
Conflicts of interests and tenderers'
prior involvement in the
preparation of a procurement

Johanna Sammalmaa

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*Johanna Saammalma**

1. Introduction

The aim of EU public procurement legislation is to open Member States' public procurement markets to competition. EU public procurement directives and the principles of equal treatment and transparency aim at achieving this end notably by making sure tenderers have equal opportunities to participate in contract awards across the EU.¹ In an ideal situation, a contracting authority decides, in the absence of undue influence, what it wants to buy and on what conditions, tenderers submit their tenders on an equal competitive position, and the evaluation of tenders is conducted objectively. This ideal situation can be distorted in many ways. For example, where a person conducting a procurement process has a personal interest in the outcome or where a tenderer has been involved in the preparation of a procurement. In the Directive 2014/24², the first situation falls under conflict of interests regulated in Article 24 whereas the latter situation is covered by Articles 40 and 41 on market consultations and prior involvement in the preparation phase. Both sets of rules were adopted during the 2014 modernisation of EU public procurement directives to prevent the use of unsound practices in the award of public contracts.³

The purpose of this article is to discuss the rules and concepts of conflicts of interests by focusing on the conditions in which a violation of procurement legislation is established. In addition, the aim is to raise the following question: under which concept should situations, where a tenderer or a company connected to it has carried out most, if not all, planning work for the contract fall into? The question is related to my PhD research on tenderers prior involvement in the preparation phase, where I have limited my focus to Articles 40 and 41. However, during the research, in particular a case from the Supreme Administrative Court of Finland (KHO:2016:56) has brought forward the question of whether a tenderer's

* Doctoral candidate, LL.M Faculty of Law, University of Turku.

¹ Recital 1 of Procurement Directive 2014/24/EU, C-496/99 *Succhi di Frutta*, paragraph 110.

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (later Directive 2014/24).

³ Green Paper 2011, p. 48-49.

involvement in the preparation can be so extensive that it could be likened to a procurement service provider within the meaning of Article 24.⁴

2. Concepts and rules

2.1 Conflicts of interests

According to Article 24 (2) the concept of conflicts of interests shall at least cover any of the following situations:

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 and 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.

As can be seen, the definition of conflicts of interests is not exhaustive and it leaves room for Member States to enforce their own rules on situations that can be characterised as conflicts of interests. In Finland, the legislator decided not to include a provision equivalent to Article 24 in the Procurement Act⁵, which implements the Directive 2014/24. The reason was that disqualification grounds are already regulated in Administrative Procedure Act⁶ and they prevent disqualified officials from taking part in conducting procurement procedures.⁷

Regarding the personal scope, Article 24 (2) covers people who in one way or another take part in procurement procedure on a contracting authority's side.⁸ This includes staff members that are involved in the procurement procedure or who may influence the outcome of the procurement procedure, such as members of a contracting authority's management.⁹ It covers also outside experts that participate in the evaluation of tenders.¹⁰ Furthermore, Article 24 (2) covers at

⁴ The case will be discussed in section 3.

⁵ Laki julkisista hankinnoista ja käyttöoikeussopimuksista 1397/2016 (Act on Public Procurement and Concessions Contracts 1397/2016).

⁶ Hallintolaki 434/2003 (Administrative Procedure Act 434/2003).

⁷ HE 108/2016 vp., p. 186. See Sections 27 and 28 of Administrative Procedure Act 434/2003. On disqualification rules in Finnish public procurement context see Määttä – Voutilainen 2017, p. 302-328, Kuusikko 2018, p. 618-634.

⁸ Semple – Andrecka 2015, p. 181-182, Steinicke 2018, p. 363.

⁹ COM(2011) 896 final, p. 12.

