



Prior involvement, advantage in knowledge and other obstacles – are public procurement procedures really fair?

7 April 2017, Lausanne Government Contracts
Public Procurement Law and Contract Law

Carl Fläring

General rule framework

- Article 41 – prior involvement of candidates or tenderers
 - Appropriate measures to ensure that competition is not distorted
 - Mandatory communication of relevant information exchanged
 - Adequate time limits

General rule framework

- Article 41 – prior involvement of candidates or tenderers
 - Exclusion - only if no other way to observe the principle of equal treatment
 - Opportunity for candidates or tenderers to prove that their involvement is not capable of distorting competition
 - Measures taken, to be documented

General rule framework

- General rule – prior involvement allowed
- Note – not only prior involvement concerning e.g. design
 - *C-538/13 eVigilo* – conflict of interests
 - Preliminary market consultations

Implications

- Positive implications
 - Increased number of possible tenderers
 - Possibly less litigation
 - Mandatory communication of relevant information exchanged - competing tenderers may raise issues

Implications

- Difficulties
 - Way of communication unregulated
 - Other intangible factors that affect the principle of equal treatment

When competition is distorted

- Requirement specifications are adapted to the products of the consultant
- Competitive advantage by information on (e.g.) the contracting authority's requirements and budget
- Prior involvement entails other inappropriate competitive advantage

Jurisprudence

- C-538/13 *eVigilo*
- C-21/03 and C-34/03 *Fabricom*

Thank you

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AIJA Lausanne: Prior involvement & advantage in knowledge

**Comments on
PRACTICAL CONSIDERATIONS
AND EXAMPLES OF DEVELOPMENTS**

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Typical challenges in interpreting line of inappropriate competitive advantage

- Effects of a small market (like Finland)
 - “Usual suspects” in design and construction phases
 - ... and possibly moving from advisory of contracting authority to partnering with tenderer/contractor
- Firm level vs. personal level of involvement
- *Where's the money* – strict interpretation affecting willingness to participate vs. ensuring competition

Typical challenges (continued)

- Practical considerations in bringing all candidates to same level of knowledge
 - General involvement not an issue
 - ... vs. mitigating advantage of in-depth knowledge concerning technical specifications (or first hand knowledge of contracting authority's preferences in competitive dialogue/alternative tenders)?

Typical challenges (continued)

- How much of a prior involvement advantage can be compensated by contracting authority's diligence
 - Timing of procedure → moving on to construction phase/procurement thereof only as and when planning/design phase on an “objectively defined” level
 - Carefully prepared, thorough invitation to tender material
 - Transparent discussion and communications with candidates

Examples of developments in construction field

- Alliance contracting and integrated project delivery becoming increasingly popular
 - Again limited pool of designers/consultants and capable contractors
 - Object of procurement very broadly defined in beginning
 - Whole purpose of contracting model to choose partners early
- Heavy use of market dialogue, tying into mitigation of prior knowledge of certain professional consultants

Thank you

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Prior Involvement

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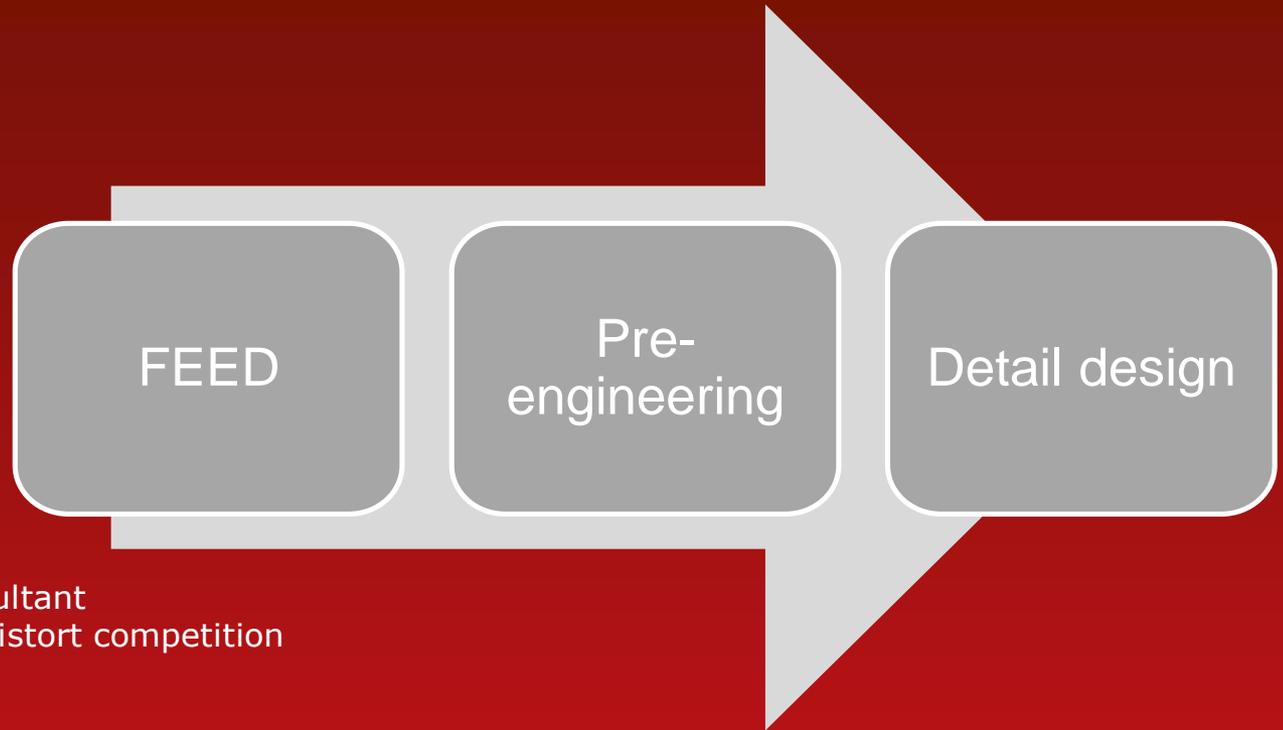
Mads Fuglesang
Advokatfirmaet Selmer, Norway

