any such 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.

(5) The measures taken under this regulation shall be documented in the report referred to in regulation 84(1)."

Similar provisions are included in regulation 59 of the Utilities Contracts Regulations, 2016.

No equivalent provisions are included in the Concessions Contracts Regulations, 2016.

4. Organisational Conflict

Recitals in the 2014 Directives

See below under Technical and professional ability "Conflict"

5. Implementing legislation

See Section 2 above

6. Technical and professional ability "Conflict"

6.1 Regulation 58(15)-(17) states:

"*(15) With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.*

(16) Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(17) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract."

This appears to be a past performance issue, in connection with which there are discretionary grounds to exclude set out in regulation 57(8)(g):

"(8) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:— … (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;"

6.2 Regulation 80(4)(b) of UCR'16 permits reliance on regulations 57-61 of PCR'15 as if reference there to contracting authorities were reference to utilities, and if relied upon would therefore provide the same grounds for review of technical and professional ability as set out in PCR'15.

6.3 No equivalent provisions are included in CCR'16.

7. Reporting

7.1 Regulation 84(1)(i) of PCR'15 states:

"*84.—(1) For every contract or framework agreement covered by this Part, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written*

report which shall include at least the following:— ... (i) where applicable, conflicts of interests detected and subsequent measures taken."

7.2 Regulation 99(1) and (2)(a) of UCR'16 state:

"*99.—(1) Utilities shall keep appropriate information on each contract or framework agreement covered by these Regulations and each time a dynamic purchasing system is established.*

(2) The information referred to in paragraph (1) shall be sufficient to permit utilities at a later date to justify decisions taken in connection with—

(a) the qualification and selection of economic operators and the award of contracts;"

7.3 Where PCR'15 selection criteria have been adopted in a utilities procurement, the requirement to report on any exclusion as a result of conflict of interest would apply, and arguably an explanation of steps taken to prevent or mitigate the conflict should be included. Even if conflict is not used as a ground for exclusion, it is best practice to report on measures taken in relation to any conflict which arises.

7.4 Regulation 45 of CCR'16 states:

"*45. Contracting authorities and utilities shall send to the Minister for the Cabinet Office a report containing such information as the Minister for the Cabinet Office may from time to time request in respect of—*

(a) any concession contract within the scope of these Regulations; or

(b) the procedure for the award of any such concession contract."

7.5 Best practice would dictate documenting any conflict of interest which is identified pursuant to regulation 35 and the steps taken to prevent or mitigate it.

SCHEDULE 2: SUMMARY OF RELEVANT CASE-LAW

Part 1: Authority Conflict

1. UK Courts

1.1 Traffic Signs And Equipment Limited v Department for Regional Development & Department of Finance And Personnel

[2011] NIQB 25

In this Northern Ireland case, it was contended that the procurement process was conducted in breach of the Public Contracts Regulations 2006. The grounds of challenge included complaints that the DRD engaged in actual or apparent bias against the plaintiff.

A director and shareholder of the plaintiff company. Mr Connolly, was formerly a director and shareholder of Signs and Equipment Limited (SEL), which tendered for Road Service traffic sign contracts in 1999, 2002 and 2005. SEL went into liquidation in December 2005. The plaintiff company was formed in January 2006. Mr Connolly was aggrieved by the treatment of the predecessor company by the defendants. Complaints were made to the Northern Ireland Audit Office and an investigation was undertaken leading to the publication of the Balfour Report in January 2010. While the investigation was under way the defendants launched a 2009 tender process but it was later abandoned. A new tender process was commenced in 2010, which lead to the award of 21 contracts in total, 18 of which went to a competitor called PWS. The plaintiff challenge these awards. Among the plaintiff's grounds of challenge were complaints of actual and apparent bias.

The parties were agreed that the obligations of equality and non-discrimination embraced the complaints of discrimination and actual bias, but disagreed on the application of apparent bias. The defendants contended that apparent bias was not an aspect of the obligations arising under the Regulations. Reference was made to Pratt Contractors v Transit NZ [2003] UKPC 83 where the Privy Council considered contractual obligations arising upon the submission of a tender. It was decided that a preliminary contract came into existence between the employer and the tenderer which included implied duties to act fairly and in good faith. However the duties of fairness and of good faith did not impose upon an employer any of the obligations that would render it amenable to judicial review. Accordingly, any finding of apparent bias was not a ground for establishing breach of contract. The duties of good faith and fairness required the evaluation of tenders to be conducted honestly, with all tenderers being treated equally. The duties did not require the appointment of an evaluation panel whose members were without any views about the tenderers nor did the duties mean that the panel had to act judicially, in that they did not have to accord the tenderer a hearing or enter into a debate with the tenderer[13].

The plaintiff contended that neither of these authorities was concerned with the Directive or the Regulations, where the obligations of equality, non-discrimination and transparency are each said to prohibit apparent bias. In addition the plaintiff contended that, apart from the statutory obligation which prohibited apparent bias, the defendants had a contractual obligation by reason of the express undertaking to avoid the appearance of bias in the

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13 An instance of this approach being applied in Northern Ireland is found in Scott v Belfast Education and Library Board [2006] NICh 4.

procurement process set out in the guidance notes referred to in the published procurement documents. The defendants' response was that this document was guidance only and did not impose any legal obligation on the defendants.

Without deciding on the application of apparent bias as an aspect of the obligations arising under this procurement process, the Court considered the matters relied on by the plaintiff and whether they constituted actual or apparent bias[14].

The allegations of bias arose on the basis that the evaluation panel for the 2010 tender featured individuals within the Department who had prior dealings with the plaintiff. While the Court refrained from expressing any view about the applicability of apparent bias, whether as a statutory obligation or a contractual obligation, to the challenge to this procurement process, it ultimately found that the following circumstances did not give rise to any actual or apparent bias on the part of those individuals:

(a) they had in the course of the 2005 procurement process marked down SEL unfairly and had wrongly represented that SEL had failed to complete the tender satisfactorily

(b) they had a professional and collegiate association with a Mr M. who had an inappropriate and undisclosed relationship with PWS during and subsequent to the 2005 and 2009 procurement processes and who as a consequence of that relationship was removed from 2010 procurement process;

(c) they were aware of being complained about by the plaintiff and of being the subject of an internal and external investigation on foot of a series of serious complaints that struck at the heart of their professional integrity;

(d) they failed to place with the plaintiff orders for works between 2006 and 2010 when such works had previously been carried out by SEL before it was liquidated, notwithstanding that the plaintiff performed the same work as SEL;

(e) they failed to consider the plaintiff for the temporary supply of road signs when the 2010 process was called into question;

(f) one of the evaluators, Mr C. was the contract administrator on another school traffic signs contract which required him to work closely and continuously with PWS over a number of years. It was alleged that in order to avoid the appearance of bias to the reasonable man he should not have been asked to or have agreed sit on the 2010 evaluation panel assessing tender bids which included PWS.