¹⁰ See C-538/13 eVigilo, which concerned conflicts of interests of experts used by the contracting authority in the evaluation. See also Dragos 2021, p. 262.

least staff members of procurement service providers, who are public or private bodies who offer ancillary purchasing activities, such as technical infrastructure for the award of contracts, advice on the conduct or design of public procurement procedures, and preparation and management of procurement procedures on behalf and for the contracting authority.¹¹ Essentially, procurement service providers are different actors who offer consultation and expert services, such as PTCServices in Finland.¹²

Article 24 (2) covers at least above-mentioned people, when they “are involved in the conduct of the procurement procedure or may influence the outcome of that procedure”. This covers at least the formal competitive tendering process including evaluation of the tenders, and should also be interpreted to cover the preparation of procurements. In EU public procurement context, depending on the procurement procedure, many or all the requirements, criteria, and conditions that eventually determine the outcome of the competitive tendering are decided during the preparation phase.¹³ The words “at least” used in the definition of conflicts of interests also indicate that it is not to be interpreted restrictively. In comparison, in Finland, the disqualification rules in the Administrative Procedure Act cover also preparatory activities, which in procurement context means that disqualified persons cannot participate in the preparation of the procurement.¹⁴

According to Article 24 (2), a conflict of interests can exist when a person has a direct or indirect financial, economic, or other personal interest in the procurement. The Directive 2014/24 does not elaborate what these interests can be. Generally speaking, they refer to situations where a staff member has, for example, family ties to potential tenderers or where she through ownership or board membership has financial or economic interest in the procurement.¹⁵ What is central to the definition of conflicts of interests is that the interest is such that it could be *perceived to compromise the impartiality and independence of the person*¹⁶. The term “perceived” indicates that it is not necessary that the person actually behaves impartially; it is enough that the situation is such that can give an impression of impartiality.¹⁷ This interpretation finds also support from the Green Paper 2011, where the concept of conflicts of interests is defined as situations where people have competing interests “which could make it difficult

¹¹ Article 2 (1) (15) and (17) of Procurement Directive 2014/24/EU.

¹² HE 108/2016 vp., p. 81. Information on PTCServices Oy, see <https://ptcs.fi/>, 2.9.2024.

¹³ See Articles 27-31 on different procurement procedures Procurement Directive 2014/24/EU.

¹⁴ Määttä – Voutilainen 2017, p. 310, 318, Kuusikko 2018, p. 189–190, HE 108/2016 vp., p. 186.

¹⁵ See e.g. Priess 2002, p. 153–155, Steinicke 2018, p. 363–368, Dragos 2021, p. 263–267.

¹⁶ In Swedish, the formulation is as follows: “--- intresse som kan ses som komprometterande för dess opartiskhet och oavhängighet under upphandlingsförfarandet”, and in Finnish “---intressi, jonka voitaisiin nähdä vahingoittavan heidän puolueettomuuttaan ja riippumattomuuttaan hankintamennettelyssä”.

¹⁷ See also C-538/13 eVigilo, paragraph 47 and Steinicke 2018, p. 361–362.

for them to fulfil their duties fairly and impartially, and where a person is in a position to influence contracting authority's decision-making process in order to further his own interests".¹⁸

According to Green Paper 2011, conflicts of interests are a serious irregularity irrespective of the intentions of the parties concerned and they are to be addressed both to prevent corruption and to protect fair competition.¹⁹ According to Article 24 (1), Member States are obliged to 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.²⁰ The term appropriate measures refer to all possible means that contracting authorities can use under national law.²¹ In situations where conflicts of interest are suspected, contracting authorities should at least examine all relevant circumstances that have led to the adoption of a decision and request information and evidence from the parties.²² In case a conflict of interest is detected, a possible remedy is to remove the person from the task.²³ Article 57 (4) (e) of Directive 2014/24 also prescribes that contracting authorities can exclude an economic operator from the competitive tendering if a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures.²⁴

2.2 Tenderers' involvement in the preparation phase of a procurement

Contracting authorities across the EU have for a long time used tenderer's assistance in the preparation of procurements due to their lack of market knowledge.²⁵ In Directive 2014/24, this practice is referred to as preliminary market consultations. According to Article 40 contracting authorities can conduct market consultations before they launch a procurement procedure with a view to prepare the procurement and inform economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market

¹⁸ Green Paper 2011, p. 48-49.

¹⁹ Green Paper 2011, p. 48-49, T-277/97 *Iseri Europa Srl*, paragraph 123.

²⁰ This active role to detect, prevent, and identify conflicts of interests has also been established in case law, see e.g. T-160/03 *AFCOn*, paragraph 75, C-538/13 *eVigilo*, paragraph 43.

²¹ Recital 16 of Directive 2014/24/EU.

²² C-538/13 *eVigilo*, paragraph 44.

