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Public Procurement
Analysis



Conflicts of Interest under EU procurement law

What are conflicts of interest?

A concept in *administrative law*:

“a set of circumstances that **creates a risk** that professional judgment or actions regarding a primary interest will be **unduly influenced** by a secondary interest.” (European Parliament, 2013)

- Unlike fraud, misrepresentation etc, the concept of conflict of interest does not necessarily imply any wrongdoing on the part of the individual or organisation
- But may be an ‘indicator, precursor or result of corruption’
- Concept covers both **perceived** and **actual** conflicts of interest
- May affect procurement process, delivery of the contract itself, or both

Examples

Contracting Authority side	Economic Operator side
<p>A member of the evaluation panel owns shares in a company which is bidding for a contract</p>	<p>The company owns property next to the planned site for development under the public contract, the value will be affected</p>
<p>A member of the evaluation panel is related to the director of a bidding company</p>	<p>A company has clients or investors with opposing interests to that of the contracting authority</p>
<p>The person drafting the specifications is a former employee of a bidding company (?)</p>	<p>A subcontractor is participating in more than one bid, and has access to sensitive details about them (?)</p>

Directive 2014/24/EU provisions

Recital 16:

“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 interest.”

Article 24:

“Member States shall ensure that contracting authorities 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...”

Directive 2014/24/EU provisions

(Art 24 continued)

“... The concept of conflicts of interest shall at least cover any situation where 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 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.”

Directive 2014/24/EU provisions

Article 57(4)(e) Exclusion grounds

“Contracting authorities may exclude or may be required by Member States to 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 Article 24 cannot be effectively remedied by other less intrusive measures;”

Subject to ability of operators to ‘self-clean’:

“57(6.) Any economic operator ... 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. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.”

Directive 2014/24/EU provisions

Article 58(4) Selection criteria – Technical and professional ability

“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 provides broader scope than Article 57 to take conflicts of interest into account and, if necessary, exclude a bidder. It is not subject to self-cleaning/limitation periods, but is subject to general proportionality principle*

AFCOn case (T-160/03)

- Agricultural consultancy contract awarded by EU Commission
- Member of evaluation panel was discovered, after evaluation of bids, to be an employee of a subsidiary of winning bidder
- Tenders re-evaluated, new panel reached the same result
- AFCOn, an unsuccessful bidder, challenged the failure to fully investigate the links between the member and bidder
- CJEU held that Commission was liable for damages as the failure to investigate was a manifest error of assessment

N.B. Evaluation panel members had all signed Col declarations

eVigilo case (C-538/13)

- Lithuanian fire & rescue service awarded contract for a new emergency warning system
- eVigilo, an unsuccessful tenderer, alleged that members of evaluation panel were part of same research group at a university as employees of the successful tenderer
- CJEU found these factors required thorough examination; the claimant was not obliged to provide tangible proof of bias
- Effect of any actual or perceived bias was to be determined under national law (this may change under 2014/24/EU?)
- Case endorses an **active** approach to detecting conflicts of interest in procurement procedures, not just passive

How to deal with Col?

Contracting authority side:

- Members of evaluation panel, and anyone else involved in the procedure, must sign a **declaration** regarding conflicts of interest
- This must be subject to a duty to keep information **up-to-date**, i.e. report any changes in circumstances
- If any conflicts are reported/discovered, the person involved should be **removed from the process**. It may also be necessary to **cancel** or **re-run** parts of the procedure
- It should be possible for bidders or others to **report** potential conflicts of interest. To promote reporting, make clear that this will be treated in a **proportionate manner** and not result in unfair sanctions

How to deal with Col?

Economic operator side:

- Bidders sign a **declaration** at the beginning of the procedure that they will report any actual or potential conflicts. Include a definition and examples of what is meant by this.
- Declaration must be kept **up-to-date** and any changes reported to authority, **including after contract award**
- It should be possible for potential conflicts to be reported **without excessive penalties/sanctions**
- Consider how to address any conflicts based on the **specific circumstances**, do not apply a blanket approach (e.g. “conflicts of interest will automatically lead to disqualification”)

Thank you.
Questions/Discussions



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