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14 The Court considered that the test to be applied in relation to apparent bias was set by the House of Lords in *Porter v Magill [2002] 2 AC 357* - *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."* The application of the test to the present case could be adapted from the wording in *Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781* - *"The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that the [defendants would not evaluate the tender] objectively and impartially against the other evidence. "* In relation to the concept of the "informed" observer it was stated - *"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."* In relation to the "fair-minded" observer it was stated -*"… that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.*

1.2 Counted 4 CLG v Sunderland City Council

[2015] EWHC 3898

The first case to consider PCR'15 regulation 24 concerned the procurement of a services contract for substance misuse treatment and harm reduction services for substance users in Sunderland. Counted4 was the incumbent supplier and lost in its bid to renew the contract. The Council applied to have the automatic suspension lifted, and as part of the ensuing interlocutory proceedings, Counted 4 alleged that one of the evaluation team (Mr S) had a conflict of interest and ought not to have participated in the evaluation exercise. The evaluation team member in question, a contract manager, had dealt with Counted4 under the previous contract and there was evidence of a strained relationship. His competency had been repeatedly challenged by Counted4 and indeed, as a result of those challenges and complaints, investigated internally by the Council. The Council claimed, inter alia, that the contract manager's impartiality could not be called into doubt; he had relevant experience of the services in question and in managing the previous contract he had simply been doing his job in difficult circumstances; he was also one of four evaluators and the rigorous evaluation process did not allow for one member to unduly influence the scoring.

In finding that there was a serious issue to be tried and the suspension should be left in place, Carr J held that it was ‘properly arguable' that the Council failed effectively to prevent, identify and remedy a conflicts of interest in allowing the person in question to be on the evaluation panel. Referring to Regulation 24 (PCR), Carr J stated "Other personal interest" can be directly or indirectly held. The phrase is very broad on its face and is clearly intended to add to the other conflicts identified, namely financial and economic. The Defendant submits that it is designed primarily at financial interest. That cannot be said to be certainly the case. The Claimant's case that "other personal interest" means anything pertaining to the relevant individual is arguable. It is arguable that [Mr S]'s personal interest in protecting his professional reputation and/or role at the Defendant by awarding a new contract to someone other than the Claimant might be perceived to compromise [Mr. S]'s impartiality and independence". The judge added that the effect of a conflict can be subtle and the fact that the evaluation process was heavily documented rule does not necessarily ‘rule out an operating confliction'. The case did not proceed to a full hearing and so these matters were not tested more fully at a later stage.

1.3 Ocean Outdoor UK Limited v The London Borough of Hammersmith and Fulham

[2018] EWHC 2508

Ocean was the incumbent lessee of advertising hoardings owned by LBHF (the Two Towers), and was unsuccessful in a competition to re-let the Two Towers. Ocean alleged that the contract was a concession and should have been advertised in the Official Journal of the European Union. Its judicial review claim included an alleged failure by LBHF to address a conflict of interest.

LBHF appointed Wildstone to manage letting of existing hoardings. Mr Cox of Wildstone had previously been CEO at Ocean, and had signed the original leases for the Two Tower hoardings, but had left in acrimonious circumstances after the identification of financial irregularities. Ocean informed LBHF that they felt there was a conflict of interest as a result

of Wildstone's involvement in the procurement, but did not provide background on Mr Cox' previous involvement at and exit from Ocean.

Ocean failed in its claim that the Concessions Contracts Regulations 2016 applied to the Two Towers contract. Therefore the Court looked at the conflict of interest claim in the context of case law on bias, rather than in the context of the obligations on conflict of interest in CCR'16. The judge applied the test summarised in *Porter v Magill [2002] 2 AC 357* per Schiemann LJ, referring to Lord Browne-Wilkinson in *R v Bow Street ex.p.Pinochet Ugarte (No.2) [2000] 1 AC 119* p.36:

"... having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

As part of his consultancy role to LBHF, Mr Cox provided a "crib sheet" for use by LBHF employees involved in evaluating the bids for leasing the Two Towers - which included statements that Ocean had bid low in relation to previous hoarding contracts with LBHF. Ocean claimed that this failed to take into account its business model and left evaluators with an impaired impression of its financial standing and ability to bid as high as competitors in the market.

The judge held that the allegations of bias had no real prospect of success, because:

- Ocean had bid for, and won, another competition run by Wildstone in respect of advertising hoardings.

- Wildstone had no financial or other interest in the outcome of the tender for the Two Towers; the basis of its fee would be the same whether the Original Lease were re-negotiated or the New Leases were executed.

- The crib sheet did not contain advice or Wildstone's opinion of Ocean; the purpose of the crib sheet was to provide arguments for the Council to use in its negotiations with Ocean, which Ocean could readily rebut.

- Although Ocean had complained to the Council informally that there had been a rift with Mr Cox and that Wildstone was hostile, the complaint was not put in writing and no particulars were ever provided.

2. European Court of Justice

2.1 AFCon Management Consultants and Others v Commission

(Case T-160/03)

Commission conducted a competition for technical assistance services as part of the Tacis Programme, under the Financial Regulation. The evaluation team initially decided to award the contract to a consortium (the GFA/Stoas consortium). Afcon came second. It was subsequently discovered that a member of the evaluation panel, Mr A, was employed by a subsidiary of Stoas. The commission cancelled the first evaluation and dismissed Mr A from the panel. A new panel was constituted and a second evaluation was conducted. The GFA/Stoas consortium was awarded the contract after the second evaluation.

Afcon complained that the Commission did not take the necessary measures once the conflict had been discovered and should not have permitted GFA/Stoas to participate in the second round of evaluation.

Court found that the Commission must act with due diligence and in accordance with the principles of equal treatment and sound administration. It has some discretion to determine what measures should be taken. In the present case the Court found that the Commission did not investigate the links between Mr A and the consortium to satisfy itself that the consortium did not seek to influence the evaluation process or to ascertain that Mr A and the consortium had not collaborated. The Commission had no grounds for ruling out the possibility that GFA/Stoas had sought to influence the tendering procedure. The Commission should have taken care to consider the possibility of collusion or fraudulent intention, particularly in circumstances where there was evidence that Mr A had sought to give preferential treatment to the consortium, where Mr. A had breached his undertaking that he had no links with any tenderer and where there were reasonable grounds to suspect collusion.

The Commission's failure to investigate was a manifest error of assessment and a breach of the principles of sound administration and equal treatment.

2.2 Evropaïki Dynamiki v European Commission

(T‑591/08)

The applicant informed Eurostat that one of its former directors 'might have' links with one of the members of the consortium selected by Eurostat and that, if that were the case, the members of the Evaluation Committee and the people who had been directly or indirectly involved in the evaluation of the tenders should be regarded as being in a situation giving rise to a conflict of interests and accordingly excluded from any decision making procedure relating to the call for tenders, since they had worked with that former director or had reported to him. All the members of the Evaluation Committee had signed a '[d]eclaration of absence of conflict of interests and of confidentiality' and had given a personal assurance that he was able to perform his duties as a member of the Evaluation Committee impartially and objectively.

