

Separation of interests

Policy against conflicts of interests in tendering processes

As established by DT-RWS on 14 September 2007

Incorporating the discussions with the building departments et al.

Rijkswaterstaat (**RWS**) is the Netherlands Directorate-General for Public Works and Water Management

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Summary

Conflicts of interests

This policy document contains guidelines and measures to counteract conflicts of interests or – formulated in a positive way – to properly separate interests in tendering processes. Separation is important because RWS is dependent on the quality of competition to obtain keen offers. The implementation phase is out of scope of this policy document.

In this policy document, a broader assessment framework than just the competitive interest was taken into account. Both an excessively strict and an overly “soft” separation are fraught with risks. Excessively strict separation carries the risk of insufficient tenders, problems with hiring, hampered working processes, hampered occupational mobility and loss of integrality. Overly “soft” separation may result in increased litigation and in pressure on the integrity of RWS and market parties.

Policy line (for the schematic representation see the matrix (p. 2)) :

- 1 Make a clear separation between non-confidential and commercially confidential information. Classify information. Column 1 of the matrix pertains to non-confidential information and columns 2 and 3 to commercially confidential information.
- 2 Restrict the quantity of confidential information to what is strictly necessary. Be clear about the period of confidentiality and keep that period as short as possible. Restrict the number of persons who have access to confidential information.
- 3 Be completely open about non-confidential information. Create safeguards for the confidentiality of confidential information (information security policy). Principle: project preparation is non-confidential, preparation of the tendering process and assessment of the tenders are commercially confidential. Seek to link in with the Dutch Government Information (Public Access) Act (*Wet Openbaarheid van Bestuur WoB*).
- 4 Never allow a company taking part in the assessment of the tenders to tender for the project. See cells A3 and B3 in the matrix.
- 5 Never allow a group company of the group of which another group company takes part in the assessment of the tenders to tender. See cell C3 in the matrix.
- 6 Allow a company that has taken part in the project preparation to take part in the tendering process on condition that the complete project preparation information is shared in timely and accessible fashion with RWS and the other tenderers. See column 1 (cells A1, B1 and C1).
- 7 Never allow a company that deployed a specific person to take part in the preparation of the tendering process to deploy that same person to take part in the tendering process. See cell A2.
- 8 Based on an *Interest Protection Plan* approved beforehand by RWS, allow a company that deployed a specific person to take part in the preparation of the tendering process to deploy another person to take part in the tendering process. See cell B2.
- 9 Based on an *Interest Protection Plan* approved beforehand by RWS, allow a group company of the group of which another group company took part in the preparation of the tendering process, to take part in the tendering process. See cell C2.
- 10 A company that wants to take part in the preparation of the tendering process may prevent being excluded by RWS from taking part in the tendering process prepared by it or, as the case may be, may prevent the exclusion by RWS of another member of the group to which the company belongs, by having an *Interest Protection Plan*, approved by RWS and upheld by the company, prior to taking part in the preparation of the tendering process.

If, in spite of the *Interest Protection Plan*, a competitor in the tendering process should nevertheless successfully argue a conflict of interests in court, asserting that because of this, RWS should exclude

the company in question, that company is not entitled to compensation. The company has brought the risk onto itself.

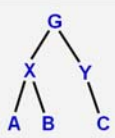
- 11 If a company acts in contravention of its *Interest Protection Plan* as approved by RWS, causing a conflict of interests, RWS in accordance with Article 45 (2), Directive 2004/18/EG (on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) will consider this a grave professional misconduct and exclude that company from further participation in projects.
- 12 The above-described policy line is also used in cases of staff occupational mobility. RWS also applies the policy line in regard to other changes in the relationships during the project preparation, the preparation of the tendering process or the assessment of the tenders.
- 13 RWS will publicise the policy as formulated in this policy document.

Matrix

This matrix serves as an orientation schedule for the above-described policy line. The schedule provides direction and is not meant to be exhaustive. A more detailed version with descriptions may be found in sections 7 and 8.

Explanation

Cells 1, 2 and 3 indicate how person **A** on the side of the contracting party was or is involved in the tendering process for the project in question.

		A WAS OR IS INVOLVED IN ...		
		1 preparation of the project	2 preparation of the tendering process	3 assessment of the tenders
TENDER				
	A X with A	A1 0	A2 X	A3 X
	B X with B	B1 +	B2 --	B3 X
	C Y with C	C1 ++	C2 -	C3 X

The left column of the table indicates the parties that may want to tender.