When would prior involvement be an issue?

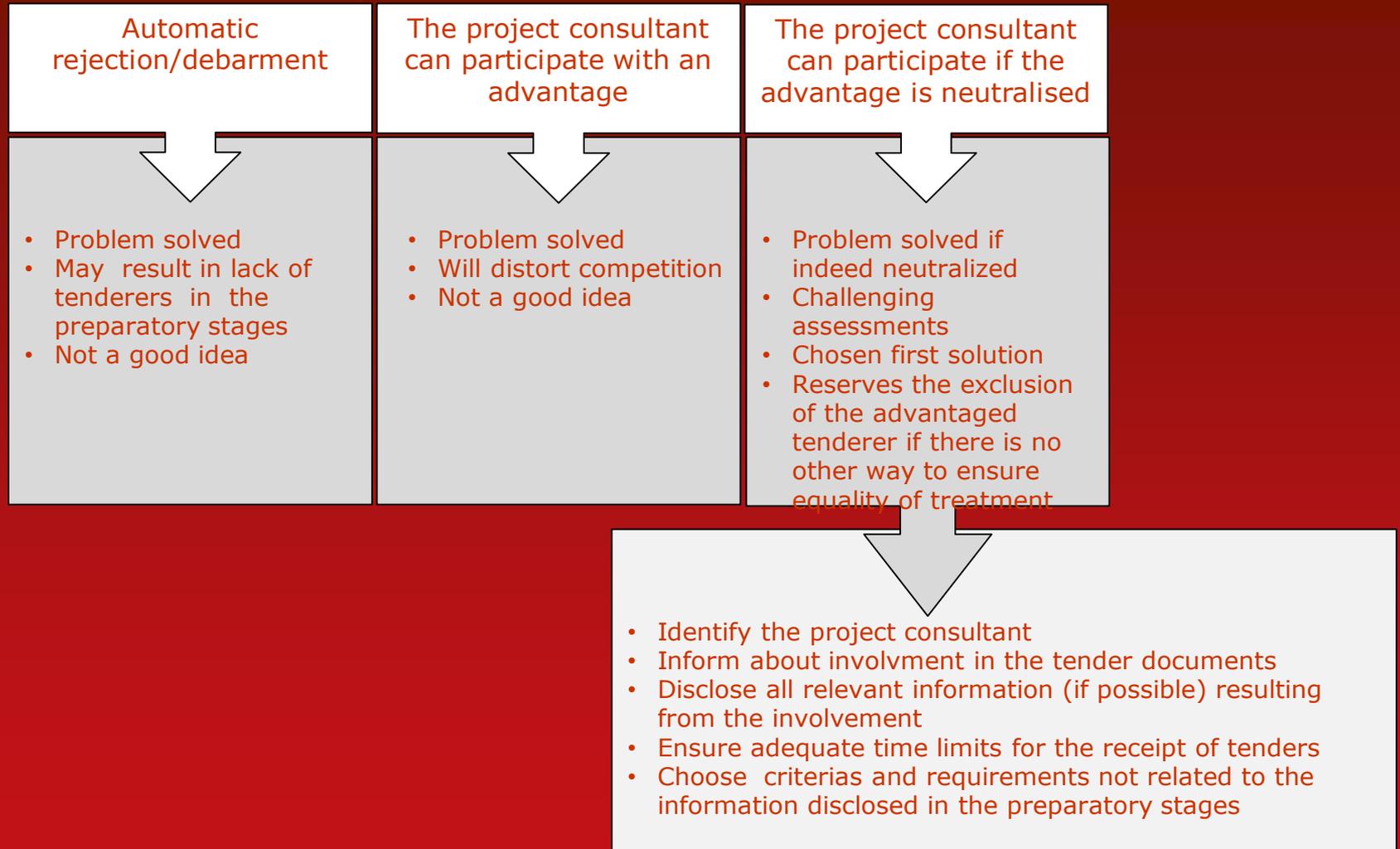
Customer dependent on project consultants for a procurement process