However, the Court held that the applicant had failed to provide any evidence to support its claim that a former director of Eurostat was a shareholder in a company which belonged to the successful consortium. Secondly, even if a former director of Eurostat were a shareholder of a company which was a member of the successful consortium, the applicant had failed to provide any evidence to establish the existence of a link between the factual situation alleged and the selection of that consortium.

2.3 eVigilo

(C538/13)[15]

This case was decided by the Court of Justice under Directive 2004/18 following a reference from Lithuania. eVigilo lost a tender and alleged that the experts who evaluated the tenders, were biased; it claimed that specialists referred to in the tender submitted by the successful

15 eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos (Case C‑538/13)

tenderers were colleagues (at the Technical University of Kaunas) of three of the six experts of the contracting authority who drew up the tender documents and evaluated the tenders. The Court assessed this matter by reference to the fundamental principles of equal treatment and transparency. It stated:

"*35. A conflict of interests entails the risk that the contracting authority may choose to be guided by considerations unrelated to the contract in question and that on account of that fact alone preference may be given to a tenderer. Such a conflict of interests is thus liable to constitute an infringement of Article 2 of Directive 2004/18."*

…

37. The finding of bias on the part of an expert requires in particular the assessment of facts and evidence that comes within the competence of the contracting authorities and the administrative or judicial control authorities.

…

43 .. the contracting authority is, at all events, required to determine whether any conflicts of interests exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. It would be incompatible with that active role for the applicant to bear the burden of proving, in the context of the appeal proceedings, that the experts appointed by the contracting authority were in fact biased. Such an outcome would also be contrary to the principle of effectiveness and the requirement of an effective remedy laid down in the third subparagraph of Article 1(1) of Directive 89/665, in light, in particular, of the fact that a tenderer is not, in general, in a position to have access to information and evidence allowing him to prove such bias.

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."

The Court considered that claims that the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract worked together in the same university, belonged to the same research group or had employee/employer relationships, if proved to be true, constitute such objective evidence as must lead to a thorough examination by the authority.

Ultimately, the concept of 'bias' and the criteria for it are to be defined by national law. The same applies to the rules relating to the legal effects of possible bias. 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.

2.4 European Ombudsman

Case 642/2008/TS

BSI took part in a tender procedure conducted by the European Commission for a service contract. BSI was one of seven shortlisted tenderers. Before any award decision, the

Evaluation Committee received an anonymous fax containing details of an exchange of e-mails between another shortlisted tenderer, IBF and Mr D, who was a technical assessor and advisor to the Committee. The Commission subsequently sought clarification of the position from Mr D who confirmed that he had worked for all seven shortlisted tenderers, not only IBF. As regards IBF, he had worked for IBF as an independent consultant in June, September and October 2006. IBF also confirmed that Mr D had worked for it as an independent expert for thirteen days during 2006 on two projects. The Commission concluded its evaluation process and decided to award the contract to IBF. BSI complained about Mr D's impartiality on the basis that this breached the equal treatment principle. In response, the Commission advised that Mr D attended the Evaluation Committee meetings as an "observer", acting as a technical advisor. He did not score or have any voting power. The Commission further stated that Mr D had clarified that he had previously worked with all of the participating consortia including BSI. It drew attention to the fact that BSI was awarded the highest score in the technical evaluation, but that its price was significantly higher than other tenderers. Mr D was not involved in any financial evaluation.

The Ombudsman recalled that the Financial Regulation[16] defines conflict of interests as arising "where the impartial and objective exercise of the functions of a player in the implementation of the budget or an internal auditor is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary." The Ombudsman also noted that the OECD Guidelines for Managing Conflicts of Interest in the Public Service (the 'OECD Guidelines') provide the following definition of "conflict of interest": (i) An actual conflict of interest exists when there is a conflict between a public official's public duty and his/her private interests, such as where the public official has private interests which could improperly influence the performance of their official duties and responsibilities. (ii) An apparent conflict of interest can be said to exist where, despite the fact that there is no actual conflict of interest, an impression exists that a public official's private interests could improperly influence the performance of his/her duties. (iii) A potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant official responsibilities in the future.

The Ombudsman considered that the above principles also apply to third parties who, as external advisors, participate in the decision-making of EU institutions. The Ombudsman has consistently taken the view that principles of good administration and, in particular, the principle of equal treatment, require that European Union institutions ensure that no actual, potential or apparent conflicts of interests affect their work. The Ombudsman dismissed an argument made by the Commission that the Regulation only applied to actual or potential conflicts and not apparent conflicts, holding that merely complying with the law is not always synonymous with good administrative practices as these may require EU institutions to do more than what the law prescribes. The concept of an apparent conflict of interests should be analysed in this context. Indeed, according to the above definition, there is an apparent conflict of interests when, despite the fact that there is no actual or potential conflict of interests, third parties (i.e., citizens) receive the impression that there is a conflict of interests. Therefore, in the Ombudsman's view apparent conflicts of interests should be avoided.

The Ombudsman noted that Mr D was not a member of the Evaluation Committee. This did not necessarily mean, however, that he had no influence on the Committee's ultimate decision. Mr. D was the Committee's technical assessor and advisor. It could reasonably be

16 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002

expected that the Committee would rely on his assessment when deciding on the quality of each tender. In this context, the Ombudsman pointed out that the Commission itself acknowledged the importance of Mr. D's advice by explaining that, due to the technical complexity of the tenders to be evaluated, a technical advisor was needed for the tender evaluation process. Furthermore, the final scores of the tenderers were calculated on the basis of (i) a technical evaluation (for which Mr D provided the input), and (ii) a financial evaluation. In sum, it was reasonable to assume that Mr D's views influenced the final result.

The Ombudsman also noted that a close examination of the Practical Guide to contract procedures for EU external actions reinforced the view that Mr. D was indeed in a position to influence the final decision of the Evaluation Committee. The Practical Guide states the following: "All members of the Evaluation Committee and any observers must sign a Declaration of Impartiality and Confidentiality [...]. Any Evaluation Committee member or observer who has potential conflict of interest with any tenderer or applicant must declare it and immediately withdraw from the Evaluation Committee. He will be excluded from participating further in any capacity in the evaluation meetings" (Emphasis added)

The Commission expressly stated that Mr D attended the Evaluation Committee meetings as an "observer". As such, it is clear that Mr. D was also bound to be free of actual, apparent or potential conflicts of interests, like all other members and observers. The Commission said that there could be no conflict of interest because Mr D had worked for all of the shortlisted tenderers, and not only for one of them, however the Ombudsman did not share the view that no conflict of interest could possibly exist simply because a person worked for all of the shortlisted tenderers. In fact, conflicts of interest may be all the more likely to arise where someone has worked for many of the parties involved in a tender. Indeed, the Ombudsman took the view that a member of an Evaluation Committee, or an observer of a tender evaluation procedure, who has worked, or who is currently working for any of the tenderers, may be considered, at the very least, as having an apparent conflict of interest. The Ombudsman recognised that there may be situations where the only experts available are those who have worked for, or provided services to the firms seeking to win a tender. In such circumstances, the contracting authority might have no choice but to use an expert who has worked for, or provided services to one or more of the tenderers. However, the Ombudsman did not consider it probable that, in an area such as standardisation, there would be only one available expert. In any event, in order for the appointment of such an expert to be valid, it would have to be shown that it was impossible to find an expert with no connection with the tenderers. In the present case, no such efforts were made. No argument had even been put forward to indicate that the Commission had no other option but to choose the expert concerned.