²³ Priess 2002, p. 157.

²⁴ In Finland, the possibility to exclude an economic operator in situations that involve conflicts of interests, has been included in Section 81 subsection 1 paragraph 7 of Procurement and Concessions Act 1397/2016.

²⁵ See e.g. Treumer 2007, p. 99.

participants.²⁶ The term “market consultations” is not defined in the Directive. The starting point is, thus, that contracting authorities can choose the way they wish to share and seek advice.

In practice, tenderers are involved in the preparation in several different ways. Contracting authorities at least in Finland arrange different kinds of dialogue events, such as information events, workshops, or private discussions with potential tenderers. Dialogue is also had via email, by using online platforms, and by inviting potential tenderers to present their solutions to a contracting authority. These dialogue events are typically constructed so that contracting authorities share information about the procurement plans and potential tenderers are asked to provide information about their solutions and views concerning the procurement.²⁷ Potential tenderers can also be involved in the preparation by commissioning them to carry out certain tasks relating to the preparation of a procurement, such as research, experiments, studies or development relating to a public contract²⁸ or to help prepare some or all procurement documents. For example, in a procurement of water treatment works relating to reconstruction of a swimming hall, a contracting authority had commissioned a company to formulate all the technical plans concerning the water treatment works.²⁹ Companies who are commissioned to carry out certain preparatory work are often referred to as planning consultants.³⁰

Since Articles 40 and 41 apply generally to situations where a potential tenderer is involved in the preparation of a procurement, they cover both situations where a company participates in different dialogue events, and where a company acts as a planning consultant.³¹ However, there are a few differences between these situations. Planning consultants are often remunerated for their services, which does not happen with different dialogue events. Planning consultants also usually carry out the planning work under a contract, which itself may have

²⁶ The possibility has also existed under the old directives, see joined cases C-21/03 and C-34/03 *Fabricom*.

²⁷ On different methods see e.g. HE 108/2016 vp., p. 163, Bergman et al. 2018, p. 31–37, Halonen – Sammalmaa 2017, p. 43–47, Holma – Sammalmaa 2018, p. 29–39, Voda – Jobse 2016, p. 182–184.

²⁸ Joined cases C-21/03 and C-34/03 *Fabricom*, paragraph 25.

²⁹ KHO 2019:85. See also case KHO 3063/2019, where a company had in a procurement concerning renovation of pool devices formulated plans, drawings, a document listing the parts that are needed for the pool device, and the work description and MAO 91/19, where a contracting authority had commissioned a company in a procurement of building of a skate park to formulate the structural design of the skate park, work plan, drawings of the general plan, and material catalogue.

³⁰ Mäkelä – Pöykkylä 2013, p. 10.

³¹ See e.g. joined cases C-21/03 and C-34/03 *Fabricom*, T-566/11 *European Dynamics*, paragraph 48. In Finland, situations that involve using tenderers as planning consultants have been decided by rules concerning tenderer's involvement in the preparation phase, see e.g. KHO:2019:85 and KHO 3063/2019. See also Steinicke 2018, p. 360.

been awarded in compliance with public procurement legislation.³² In dialogue events mentioned above, potential tenderers role is typically limited to sharing information and advice while the contracting authority decides how to use the information. By contrast, planning consultants can also be involved in formulating the requirements and criteria used in procurement documents. While in these situations the formal decision-making is in the hands of contracting authorities, planning consultants may *de facto* have considerable impact on what kind of requirements are set.³³

Unlike with conflicts of interests, the involvement of tenderers in the preparation of a procurement is not on its own considered an irregularity but a practice that enables contracting authorities to achieve better procurement outcomes.³⁴ However, it is recognised that such a practice can lead to violations of the principle of equal treatment. Market consultations involve a risk that a tenderer receives information that it can use to its advantage in the procurement process, more time to prepare its tender, or it is able to influence the procurement requirements to its advantage.³⁵ The possibility that a tenderer is able to influence procurement requirements in a way that favours it has been in CJEU's case law referred to as a situation that can give rise to "conflicts of interests".³⁶ However, conflicts of interests that arise in the context of market consultations are different than conflicts of interests defined in Article 24.³⁷