Consultants also want to participate in subsequent stages—this is where the money lies!

The information/experience acquired may give the consultant an advantage which could distort competition



How could prior involvement be handled?



Even though it is the customer's obligation to ensure that potential advantages are neutralised, it is the project consultant who will face the consequences if the client does not succeed.

Conflict of interest or knowledge advantages that will distort competition leads to disqualification of the bidder



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An Example From the Far North!



The municipality of Gjøvik conducted a tender procedure for the engagement of a group for i.a. pre and detail engineering in relation to the refurbishment and rebuilding of the city hall.

Advantage in knowledge and conflict of interest for one of the bidders?

- One of the tenderers was a local architect
- The firm had worked for the municipality on the project for the last **eight years** with different type of consultant services related to the refurbishment
- The firm had been awarded the contract as **project manager** throughout the refurbishment process
- Also been awarded the contract as **construction manager**
- Participated in the tender procedure and was qualified and subsequently **awarded the contract.**

- The firm had worked closely with the municipal administration
- Held several meetings with the different departments
- Gathered basic information for the project,
- Made sketches and written strategy reports, that were later enclosed as part of the tender documents.



The municipality's measures to neutralise the advantage

- Awareness of the consultant: The name of the of the project consultant and its roles were stated in the tender documents
- The advantage in knowledge: The reports and documentation prepared by the architect were handed out to the bidders. However, important parts of the documentation package were not published before after the PQ phase, just days before deadline for submitting the tenders.
- The time advantage: The municipality chose to use the minimum time limits set out in the Norwegian Public procurement Regulations - compensated for the eight year time advantage?

- Two tenderers filed complaints - first directly to the municipality and subsequently to the Norwegian Complaint Board for Public Procurements.
- Stated that the bidder had to be disqualified:
 - the prior involvement in the project had given the tenderer awarded the contract an advantage that could not be neutralized.
 - In addition there was a conflict of interest – buying services from itself

Not an advantage that could distort competition?

KOFA:

- Decisive factor: whether the consultant's prior involvement had given a clear competitive advantage which could not be neutralised before the competition was finished
- Not sufficient to assess how the prior involvement looks “from the outside”
- Concrete assessment of the prior involvements’ actual impact on the competition assessed in retrospect
- The plaintiffs could not prove that the architect was better suited to answer the price form than the other bidders
- The probability for the exercise of an option was dependant of work still not carried out
- The knowledge about the project and the scope for the refurbishment the supplier had acquired by drafting the tender documents represented an advantage. However, this advantage had been neutralised by the disclosure of the documents to the tenderers.

Lessons learned

The threshold for disqualifying tenderers due to prior involvement is high.

The following circumstances may lead to rejection:

- Where a project consultant to a customer that participate in the subsequent competition assists the customer with evaluation of the tenders
- Where a project consultant assists the customer with writing the tender documents and sets qualification criteria/minimum requirements and/or award criteria that give the project consultant a competitive advantage.
- Where a project consultant gets access to relevant information for the subsequent tender competition that are not communicated and shared with the other bidders, or is shared but too late in the process.
- In Norway suppliers should not fear prior involvement!

Thank you

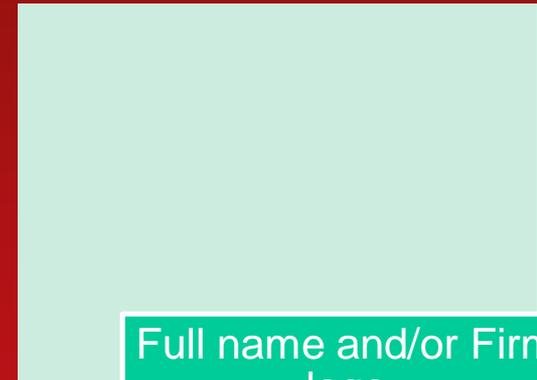
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