If, in a highly specialised field, the Commission was obliged to choose an expert who had connections with some of the tenderers, the Commission would need to make a special effort to ensure that the expert's work was not unduly affected by a conflict of interests. For example, it would need to ensure that the identity of the tenderers remained hidden from the expert when he/she examined the tenders. The Ombudsman had not been provided with any evidence to indicate that such measures were taken in the present case. The Ombudsman concluded that the Commission should have replaced Mr D as its technical assessor and advisor and that an instance of maladministration occurred in so far as the Commission failed to take appropriate action when it became evident that there were multiple conflicts of interest between Mr D and the shortlisted tenderers.

Prior to the commencement of evaluation, Mr D had to sign a declaration of impartiality and confidentiality which read as follows: "I, the undersigned, hereby declare that I agree to

participate in the evaluation of the above-mentioned tender procedure. [...] I am independent of all parties which stand to gain from the outcome of the evaluation process. To the best of my knowledge and belief, there are no circumstances, past or present, or that could arise in the foreseeable future, which might call into question my independence in the eyes of any party; and, should it become apparent during the course of the evaluation process that such a relationship exists or has been established, I will immediately cease to participate in the evaluation process. [...]" (Emphasis added). Mr. D did not understand the declaration which he was asked to sign, namely, that it required him to declare actual, and apparent and potential conflicts of interest. The Ombudsman examined the declaration carefully and took the view that the declaration was not well-worded. This constituted a second instance of maladministration. The Commission should make it perfectly clear that the expert should declare all actual, apparent and potential conflicts of interest.

According to the ECJ case-law, if an institution receives allegations of a conflict of interests, it is obliged to carry out an investigation and subsequently decide on the possible action it should take. In particular, it follows from the case-law that, if there is a conflict of interest between a member of an evaluation committee and a tenderer, the institution is obliged to act with due diligence. It has to take into account all the relevant information when it formulates and adopts its decision on the outcome of the procedure for the award of the tender at issue. This obligation derives in particular from the principles of sound administration and equal treatment. If a conflict of interest is discovered between a tenderer and a member of an evaluation committee, the institution has some discretion to determine how the subsequent stages of the tender award procedure are to be conducted. The Commission never carried out such an investigation and this failure constituted another instance of maladministration.

Note - http:www.oecd.org/dataoecd/13/22/2957360.pdf

Case1348/2009/(CK)RT

The Commission published a procurement notice for a project in Montenegro. The complainant submitted an application but subsequently found out that the Chairman of the evaluation panel was an EU official with whom it had had a professional conflict when applying for another EU project in Bulgaria. It requested that the official in question not be involved in the evaluation procedure but received no reply from the Commission in this regard. The complainant was subsequently unsuccessful in the competition. The Commission asserted that there was no reason to doubt the impartiality of the Chairman of the Evaluation Committee.

The Commission pointed out that under the applicable Financial Regulation which governed the process a Chairman should not take any action that would bring his or her interest into conflict with those of the EU. In addition, a chairman did not have the right to vote, nor to interfere with the evaluation process. The decision to reject the complainant's tender offer was taken exclusively by the voting members of the Evaluation Committee.

It was disclosed following subsequent investigation that the Chairman, acting on behalf of the Bulgarian authorities, had been partly in charge of a project involving one of the complainant's subsidiaries. The latter had failed to submit a final report within the contractual deadline and, as a result, part of the project concerned could not be implemented. The Chairman's involvement in the said project was limited to the normal tasks of a junior state official and the Bulgarian authorities took all the management decisions on that project.

The Ombudsman recalled that the ECJ had held in AFC on that, after discovering the conflict of interest, the Commission has some discretion when determining the measures which must be taken the subsequent stages of the procedure for the award of the tender. Nevertheless, the Commission must act with due diligence and on the basis of all the relevant information when adopting its decision on the outcome of the procedure.

The Ombudsman considered it necessary to check (i) how the Commission proceeded to establish whether or not there was a risk of a conflict of interest between the complainant and the Chairman and (ii) whether or not the Commission committed a manifest error of assessment in concluding that there was no such risk.

In relation to (i), the Ombudsman found that while certain steps had been taken by the Commission they had not been taken in good time. The Commission carried out an investigation only after the evaluation of the tender offers had already been completed, and the contract in question had been awarded. However, given that the evidence made available to the Ombudsman during his inspection of documents confirmed the Commission's above conclusion, the Ombudsman did not make a finding of maladministration in this respect. As regards (ii), on the basis of the inspected documents, the Ombudsman concluded that there was no reason to doubt that the Chairman acted independently and impartially.

Part 2: Candidate/Tenderer Conflicted

1. European Court of Justice

1.1 Fabricom

(Joined Cases C-21/03 and C-34/03)

This was a reference to the ECJ for a preliminary ruling concern the interpretation of Council Directive 92/50/EEC. The Court held that the procurement directives then in force (namely Directive 92/50, Directive 93/36 and Directive 93/37 which contain no provisions to the effect that a person may not participate in a tender where he has previously participated in the planning of the contract) preclude a national rule whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services, where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition. The Court held that such a blanket rule does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case there should be no concerns.

1.2 Deloitte Business Advisory v Commission

T 195/05

This case concerned a tender procedure conducted pursuant to the Financial Regulation[17] for a framework contract under which there was to be an evaluation of the programme of Community action in the area of public health. This would involve assisting in the

[17] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities

preparation and design of Community designs and policies as well as the evaluation of programmes.

Art. 94 prohibited the award of contracts to tenderers who ‘are subject to a conflict of interest'. Deloitte was part of a consortium, "Euphet", which submitted a tender. The Commission informed Euphet that its tender had been rejected as there was found to be a risk of conflicts of interest within Euphet.

The main partners in Euphet were involved in activities of the DG 'Health and Consumer Protection', and held a large number of subsidy contracts in that area and that of public health. Euphet did not acknowledge that its members were involved in the implementation of the public health programme. Also, the majority of the most experienced experts proposed by Euphet were connected with organisations which had received large subsidies from the Commission for carrying out work relating to the Community public health programme.