To prevent violations of the principles of equal treatment, Articles 40 and 41 introduce a few safeguards. First, Article 40 (2) prescribes that contracting authorities can use advice that they have received during market consultations provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency. Second, Article 41 sets a general requirement for contracting authorities to take appropriate measures to ensure that competition is not distorted when a tenderer or an undertaking related to it has advised the contracting authority. Such appropriate measures shall include the communication of relevant information exchanged during the preparation to other tenderers and the fixing of adequate time limits for the receipt of tenders. Third, Articles 41 (2) and 57 (4) (f) prescribe that contracting authorities can exclude an economic operator where a distortion of competition form the prior involvement of the economic operators

³² KHO 2019:85, KHO 3063/2019, MAO 91/19. See also Mäkelä – Pöykkylä 2013, p. 3-4.

³³ See e.g. case KHO:2016:56, which will be discussed in section 3. See also Mäkelä – Pöykkylä 2013, p. 3-4.

³⁴ COM(2011) 896 final, p. 12.

³⁵ Joined cases C-21/03 and C-34/03 *Fabricom*, paragraphs 29-30, Green Paper 2011, p. 48-49, 53, Priess 2002, p. 153.

³⁶ Joined cases C-21/03 and C-34/03 *Fabricom*, paragraph 30, T-415/10 *Nexans France*, paragraph 114.

³⁷ Steinicke 2018, p. 360-361.

cannot be remedied by other less intrusive measures. The economic operator has to be given the opportunity to prove that their involvement in the preparation was not capable of distorting competition.

3. Interrelationship of the two concepts

Both Article 24 and Articles 40 and 41 aim at protecting fair competition but from different standpoints.³⁸ While Article 24 focuses on conflicts of interests of people who for the contracting authority or for the procurement service provider, Articles 40 and 41 focus on undue influence that potential tenderers or companies connected to them can have on the procurement. Although the distinction between these two situations appears clear, it is not necessarily always straightforward. The difficulty arises because both concepts concern situations, where there is a risk that interests of a tenderer are taken into account in a way that favours them in the procurement procedure.

A typical example of a conflicts of interest is a situation where a person involved in the procurement procedure is related to a person, who owns a company who participates in the competitive tendering. The classification may be more difficult for example in a situation, where a person who holds a managerial position in the contracting authority also holds a board membership in a company that competes for the public contract. In legal literature, such a situation has been classified as conflicts of interests.³⁹ However, in T-415/10 *Nexans France*, a similar situation was approached from the point of view of tenderer's involvement in the preparation of a procurement. In the case, Mr P and Mr M had served as agents of one of the members of the tender consortium (ENEA) and as members of the Governing Board and the Executive Committee of the contracting authority as representatives of the Italian Republic (Mr P) and as a recognised expert in nuclear fusion (Mr M).⁴⁰ It could be argued that under Procurement Directive 2014/24 such a situation would fall under Article 24.

From a tenderer's point of view, what is important is that a tenderer can in both situations be excluded from the competitive tendering if there are no other less intrusive measures to remedy the conflict of interests or distortion of competition resulting from tenderer's involvement in the preparation.⁴¹ However, it appears that the conditions in which a tenderer can be excluded are different. As stated in

³⁸ Priess 2002, p. 153, Steinicke 2018, p. 360.

³⁹ See Priess 2002, p. 154-155.

⁴⁰ T-415/10 *Nexans France*, paragraphs 114, 116-121. The outcome was that there was no violation of the principle of equal treatment because it was revealed that neither the Governing Board nor the Executive Committee played any role in the preparation of the procurement documents, see paragraphs 118-121. It should be noted that the case did not concern interpretation of EU public procurement directives.

⁴¹ Article 57 (4) (e) and (f) and Article 41 (2) of Procurement Directive 2014/24/EU.

section 2.1, the concept of conflict of interests covers situations where there exist an interest that could be *perceived* to compromise impartiality and independence of a person involved in the procurement. The word “perceived” indicates that it is possible to establish a violation also in situations, where a person’s bias has not influenced the procurement procedure.