The cell in the top left hand corner represents the relationships between the parties during the tendering period.

In this schedule, **G** is the group of companies to which companies **X** and **Y** belong. **A**, **B** and **C** are natural entities that have a labour relationship or a consultancy relationship with **X** or **Y**, respectively. **X** and **Y** may also represent a combination that is submitting a tender.

The schedule can also be used in a case where **A** was not yet connected to **X** in the preparation phase. One could even image that **A** was still working for the contracting party at the time, starting employment for **X** prior to or during the tendering process.

Cells A1 through C3 represent the degrees of separation of interests, where a cross stands for an insurmountable blockage on account of a conflict of interests. In cells with one or several plusses, a conflict of interests is relatively easy to prevent. The cell with a zero requires more care and the cells with one or several minuses require special measures to be taken.

Separation of interests

Conflict of interests is a very topical theme. Recently, increasingly questions arise in relation to conflict of interests. The increased attention for this theme is the result of developments in European law, an enhanced focus on integrity issues and changes in the market approach as a result of the RWS Business Plan. Also hiring as engaged in by the Civil Engineering Division of RWS, in the context of Shared Quality, prompts questions both from the RWS organisation and the market about what is or is not allowed. The Association of Consulting Engineers of the Netherlands (*NLINGENIEURS*) and individual companies put specific questions to RWS about the rules of play in this regard.

1 Conflicts of interests

This policy document focuses on conflicts of interests to do with tendering processes, i.e. conflicts of interests in relation to putting a public contract on the market. Primarily concerned here is the conflict between commercial interests. The implementation phase is out of scope of this policy document.

Conflicts of interests in tendering processes may occur when a tendering market party was or is involved in the preparation of the project or the tendering process or the assessment of the tenders. A conflict of interests may lead to a distortion of competition as a result of a) tendering with inside information and b) contract manipulation or manipulation of the tendering process or the awarding of the contract¹.

In this context, a tendering market party is considered to include the tenderer and its consultants, subcontractors and suppliers, if any.

Inside information in this regard refers to prior knowledge of confidential information of RWS, sensitive information in regard to the tendering process, which might result in a competitive advantage for the tendering market party in the tendering process². The confidential information in question may relate to the preparation of the tendering process (estimations, financial models, risk analyses and –pricing, critical factors for success, the manner in which the market is to be approached) or to the assessment of the tenders submitted.

A conflict of interests will mainly concern consultancies, more in particular engineering consultancies. As a result of the increased use of integrated contracts, as based on the RWS Business Plan, these consultancies increasingly find themselves in situations where they serve both the contracting party and the candidates/tenderers.

Alternatively, non-commercial personal interests may be concerned. Showing that one has confidential information may increase one's status, enabling the party involved to do more successful 'networking'.

2 Why is separation important?

A significant part of the competitive battle concerns having the best possible knowledge, which will give one a better chance at winning the contract. It is in RWS' interest for participants in a tendering process to have the best knowledge.

However, knowledge can also be inside information. Inside information undermines open and fair competition and where inside information is decisive for the outcome of the tendering process, the market parties will try to acquire it. This does not only put the quality of competition at risk, but also the

¹ Incidentally, manipulation also includes conspiracy between two or more tendering parties to the detriment of the contracting authority or of the other tenderers. This concerns prohibited conduct. This policy document is not about conspiracy but about conflicts of interests resulting from involvement on both the contracting authority's and the tenderers' side.

² Cf. Article 1, Directive 2003/6/EG of the European Parliament and the Council of 28 January 2003 concerning insider trading and market manipulation (market abuse); official Journal of the European Union 2003, L 96/16. Also compare ground 12.

integrity of the RWS organisation and of the market parties. Competition benefits from fair play. This will stimulate market parties to distinguish themselves, to be innovative and to make keener offers.

Naturally, open and fair competition does not depend only on – in positive terms – a good separation of interests, but also on other factors, such as the presence of sufficient providers and the availability of a *competitive* market of suppliers and subcontractors.

3 Risks of an excessively strict separation of interests

In establishing policy in relation to conflicts of interests, RWS must take into account the following risks that may result from an excessively strict separation of interests.

1 Insufficient tenders

A strict separation of interests requires a larger number of parties on the market than a limited separation of interests. In specific market segments, a strict separation of interests may result in insufficient competition or, as the case may be, failed tendering processes as a result of no tenders.