The reasons for the decision rejecting the a tender were the risk of conflict of interest on the part of the tenderer, the tenderer's failure to acknowledge the existence of such a risk and the absence, in the tender, of concrete proposals for the removal of that risk. "The evaluation committee concluded that Euphet does not acknowledge the fact that a number of the consortium partners have a large involvement in the implementation of the Public Health programme. Considering the great risk of [conflict of interest], a detailed and concrete explanation would have been required to provide a sufficient level of understanding of how the [conflict of interest] issue should be addressed and the risks should be eliminated. However, the approach proposed is not sufficient, and no satisfactory assurance is provided by the tenderer that [conflict of interest] could be avoided."

Article 94 of the Financial Regulation permits exclusion of a tenderer from a procurement procedure only if the situation of conflict of interest to which it refers is real and not hypothetical. However the Court found that that does not mean that a risk of conflict of interest is not sufficient to exclude a tender. In principle, it is only when the contract is performed that a conflict of interest can become real. Before conclusion of the contract, a conflict of interest can be only potential and Article 94 therefore implies an assessment in terms of risk. That risk must actually be found to exist, following a specific assessment of the tender and the tenderer's situation, for that tenderer to be excluded from the procedure. The mere possibility of a conflict of interest cannot suffice for that purpose.

In the procedure for the award of a framework contract, account must be taken of the fact that specific contracts, award of which will give rise to a check that there is no risk of conflict of interest, must come into being before the successful tenderer for the framework contract is entrusted with the performance of specific tasks. Thus, in such a case, the risk that a conflict of interest will in fact arise can be considered only where there are material circumstances placing the tenderer in a position where it is unable to avoid the risk of bias in the performance of the majority of the tasks under the framework contract.

According to the Court, the Commission thus took the view that a situation of conflict of interest already existed in principle at the stage of the procedure for the award of the contract, even if that conflict had not yet materialised in terms of its consequences. It follows that the Commission correctly assessed Euphet's tender on the basis of the provisions of Article 94 and acted properly in excluding Euphet.

The Commission was correct to take the view, at the stage of the procedure to award the contract, that there was a conflict of interest which could compromise the impartial and objective performance of the framework contract by Euphet.

The Commission was also correct to infer that 'Euphet [did] not acknowledge the fact that a number of the consortium partners [had] a large involvement in the implementation of the Public Health programme' and that, 'considering the great risk of [conflict of interest], a detailed and concrete explanation would have been required to provide a sufficient level of understanding of how the [conflict of interest] issue should be addressed and the risks should be eliminated'.

Moreover, the Court held that the Commission did carry out a specific check on the tender submitted by Euphet before deciding to exclude it from the contract.

Deloitte also failed in its argument that Euphet was the victim of automatic exclusion since a concrete assessment of the existence of a conflict of interest was possible only after award of the contract — and, more particularly, at the time when a specific contract is concluded in performance of the framework contract. The Court held that the Commission was not required under the specific rules applicable to this competition to request additional information.

1.3 Intrasoft

Case T-403/12

The European Commission held a competition to procure a service provider to assist Serbia to modernise its customs system, a project known as "EuropeAid/131367". The tendering procedure was conducted by the Commission, not pursuant to the procurement directives but under the [Financial Regulation]. The Financial Regulations and the tender documents both precluded award of the contract to a candidate which was the subject of a conflict of interest. In the course of that procedure, Intrasoft asked whether a firm intending to tender would be considered to have a conflict of interests because of its participation in the implementation, in a previous tendering procedure known as ‘EuropeAid/128180'. The Commission replied and stated that there would be no conflict of interest [given that] EuropeAid/128180 did not include preparation of the tender documentation for Europe/Aid/131367. Intrasoft duly submitted its application only to be subsequently notified by the Commission that there was a conflict of interest: the contract could not be awarded to Intrasoft because it had (arising from the EuropeAid/128180 project) privileged access to documents constituting an integral part of the tendering procedure and which constituted the starting point for determining the activities covered by the new contract; these facts only became apparent to the Commission upon reviewing the Intrasoft application.

Infrasoft argued, inter alia, that the exclusion of a tenderer must be based on the existence of an actual risk of a conflict of interests, substantiated by the specific circumstances of the case, while leaving the interested party the possibility of showing that there was no conflict of interests. It claimed that it was not involved in drafting the terms of reference or the project-related requirements for EuropeAid/131367 and did not have in its possession any more information than that available to all the tenderers. The fact that it had taken part in drawing up a number of technical documents in connection with another tendering procedure could not, in itself, constitute a sufficient reason to draw the unfavourable inference that the applicant was subject to a conflict of interest. Further, it considered that it is apparent from the Court's case-law (*Fabricom*) that the experience acquired under a previous contract is not

capable of distorting competition, because if that were the case most tenderers would have to be excluded from new tendering procedures on that ground.

The Commission claimed that a certain number of documents drafted by the applicant under the previous contract were joined to the terms of reference for the new tendering procedure. These documents 'constitute[d] the basis for an important portion of the activities due under the on-going tender'. The Commission did not dispute that the documents were made available to all potential candidates. However, it contended that the applicant had access to them before the other tenderers and thus enjoyed a competitive advantage. Furthermore, while not claiming that this was actually the situation in the present case, the Commission suggested that, having participated in their drafting, the applicant would have been in a position to draft the documents in a way that gave it a competitive advantage for the procurement contract at issue. The Commission claimed that *Fabricom* supported its position, namely that a person who has participated in certain preparatory works may be at an advantage when formulating its tender on account of the information concerning the public contract in question which he has received when carrying out that work.

The Court pointed out:

(a) the Financial Regulation permitted exclusion of a tenderer from a procurement procedure only if the situation of conflict of interest to which it refers was real and not hypothetical. "*That does not mean that a risk of conflict of interest is not sufficient to exclude a tender. In principle, it is only when the contract is performed that a conflict of interest can become real. Before conclusion of the contract, a conflict of interest can be only potential and Article 94 of the Financial Regulation therefore implies an assessment in terms of risk. That risk must actually be found to exist, following a specific assessment of the tender and the tenderer's situation, for that tenderer to be excluded from the procedure. The mere possibility of a conflict of interest cannot suffice for that purpose*."

(b) the concept of a conflict of interests is objective in nature and, in order to establish it, it is appropriate to disregard the intentions of those concerned, in particular whether they acted in good faith (see *Nexans France v Entreprise commune Fusion for Energy*, T 415/10).

(c) 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 (*Nexans France v Entreprise*).

(d) the reasoning in terms of risk of conflict of interests requires a concrete assessment, first, of the tender and, second, of the situation of the tenderer concerned; what is required is an objective analysis, without taking into account the applicant's intentions, whether the risk of a conflict of interests stems from the applicant's situation and from a concrete assessment of its tender.