This interpretation finds support from the case C-538/13 *eVigilo*, which concerned conflicts of interests in a situation where three of the contracting authorities’ experts that participated in the evaluation of the tenders worked in the same place (Technical University of Kaunas) as the specialists named in the winning tenderer’s tender. In the case, the CJEU stated that an expert’s bias can be established solely on the basis of an objective situation and that the concept of bias, criteria for it, and its legal effects are defined by national law⁴². According to the CJEU, it was also for the national law to determine whether and to what extent 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 when they assess the lawfulness of the evaluation.⁴³ Thus, the decision in *eVigilo* also indicates that it is possible to establish a violation even if a conflict of interests has not been shown to influence the procurement process. From the point of view of excluding a tenderer, rules on conflict of interests and exclusion on grounds of conflict of interests seem to, thus, lead to a possibility to exclude the tenderer, who is involved in a conflict of interests, even when the conflict of interests has not influenced the procurement procedure.⁴⁴

This differs from the line of interpretation adopted in the context of tenderer’s involvement in the preparation phase. As stated in section 2.2, the practice of involving tenderers in the preparation of a procurement does not on its own violate the procurement rules. Based on the wording of Articles 41 and 57 (4) (f) a tenderer can only be excluded from the competitive tendering if its participation in the preparation has violated the principle of equal treatment. According to Article 41, exclusion is also possible if tenderer itself did not participate in the preparation but an undertaking connected to it did. The question of when a tenderer’s involvement in the preparation has violated the principle of equal treatment is dealt more closely in my PhD research. For the purpose of this article, it suffices to say that based on CJEU’s case law, violation cannot be established

⁴² The decision in *eVigilo* concerned application of Procurement Directive 2004/18, which did not include a provision on conflicts of interests, see C-538/13 *eVigilo*, paragraph 38. Under Procurement Directive 2014/24, Member States have to also take into consideration Article 24’s definition of conflicts of interests, which still leaves Member States margin of discretion to define the concept of conflicts of interest more closely. See also Steinicke 2018, p. 362.

⁴³ C-538/13 *eVigilo*, paragraphs 23-24, 41, 46-47. See also Semple – Andrecka 2015, p. 183, who have argued that Article 24 should be read together with the *eVigilo* case.

⁴⁴ See also Steinicke 2018, p. 369-371, who criticises the conclusion reached in C-538/13 *eVigilo*.

solely on perception but the tenderer's involvement in the preparation has had to have an influence on the procurement procedure.

The above mentioned becomes clear from the joined cases C-21/03 and C-34/03 *Fabricom*, which concerned lawfulness of Belgian legislation, which prevented any person, who had been instructed to carry out research, experiments, studies or development in connection with a procurement, from participating in the competitive tendering for the said procurement without being able to prove that the experience they had acquired was not capable of distorting competition. The CJEU acknowledged that a person who has carried out certain preparatory works may be in a better competitive position than others. However, the rule that prohibited those people from participating in the procurement procedure automatically was disproportionate because they might be excluded also in situations, where their participation "entails no risk whatsoever for competition between tenderers".⁴⁵

The decision in *Fabricom* indicates that an exclusion is only possible if a tenderer's involvement in the preparation has influenced the procurement procedure. This finds support also from subsequent case law. For example, in the case T-403/12 *Intrasoft International SA*, a tenderer had been excluded from the competitive tendering on grounds that a member of its consortium had in the context of another tendering procedure prepared documents that were used as a starting point for determining the activities covered by the procurement in question. In its decision, the Court stated that preparation of such documents does not constitute preparatory works that can lead to a conflict of interests unless it is 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".⁴⁶

Consequently, it seems that the conditions in which a tenderer can be excluded are different in situations that fall under Article 24 and Articles 40 and 41. Whether this is the correct interpretation remains to be seen. This interpretation has been challenged on grounds that it is contrary to earlier case law according to which an exclusion on the basis of violation of the principle of equal treatment is not possible if it has not been shown that the situation has influenced the procurement

⁴⁵ Joined cases C-21/03 and C-34/03 *Fabricom*, paragraphs 28-30, 33-36.