Incidentally, where the availability of market parties is concerned RWS has to take the chain into account. It does not just involve the candidates/tenderers, but also the subcontractors (or, as the case may be, consultants) and suppliers, which those candidates/tenderers need to be able to submit their bids.

2 Insufficient hiring options

If, in the context of a strict separation of interests, RWS should stipulate that a consultant (or, as the case may be, his/her employer), who helps RWS with the preparation, cannot tender for the tendering process or advise on tenders, this may result in a lack of options to obtain hired staff.

This problem is enhanced where the use of integrated contracts leads to a considerably higher demand for consultancy services. In the traditional situation, RWS would contract for a single design to be made, subsequently to put it to tender; in the tendering process of an integrated contract, however, all tenderers need a (calculation) design to be able to submit their tender.

The strength of RWS lies in being able to use learning experiences that go beyond the project boundaries. Project experiences are shared intensively. Accordingly, hired staff working on a specific project can take cognisance, from their positions at RWS, of tendering processes for other projects in which their employer may be participating or considering to participate. Strict rules in this respect may exacerbate a limited availability of hired staff, which may affect production.

3 Hampered work- and decision-making processes

One or several measures to counteract conflicts of interest concern(s) the protection of competition-sensitive information. The other side of that coin is that protectionism restricts the open information culture. Strict measures will hamper work- and decision-making processes at RWS.

4 Hampered occupational mobility

RWS strives to coordinate tasks and personnel competencies more adequately. One result of this is that RWS employees who carry out tasks that are being phased out by RWS must get the opportunity to work for the market parties that take over these matters from RWS. A strict separation of interests may hamper those employees' chances on the labour market and, in addition, the transfer of tasks to the market.

This problem increases as tendering processes take longer. The choice of RWS to use more integrated contracts and also, where applicable, to interweave the spatial planning procedure for infrastructure and the tendering process, will make the tendering period considerably longer. Employees will not readily be put on hold for such a long time.

5 Approach insufficiently comprehensive

A strict separation of interests may lead to another dichotomy, comparable to that in the traditional situation. Some market parties will specialise on the preparatory work, others on design- and realisation

activities. A strict separation will encourage such segregation. However, professional contracting will strive to promote integration rather than segregation of tasks.

4 Risks of insufficiently strict separation of interests

In establishing policy in relation to conflicts of interests, RWS should take into account the following risks as may result from an insufficiently strict separation of interests.

6 Increased litigation

A “soft” separation of interests may create mutual suspicion between market parties and between market parties and RWS about whether the competition is fair. This may result in increased litigation about tendering processes. Merely the *semblance* of a conflict of interests can start that process. It is difficult to eradicate mistrust, once inspired.

7 Pressure on the integrity of RWS and market parties

A “soft” separation of interests may result in market parties doing their utmost to acquire sensitive information about the tendering process, where necessary at the cost of the integrity of the RWS organisation. Also the integrity of the market parties themselves may be at stake. The boldest party will win. This may create a culture of headhunting employees with the requisite expertise.

5 EC law and the separation of interests in tendering processes

A strict but clear policy line would be for market parties that were involved in the project preparation not to be allowed to tender for the realisation of the project. However, on 3 March 2005 the European Court of Justice made a ruling in the ‘Fabricom’ case that blocks such a clear separation³.

According to this ruling, the contracting party must give market parties that were involved in the preparation of a project the opportunity to show that that involvement does not endanger competition. In view of the ruling, various engineering consultancies and NLINGENIEURS ask RWS for clarity. In what cases will RWS accept tenders for a contract submitted by market parties that were involved in the preparation of that contract? The case law clarifies the assessment criteria for this only in part⁴.

6 Market parties most interested in fair competition

Market parties are the parties with a foremost interest in fair competition. Losing a tendering process because a competitor has inside information or was able to manipulate the contract is extremely frustrating. Insufficient trust in the integrity of the tendering process will result in increased litigation, where it should be kept in mind that even a semblance of unfairness may start an escalation. Incidentally, it is just as frustrating for a market party to be excluded from a process on account of an *erroneous semblance* of a conflict of interests.

From this perspective, there is a shared interest of contracting parties and market parties or, as the case may be, their umbrella organisations, in making solid arrangements.

Focal points in this respect are:

- What degree of involvement in the project preparation, the preparation of the tendering process or the assessment of the tenders submitted will another tenderer still just be able to accept?
- What policy of RWS will give market parties sufficient faith in the fairness of the competition as directed by RWS?

