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# Changes to consortium bidders during a procurement - can you allow this?

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A [recent case](#) in the CJEU has shed some light on whether an authority is permitted to allow changes to consortium bidders during the course of a procurement process. This case concerned the provisions of the Utilities Directive but the principles are equally applicable in a public sector context.

The Danish railway infrastructure operator commenced a negotiated procedure for works relating to a new railway line. The authority had stipulated that it would take a minimum of four bidders through the negotiation stage of the process.

At PQQ stage there were few technical requirements, and all five organisations which expressed an interest were selected to participate in the process. One of the bidders dropped out, leaving the minimum of four bidders remaining.

One of the short listed bidders was a consortium comprising two members, "Aarsleff" and "Pihl". Shortly after the short listing stage, Pihl was declared insolvent and the authority decided to allow the remaining consortium member, Aarsleff, to continue as a bidder in the process in its own name in place of the consortium. This was on the basis that Aarsleff would itself have passed the short listing stage even without the capacity and experience of Pihl, and in any event Aarsleff had acquired 50 salaried staff from Pihl including individuals who were key to the project.

Aarsleff was subsequently awarded the contract and another bidder challenged this award on the basis that this was a violation of the principle of equal treatment. Aarsleff had not, in its own name, undertaken the same steps as the other bidders in expressing an interest and being short listed for the process. On a strict interpretation of the Directive, only those economic operators who were pre-selected at the start of the process were permitted to submit tenders and be awarded contracts.

However, the court said that the inclusion of Aarsleff as a bidder at that stage in the process was permissible. The CJEU clarified that the requirements which need to be established in this situation are:

- the new entity by itself meets the selection requirements laid down by the authority (PQQ); and
- the continuation of its participation in that procedure does not mean that other bidders are placed at a competitive disadvantage.

As to what competitive disadvantage means in this situation, the key question seems to be whether the replacement entity has benefited from differing treatment which gave it an advantage at the point at which it was allowed to participate on its own, without first having been pre-selected. It is likely that much will be made of this key issue in subsequent situations which differ on their facts, but for now the case is helpful guidance on this question which often arises in complex and lengthy procurement processes where consortium bidders often change in composition prior to contract award.

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