⁴⁶ T-403/12 *Intrasoft International SA*, paragraphs 11, 84-86. See also T-415/10 *Nexans France*, paragraphs 123-125, where the Court found that the applicant had not "succeeded in establishing that the requirement flowing from the tender documentations were conceived under the influence of and for the advantage of" one of the members of a tender consortium. See also the case T-556/11 *European Dynamics*, paragraph 45, where the Court stated that a contracting authority cannot exclude a tenderer consortium on grounds that one of the members of a consortium was connected to a company that had participated in the preparation of the tender documents without checking "whether that relationship actually impacted on its conduct in the context of the present procedure".

procedure.⁴⁷ However, if under Article 24, a violation can be established on the basis of perception, contracting authorities have to remedy situations, where conflicts of interests can be perceived to influence the procurement procedure. While in many situations it might be possible to remove a biased staff member, a tenderer can be excluded if no other less intrusive remedies exist. Not excluding a tenderer in such a situation on grounds that the situation has not influenced the procurement procedure would mean that conflict of interests is not remedied. Considering that conflicts of interests are regarded as a serious irregularity it would seem illogical to allow a contract to be awarded in such circumstances. Thus, it can be argued that when it comes to exclusion on grounds of Article 24, case law which relates to for example exclusion of tenderers involved in the preparation should not be applied.

According to Article 41 (3) in the context of tenderer's prior involvement in the preparation, before the tenderer is excluded from the competitive tendering it has to be given the opportunity to prove that their involvement in the procurement procedure is not capable of distorting competition. This requirement was originally established in CJEU's case law concerning exclusion on grounds of violations of the principle of equal treatment.⁴⁸ Such a possibility has not been specifically provided in Articles 24 or 57 (4) (e) concerning conflicts of interests.⁴⁹ Whether such a possibility could anyway be derived from the so-called self-cleaning provision in Article 57 (6)⁵⁰ or from previous case law referred to above, remains to be seen. However, if such a possibility exists, it raises the question of what it is that the tenderer should prove. Even if the tenderer shows that there has been no influence on the competitive tendering, that does not change the fact that the conflict of interest that is based on perception remains.

The different conditions within which a violation can be established and a tenderer (possibly) be excluded raise the question of the role of tenderers or companies connected to them who have carried out most if not all of the planning work for contracting authorities. The question I want to present is the following: *should such a tenderer be likened to a procurement service provider within the meaning of Article 24?* To elaborate this question, I will use as an example the case

⁴⁷ See Steinicke 2018, p. 369-372 and also the case C-213/07 Michaniki, paragraph 69 where automatic exclusion was not possible in a situation that involved a conflict of interests and to which Steinicke refers to. Moreover, see Dragos 2021, p. 267, who argues that exclusion on grounds of conflicts of interest as defined in Article 24 should be possible only if it has influenced the competition. See also C-538/07 Assitur, paragraphs 29-30.

⁴⁸ Joined cases C-21/03 and C-34/03 Fabricom, paragraph 36, C-213/07 Michaniki, paragraphs 66-67, C-538/07 Assitur, paragraph 33.

⁴⁹ See also Steinicke 2018, Semple-Andrecka 2015, p.

⁵⁰ Article 57 (6) of Procurement Directive 2014/24 provides that any economic operator who is encumbered by one of the exclusion grounds listed in Article 57 (1) and (4) may provide evidence to the effect that it has taken sufficient measures to show its reliability despite the existence of a relevant ground of exclusion.

KHO:2016:56 decided by the Finnish Supreme Administrative Court, which concerned a procurement of a design service relating to design of two bridges and its surrounding areas in the city of Helsinki. The procurement related to a broader project of constructing a railway tunnel to be built under Helsinki. Before the procurement in question, the contracting authority had arranged a tendering procedure for a designer consultant. The consultant was assigned a significant role in the planning of design service procurements as its tasks included deciding what kind of design procurement are made, when they are awarded, and their preparation. The designer consultant had significant roles also during the competitive tendering and contract period. It was revealed that the consultant had 25 people working in the project during its different phases whereas only one government official participated in the preparation on a full-time basis.⁵¹

In the procurement in question, the designer consultant had drafted, among others, the invitation to confirm interest, invitation to tender documents, award criteria and their weightings. During the competitive tendering, its tasks included evaluation of the requests for participation and tenders. The contracting authority excluded a company X, who belonged to the same group as the planning consultant, from the competitive tendering. The companies were 100 % owned by the same company and there were a few people that held board positions in both companies. The reason for exclusion was that the planning consultant would become disqualified to assess the requests for participation if the company X was allowed to participate. The KHO referred in its reasoning to the case C-538/13 *eVigilo* and stated that the contracting authority had not violated procurement rules when it excluded the company X to secure the equal and non-discriminatory treatment of tenderers *during the procurement process*.⁵² In its reasoning, the KHO referred to the consultants role in the preparation but it seems like the decision was based more on the fact that the consultant would become biased during the evaluation process if the company X was allowed to participate.⁵³