³ According to the Fabricom ruling (European Court of Justice case C-21/03, 3 March 2005) a contracting party cannot impose on the contracting party the rule that a person who was in charge of the research, tests, study or development of projects, contracts or services, cannot tender for those projects, contracts or services, without being given the opportunity to show that in the circumstances of the specific case, the experience gained by him cannot distort competition.

⁴ In the ruling (legal ground 30) the Court of Justice does note that a person who was involved in the preparation should not get the chance to manipulate the conditions for the contract in a manner beneficial to him.

7 Three levels of interest; three questions

Interests always become specific in people of flesh and blood, in natural persons. Since natural persons are often parts of larger systems, also these systems must be designated stakeholders. Initially, these are the companies in the legal sense (legal entities) with which those natural persons have labour relations or to which they provide advice; on a further level they concern the groups to which those companies belong (economic undertakings).

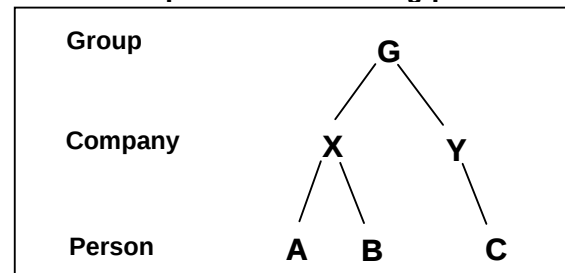
This allows us to distinguish three levels that any policy in relation to conflicts of interests must regard:

1. the natural person;
2. the company in a legal sense (legal entity) with which that natural person has relationships (labour relationship, consultancy relationship);
3. the group⁵ to which that company belongs (the undertaking in the economic sense).

Assuming that natural person **A** was involved in the project preparation, the preparation of the tendering process or the assessment of the tenders submitted for a specific project, these levels result in three questions that relate to the tendering for the project.

Point of departure for those questions is that **B** and **C** were not involved in the project preparation, the preparation of the tendering process or the assessment of the tenders submitted.

Relationships in the tendering process



- *Question 1 (1st degree connection)*

Companies **X** and **Z** want to tender for a tendering process (company **Z** does not belong to group **G**). In what cases or, as the case may be, under what conditions should tenderer **Z** accept that competitor **X** tenders, deploying **A**? In what cases or, as the case may be, under what conditions is RWS willing to allow company **X** tendering, deploying **A**?

Incidentally, **X** can also designate a tendering combination or a tender together with its subcontractors or, as the case may be, its consultants at the time of the tendering process.

- *Question 2 (2nd degree connection)*

Companies **X** and **Z** want to tender for a tender for a contract. In what cases or, as the case may be, under what conditions should tenderer **Z** accept that competitor **X** tenders, deploying **B**? In what cases or, as the case may be, under what conditions is RWS willing to allow that **X** tenders, deploying **B**? Like **A**, **B** is an employee or a consultant of company **X**.

- *Question 3 (3rd degree connection)*

Companies **Y** and **Z** want to tender for a contract. In what cases or, as the case may be, under what conditions should tenderer **Z** accept that competitor **Y** tenders, taking into account his relationship to

⁵ Article 24b of Book 2 DCC reads: A group is an economic entity wherein legal entities and companies are connected in an organisation. Group companies are legal entities and companies connected together in a group.

The law says nothing else about the concept of an economic entity; the point of departure, however, is that two companies belong to a group if the one company exercises decisive control over the other.

The concept of a 'group' is dissimilar from the concepts subsidiary and participation. A subsidiary of a legal entity (parent) is a legal entity in which the parent legal entity, perhaps together with the subsidiaries, has more than half of the control (see Article 24a, Book 2 DCC). The concept of 'group' is more restrictive than the concept of participation, where basically, a participation in the issued capital of one fifth or over is concerned (see Article 24c, Book 2 DCC). Participation need not constitute decisive say.

company **X** and, accordingly, to **A**? In what cases or, as the case may be, under what conditions is RWS willing to allow that company **Y** submits a tender? **X** and **Y** are companies of the same group.

Occupational mobility

In asking these questions, it is not relevant who **A**'s employer was during its work for the project preparation or the preparation of the tendering process. It may even be imagined that **A** was an RWS employee⁶. The three questions also cover situations in which **A**, prior to the tendering process, transfers to one of the tenderers or to a company connected to a tenderer in a group.