(e) the conflict of interests must be of an objective nature, requiring the intentions of the interested party to be disregarded and that the mere possibility of a conflict of

interests cannot suffice, for that risk must actually be found to exist in the case in point. Consequently, the risk of a conflict of interests cannot be based on the simple presumption that at the time of the drafting of the documents in question, in the context of another call for tenders, the applicant was aware of the contracting authority's intention to publish a new invitation to tender and of its intention to select the documents drafted by the consortium of which it was part as the basis for some of the activities concerned in the public contract referred to in the new call for tenders.

(f) the risk of a conflict of interests exists for the person responsible for the preparatory work for a public contract who participates in that same contract. It should be noted that, when the Court of Justice used the expression 'preparatory work' at paragraph 29 of the judgment in *Fabricom*, it was referring to work carried out in the context of one and the same call for tenders.

(g) The Commission was not entitled to treat the preparation of documents drafted in the course of another call for tenders in the same way as preparatory works under the tendering procedure at issue, unless to show objectively and specifically, first, that those documents had been prepared in the light of the tendering procedure at issue and, secondly, that they had given the applicant a real advantage.

(h) it has not been established that the applicant was in possession of more information than the other tenderers, which would have amounted to a breach of the principles of equal treatment and of transparency. The risk of a conflict of interests has not been objectively established and the rejection of the bid of the consortium of which the applicant was part was not justified.

1.4 Nexans France v European Joint Undertaking for ITER and the Development of Fusion Energy

Case T-415/10

Complaint about the presence on the awarding authority's Governing Board of a person employed by ENEA, which was a member of the consortium to be awarded the contract. It was alleged that ENEA influenced to its advantage the conditions of the call for tenders. Specifically, it was alleged that Mr M. and Mr P., both agents of ENEA and members of the Executive Committee and the Governing Board of the awarding authority, were involved in preparing the call for tenders and thus had the opportunity to influence the determination conditions imposed on candidates in a manner favourable to ENEA's candidature. Furthermore, the technical specification was sent to ENEA for validation before the call for tenders was launched. Finally, an agent of ENEA had access, during a visit to Nexans Korea's plant, to confidential information relating to the applicant.

Certain principles regarding conflict of interest were recounted by the Court.

(a) The fact that a tenderer, even though he has no intention of doing so, is capable of influencing the conditions of a call for tenders in a manner favourable to himself constitutes a situation of a conflict of interests. In that regard, the conflict of interests constitutes a breach of the equal treatment of candidates and of the equal opportunities for tenderers. See also Fabricom and *AFCon Management Consultants*.

(b) The concept of a conflict of interests is objective in nature and, in order to characterise it, it is appropriate to disregard the intentions of those concerned, in

particular whether they acted in good faith (See also *P Ismeri Europa v Court of Auditors*).

(c) Awarding authorities are under no 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 risk of practices likely to distort competition between tenderers (see *Fabricom*, and Case C-538/07 *Assitur* and Case C-376/08 *Serrantoni*).

(d) The exclusion of a tenderer in a situation of 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 (Case T-345/03 *Evropaïki Dynamiki v Commission*; see also *Assitur*, *Serrantoni*).

The authority claimed that the persons in question were not representing the interests of ENEA in their capacity as members of the Governing Board, but were there as recognised industry experts. The Court held the fact that it is not in their capacity as agents of ENEA that those qualified individuals are members of the governing bodies of the authority is not in itself capable of preventing them from using their situation within the authority to serve the interests of ENEA. Rather, one must examine the actual role that those agents of ENEA, and also ENEA itself, may have played in the preparation of the tender documents and, in particular, in the definition of the technical specification. The court found thateclara the boards and committees which the individuals in question participated in had not played any role in the preparation of the tender documentation. The Court also found that ENEA was unable to derive any advantage from the fact that the Technical Specification was submitted to it before the call for tenders was launched or that it was able to influence the determination of the Technical Specification in a manner that would subsequently have been favourable to its interests. The Technical Specification proposed by ENEA had ultimately not been accepted and any prior knowledge that ENEA had been able to gain from its involvement, could not have the effect to securing a comparative advantage for ENEA. Finally, it was not proven how the confidential information obtained by an expert of ENEA during a visit to Nexans Korea's plant may have had an impact on the preparation of the tender documentation. The applicant's complaints on these grounds were all dismissed.

1.5 Communicaid Group v European Commission

Case T-4/13

Communicaid complained that an expert who had been employed by the European Commission in the months prior to publication of the contract notice at issue and who had participated on a tender evaluation committee in a similar award procedure was now employed by the successful tenderer, and had played a role in the preparation of the latter's tenders. The expert in question had previously contacted Communicaid and the successful tenderer and claimed that he was in a position to procure the contract for whichever candidate would employ him; he was subsequently hired by the successful tenderer. Communicaid was later approached by the expert who made it known that he had enabled the successful tenderer to win the majority of the lots in the competition as a result of the expertise and experience he had acquired during his secondment to the Commission and in his capacity as a member of an evaluation committee during a previous tendering procedure launched by the Court of Auditors concerning very similar language training services. Communicaid complained that the successful tenderer obtained an unfair advantage and the Commission infringed the

principles of transparency, non-discrimination and equal treatment and breached the Financial Regulation in awarding contracts to the successful tenderer.

The Court held that (i) the Commission could not have breached the principle of transparency as it had not been proved that the Commission was aware of the recruitment of the expert by the successful tenderer; (ii) there was no evidence that the expert, before leaving the Commission and being hired by the successful tenderer, had drafted the call for tenders at issue or had participated in its drafting, thus giving his new employer an advantage over Communicaid that was liable to infringe the principle of equal treatment; (iii) it was not proved the former expert had participated in the drafting of the successful tenders; and (iv) it was not proved that the successful tenderer enjoyed an unfair advantage because its new employee was a member of a tender evaluation committee in a previous, similar procurement procedure.

1.6 European Dynamics Luxembourg SA and Others v European Union Intellectual Property Office

Case T 556/11

The contract to be awarded by EUIPO covered the supply of IT services. ED was unsuccessful and alleged, inter alia, that the awarding authority was in breach of the Financial Regulations and the principle of equal treatment because second and third-ranking successful tenderers ought, in their view, to have been excluded from the tendering procedure owing to a conflict of interest and also to the fact that the third successful tenderer, the Drasis consortium, included a party which had been involved in drawing up the tender specifications.