The purpose here is not to analyse the decision in KHO:2016:56 in detail. However, one of the questions that the case KHO:2016:56 raises is whether the decision would have been different if the consultant's tasks were limited to preparatory activities. The case KHO:2016:56 is a good example of a situation where the procurement was almost, if not entirely, prepared by a consultant. Even if the contracting authority remains as the formal decision-maker, the consultant's tasks as well as the striking difference between consultant's and the contracting authorities resources raise the question of how much control can the contracting

⁵¹ KHO:2016:56.

⁵² --- ei ole toiminut julkisista hankinnoista annettujen oikeusohjeiden vastaisesti sulkiessaan Finnmap Consulting Oy:n tarjouskilpailusta turvatakseen tarjoajien tasapuolisen ja syrjimättömän kohtelun hankintamenettelyn kuluessa”, KHO:2016:56.

⁵³ KHO:2016:56.

authority actually have over what kind of a procurement is awarded.⁵⁴ Thus, it can be asked should this type of a situation be likened to a situation, where a procurement service provider acts on behalf of the contracting authority, which would constitute a conflict of interests.

There is nothing in the case law or in the Directive 2014/24 that would indicate that tenderer's involvement in the preparation phase should be treated differently depending on how extensive it is. In addition, it can be argued that joined cases C-21/03 and C-34/03 *Fabricom* precluded the possibility to exclude a tenderer who has been involved in the preparation always if there is no influence to the procurement procedure.⁵⁵ It can also be argued that there is a good reason to allow exclusion only when a tenderer's involvement in the preparation has influenced the procurement procedure because otherwise tenderers might refrain from giving contracting authorities the information they need.

At the same time it can be argued that allowing tenderers who have carried out most of the planning work or companies connected to them to participate in the competitive tendering can be as damaging to the integrity of the procurement function as situations where a procurement has been prepared by a bias official. It might also not always be possible to show that a tenderer's involvement has influenced the procurement procedure, even if a tenderer's involvement has been extensive. For example, in the case KHO:2016:56, the court of first instance had established that the exclusion violated public procurement rules because it had not been shown that the involvement of the designer consultant in the preparation had favoured the company X.⁵⁶ For these reasons, I believe that there should be more through examination of the role of planning consultants can de facto play in the preparation and how these situations should be addressed.

4 Conclusions

I have argued in this article that the conditions in which violations can be established under Article 24 and Articles 40 and 41 are different and that this difference influences the conditions within which a tenderer can be excluded from the competitive tendering. Whether this interpretation is correct is unclear and in legal literature there also exists differing opinions.⁵⁷ However, considering the different approaches of the EU legislator towards conflict of interests as defined in Article 24 and tenderers involvement in the preparation, there are good reasons to

⁵⁴ In the case, the contracting authority itself pointed out that it had no possibility to actually supervise for example that the consultant's decisions do not favour companies connected to it, KHO:2016:56.

⁵⁵ Joined cases C-21/03 and C-34/03 *Fabricom*, paragraph 35.

⁵⁶ KHO:2016:56.

⁵⁷ See page 9.

argue that a tenderer could be excluded without a need to show that the conflict of interests has influenced the procurement procedure.

The other purpose was to raise into the question the role of planning consultants that carry out most or even all preparatory work for the contracting authority. It seems like all situations, where a tenderer is involved in the preparation are decided under Articles 40 and 41. However, there is a risk that such an approach endangers the integrity of a procurement process in situations, where a tenderer or company connected to it has actually carried out most or all planning work and where it is not possible to show a competition distorting influence. Consequently, it can be asked whether such situations should be likened to procurement service providers within the meaning Article 24. If this was done it would raise several difficult questions regarding particularly when would preparatory work be classified as “extensive”. However, considering the *de facto* influence planning consultants can have on the preparation of the procurement, I believe the question merits more thorough analysis than has been possible in this article.

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