EUIPO contended that a potential conflict of interest may arise where a tenderer has participated in the preparation of the call for tenders and, secondly, in such a case, the tenderer concerned must be given the opportunity to explain why, in the particular circumstances of the case, that potential conflict of interest did not confer any undue competitive advantage on him. In any event, the conflict of interest must be real and not hypothetical and the existence of the risk of it materialising must be established following a specific assessment of the tender and of the tenderer's situation. The existence of a potential conflict of interest on the ground that a subcontractor took part in drafting the tender specifications is not sufficient to exclude that tenderer. In the present case, EUIPO took account of the alleged conflict of interest. When EUIPO noted that PricewaterhouseCoopers (PWC) Spain was a subcontractor of the Drasis consortium, it immediately sought clarification from the latter. In response to that request, Drasis firstly explained that only PWC UK and PWC Belgium had taken part in the preparation of the tender specifications and that there was no structural link between them, on the one hand, and PWC Spain, on the other. Secondly, pursuant to the duty of confidentiality by which PWC UK and PWC Belgium were bound in the context of the provision of services to EUIPO for the drafting of the tender specifications, they did not disclose any relevant information to the other companies in the same group. Thirdly, Drasis stated that it had contacted PWC Spain only six days before the deadline for the submission of tenders, and its letter of 15 April 2011 confirmed the fact that PWC Spain had not been involved in the preparation, drafting, pricing or sign-off of the technical tender submitted by the consortium. In the light of that information, EUIPO then checked whether PWC Spain's involvement in the Drasis consortium could have conferred an unfair competitive advantage on that consortium vis-à-vis the other tenderers, and concluded that this was not the case. EUIPO therefore submitted to the Court that it acted in compliance with the tender specifications and the applicable rules and that it correctly found that there was no valid reason to exclude the Drasis consortium from the tendering procedure.

The Court found that PWC UK and PWC Belgium, companies fully controlled by PWC International Ltd, had participated in the preparation of the tender specifications of the tendering procedure and that, on the other hand, PWC Spain, another subsidiary of PWC International, was part of the Drasis consortium, the third successful tenderer. The consortium had invited PWC Spain to take part in the tendering procedure as a subcontractor only six days before the deadline for the submission of the tenders.

The existence of structural links between two companies, one of which took part in the drafting of the tender specifications and the other took part in the tendering procedure for the public contract in question, is, in principle, capable of causing such a conflict of interest. However, the risk of a conflict of interest in the light of that case-law appears to be less significant when, as in the present case, the company or companies responsible for the preparation of the tender specifications are not themselves part of the tenderer consortium, but are merely members of the same group of undertakings as that to which the company that is a member of the consortium also belongs. The Court found that 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.

The mere finding of a relationship of control between PWC International and its various subsidiaries is not sufficient for the contracting authority to be able automatically to exclude one of those companies from the tendering procedure, without checking whether that relationship actually impacted on its conduct in the context of the present procedure. The same also applies to the finding that the implementation of certain preparatory work by a company belonging to a group of undertakings, another company of which is taking part, as a member of a tendering consortium, in the tendering procedure, since the latter company must be allowed to demonstrate that that situation involves no risk whatsoever for competition between tenderers (*Fabricom*, *Nexans*).

By contrast, the existence of a conflict of interest must lead the contracting authority to exclude the tenderer concerned, where that approach is the only measure available to avoid an infringement of the principles of equal treatment and transparency, which are binding in any procedure for the award of a public contract, that is to say, that no less restrictive measures exist in order to ensure compliance with those principles. It must be stated that a conflict of interest is, objectively and in itself, a serious irregularity without there being any need to qualify it by having regard to the intentions of the parties concerned and whether they were acting in good or bad faith.

A second allegation was that there was a conflict of interest in relation to the Unisys consortium. It was contended that that consortium was in a position of conflict of interest due to its position on another framework and that this was prohibited by Article 94 of the General Financial Regulation. It was alleged that the contractor under framework contract AO/021/10 was to participate in the preparation of the tender specifications and to review the execution of the implementing contracts by the contractor under framework contract AO/029/10.

The Court noted that the second successful tenderer, the Unisys consortium, in the context of tendering procedure AO/029/10, is also the first successful tenderer and contractor under framework contract AO/021/10 under which it is responsible for providing external services regarding program and project management in the field of information technology and for providing technical advice on all types of information systems in all fields of technology. By contrast, tendering procedure AO/029/10 — the subject of the present dispute — related to ‘software development and maintenance services' with respect to the supply to EUIPO of IT

services for prototyping, analysis, design, graphic design, development, testing and installation of information systems.

However, at the time of the expiry of the deadline for submission under tendering procedure AO/029/10, tendering procedure for AO/021/10 was still ongoing and no contract had been awarded for same. Since, at that stage, there was not yet any 'valid contract' between the Unisys consortium and EUIPO the alleged conflict of interest was still uncertain and hypothetical (see, Deloitte Business Advisory v Commission). The case-law cited requires the purported conflict of interest to have affected the timing or outcome of the tendering procedure. Given the overlap in time between the two tendering procedures, however, it was impossible to conclude that the Unisys consortium could have derived any benefit from one procedure that assisted it with the other. .

It followed that it was not possible for a conflict of interest to have had any impact on the conduct or outcome of tendering procedure AO/029/10, to have distorted competition between the tenderers or to have benefited the Unisys consortium to the detriment of the complainant.

1.7 European Ombudsman

Case 1717/2010/ANA

The EU Delegation in an unspecified Asian country published a service procurement notice with the objective of providing Technical Assistance to a Europeaid Programme ('TAP'). The complainant argued, inter alia, that another tenderer was proposing to use an expert who had been involved in the preparatory stages and formulation of the TAP. It argued that this should have led to the exclusion both of the expert and of the tenderer from the tender procedure. In response to the complaint the Commission provided all tenderers with a 'TAP Report' which analysed in detail the background, aims, objectives and actions to be undertaken. The complainant argued that because the expert had been involved in the formulation of the TAP Report, the tenderer ought to have been excluded from the competition and it was insufficient to provide this report to other tenderers two weeks prior to the tender deadline.

The Ombudsman recalled that it he had previously held that "if an expert who carried out preparatory research or work relating to a public contract is subsequently employed by a firm participating in the tender for that contract, this could give that firm an advantage when formulating its bid. The relevant expert may have additional information or experience from carrying out such preparatory work that would not be available to other tenderers. This could also lead to a conflict of interest to the extent that, even unintentionally, he/she might influence the conditions imposed upon the contract in a manner favourable to him/her. This in itself could distort competition"[18]. The Commission argued that the expert's contribution to the TAP Report was limited, that the TAP Report did not contain essential information about the tender in question that was not included in the Terms of Reference, and that the TAP Report, which was in any event in the public domain, was sent to all tenderers simultaneously, allowing them sufficient time to take it into account in the preparation of their bids. The Ombudsman considered that the arguments put forward by the Commission to explain its conclusion that there was no conflict of interest on the part of the Tenderer that would have made it necessary to exclude the latter from the tender in question were reasonable and it found that no instance of maladministration occurred.

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18 Decision of the European Ombudsman closing his inquiry into complaint 2486/2008/MF against the European Commission

Case 1005/2011/MMN

This concerned a tender procedure for the provision of technical assistance and training to the Ministry of Agriculture, Food and Consumer Protection and to the National Food Authority in Albania, as conducted under the Financial Regulation[19]. It was alleged that an employee (Mr P) of the successful tenderer participated in the drafting of the Terms of Reference of the relevant public tender

The Commission argued that there was no conflict of interest. Mr P had merely been asked to provide some background information for sections on 'Current state of affairs in the relevant sector' and 'Related programmes and other donor activities' of the Terms of Reference. The Commission added that neither the successful tenderer nor any of its experts have access to other parts of the Terms of Reference. The Commission further noted that the aforementioned sections were generic in nature, and the information therein was not confidential and was accessible to the public. Mr P had been asked to provide information for these sections because he was well-placed to know the latest developments in Albania.

The Ombudsman concluded that the Commission had failed properly to handle the issue of Mr P's involvement, which gave rise to an apparent conflict of interest. This constituted an instance of maladministration. Insufficient evidence was provided to show that the Mr P's involvement did not give rise to unfair competition. The Commission should have investigated of its own motion Mr P's exact involvement in the drafting of the terms of reference. Moreover, the fact that the request for Mr P's input was expressed orally made it very difficult to ascertain the information which may have been disclosed to him; the Ombudsman considered that principles of good administration require that there should be a written record of such a request made by a Commission staff member. The Commission should not have accepted the declarations of lack of conflict of interest made by the tenderer and Mr P without questioning their validity. In any event, even if the account of events presented by the Commission was accurate, Mr P's involvement would nevertheless have given rise to an apparent conflict of interest (as defined in the OECD Guidelines) and this constituted an instance of maladministration.

Part 3: Organisational Conflict

Assitur

Case C 538/07

The court held that Italian laws which allowed exclusion of bidders where there was a relationship of control between them were contrary to EU law. "Such legislation, which is based on an irrebuttable presumption that tenders submitted for the same contract by affiliated undertakings will necessarily have been influenced by one another, breaches the principle of proportionality in that it does not allow those undertakings an opportunity to demonstrate that, in their case, there is no real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers."

19 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002

"the question whether the relationship of control at issue influenced the respective content of the tenders submitted by the undertakings concerned in the same public procurement procedure requires an examination and assessment of the facts which it is for the contracting authorities to carry out. A finding of such influence, in any form, is sufficient for those undertakings to be excluded from the procedure in question. However, a mere finding of a relationship of control between the undertakings concerned, by reason of ownership or the number of voting rights exercisable at ordinary shareholders' meetings is not sufficient for the contracting authority to automatically exclude those undertakings from the procedure for the award of the contract, without ascertaining whether such a relationship had a specific effect on their conduct in the course of that procedure."

Lloyds of London v Agenzia Regionale per la Protezione dell'Ambiente della Calabria (Arpacal) – 8 February 2018

Case c-144/17

Pursuant to Italian legislation which allowed contracting authorities to exclude tenderers if they appeared to be controlled by a "single decision making centre", Arpacal excluded two Lloyds syndicates from participating in a procurement for insurance services. This was on the basis that the tenders of each syndicate were signed off by the same Special Agent of Lloyds General Representative in Italy. Relying on case law (the relevant procurement Directive was 2004/18), the court held that any legislation/grounds for exclusion must be proportionate: "automatic exclusion of candidates or tenderers that are in a relationship of control or of association with other competitors [in national legislation] goes beyond that which is necessary to prevent collusive behaviour and, … constitutes an irrebuttable presumption of mutual interference in the respective tenders, for the same contract… Accordingly, it precludes the possibility for those candidates or tenderers of showing that their tenders are independent and is therefore contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders". So the fact that two bids are signed by the same individual is not sufficient to show that they were not drawn up independently.

The court went on to say – " … the Court has already held that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, ... Relationships between undertakings in the same group may in fact be governed by specific provisions such as to guarantee both independence and confidentiality in the drawing-up of tenders which may be submitted simultaneously by the undertakings in question in the same tendering procedure (*Assitur*, C 538/07)." This is in line with the Advocate General's opinion in case C-531/16 *Specializuotas Transportas* that, where a contracting authority is aware of the existence of links between tenderers, a high level of diligence is required – "the active role expected of it, as a guarantor of effective competition between tenderers, should normally lead it to make certain that the tenders submitted by those tenderers are separate."

Šiaulių regiono atliekų tvarkymo centras, 'Ecoservice projektai' UAB, formerly 'Specializuotas transportas' UAB, and interveners

Case C-531/16 EU:C:2018:324

A request for a preliminary ruling was made in proceedings concerning the award of a public service contract relating to the collection of communal waste and its transportation to the place of treatment. Tenderers A and B were subsidiaries of an entity which held 100% and

98.2%, respectively, of the shares of those undertakings. The boards of directors of tenderers A and B were made up of the same persons. Neither the applicable national legislation nor the procurement documents obliged tenderers to disclose links with other operators participating in the same tendering procedure, nor did they require the contracting authority to verify and assess those links. Following the commencement of proceedings in the Lithuanian courts challenging the contract award, the ECJ ruled that Article 2 of Directive 2004/18 meant that:

1.8 Failing any express legislative provision or specific condition in the procurement documents, related tenderers submitting separate offers in the same procedure were not obliged to disclose, on their own initiative, the links between them to the contracting authority.

1.9 The contracting authority, when it had evidence that called into question the autonomous and independent character of tenders, was obliged to verify whether the offers were in fact autonomous and independent. If this proved not to be the case, Article 2 precluded the award of the contract to the tenderers having submitted those tenders.

The questions in the standard selection questionnaire relating to persons of significant control and conflicts of interest should assist contracting authorities to identify the issues that arose in this case. However, it is recommended that authorities insert provisions within the procurement documents designed to bring such issues to their attention. Given the virtually identical wording in Article 2 of Directive 2004/18 and Article 18 of Directive 2014/24, this ruling will have a bearing on procurements conducted under the 2014 Directive. In that connection, contracting authorities should note the obligation upon them to verify whether offers are in fact autonomous and independent when they have evidence to the contrary.

Serrantoni Srl v Comune di Milano

Case C-376/08

The case (Directive 2004/18/EU) concerned an Italian act in which consortia were automatically excluded from participating in the procedure for the award of a public contract and imposed a criminal penalty if the participants in a consortium also participated individually in the tender procedure.

The European Court of Justice decided that "(…) a rule requiring automatic exclusion, such as the rule at issue in the main proceedings, would not in any event be compatible with the principle of proportionality.", cf. para 38. "A rule of that kind involves an irrebuttable presumption of mutual interference (…) even where the consortium in question has not participated in the procedure on behalf and in the interests of those companies, without either the consortium or the companies concerned being afforded the possibility of showing that their tenders were drawn up completely independently and that there is therefore no risk of influencing competition between tenderers.", cf. para 39

The European Court of Justice therefore decided that a national rule providing automatic exclusion and imposition of criminal penalties against both the consortium and the companies that are members of the consortium was contrary to Community law if the latter submitted competing bids to the association in the same tender procedure

Part 4: Strategic Conflict

No case law of which we are aware at this time.

[1] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002.

[2] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002.