An additional situation that may be imagined is where **A** was not actually involved in the project preparation or the preparation of the tendering process, but a colleague of **A**, named **D**, was. An even remoter connection would be that **A** and **D** worked at different group companies, none of which are tendering. Also for that situation, *in theory* these questions may be asked. That is not useful in the framework of this policy document, however. This policy document does not go beyond the 3rd degree connection. Should such a situation occur, extrapolation of the policy formulated in this document may provide orientation.

8 Proposals for policy

8.1 Clear separation between commercially confidential and non-confidential information

RWS can limit the risk of inside information by clearly separating commercially confidential information that is sensitive to the tendering process and information that need not be confidential. In principle, this entails the classification of two kinds of information:

- non-confidential information of which anyone outside and inside RWS can avail;
- commercially confidential information of which only the employees for the project, who need this information for their work, may avail; information directly concerning the award procedure can only be available to a small group of decision makers. Commercially confidential is formally classified as 'Departmentally confidential'.⁷

In case of confidential information, the time window for the confidentiality must be indicated each time.

By, on the one hand, being actively transparent in regard to non-confidential information and, on the other, creating safeguards for the confidentiality of commercially confidential information, RWS can stringently limit the chances that inside information is somehow created.

As to the question what information should be commercially confidential, RWS can link in with the Dutch Government Information (Public Access) Act (*Wet Openbaarheid van Bestuur* WOB). The WOB provides that all information is public unless it falls under the exception criteria. All information that RWS receives from companies in the context of tenders submitted in a tendering process is confidential⁸.

In addition, RWS *may* also designate estimations as confidential⁹. RWS can make its own considerations and, for example, choose to make estimations public but not underlying parameters. This might serve if RWS wants to provide estimations by way of strict budget.

⁶ Incidentally, also circular letter AD 1999/U84410 of the Dutch Minister of the Interior and Kingdom Relations dated 13 September 2006 applies here. This circular letter contains a policy to counteract so-called revolving door constructions. Former officers cannot be involved in the tendering process for 2 years.

⁷ See article 5 of het Dutch Civil Service Information Security (Classified Information) Decree (*Besluit voorschrift informatiebeveiliging rijksdienst – bijzondere informatie*).

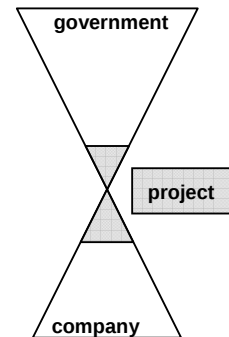
⁸ Article 10 (1c) Dutch Government Information (Public Access) Act: the government cannot make public company- and manufacturing information that was provided to it confidentially. Even outdated information, no longer topical for competition, falls under this injunction. Source: HDJZ, Leidraad Wet openbaarheid van bestuur; May 2006.

⁹ Article 10 (2b) Dutch Government Information (Public Access) Act gives the government the option of not providing information where such provision harms the economic and financial interests of the State.

The confidentiality of information benefits from a restriction on the number of persons who have access to the information. In tendering process situations, it works better to keep the confidential information inside the project where possible. Safeguards can be created there. From this perspective, the project mandate must be sufficiently ample. In addition, the closer someone is involved in the project, the more he is likely to be convinced of the importance of confidentiality.

In principle, the period of confidentiality commences the moment that general preparations (research, testing, studies and/or the development of the contract) pass into the preparation of the tendering process (estimations, financial models and risk analyses). The end of the confidentiality period depends on the nature of the information.

Good RWS policy in relation to information security is a prerequisite to prevent inside information and conflicts of interests.



8.2 *Market-neutral specifications and conditions*

Whenever a market party is involved in the preparation of a project or of the tendering process, this may lead to a situation in which it can consciously or unconsciously affect the project specifications and conditions in a way that will benefit it or gain it inside information. RWS must ensure that this cannot happen. In terms of tendering law, incidentally, it is prohibited to write the specifications of a contract in such a way as will make it suitable for a specific market party.

Contracting parties and the market need a certain uniformity in contracting. Market parties that help the contracting parties in developing standards should not be reproached with having a conflict of interests when tendering for contracts in which subsequently, those standards are applied¹⁰. After all, the standard is general.

8.3 *Nine situations of possible distortion of competition*

The three questions in combination with the three kinds of activities that precede the granting process result in nine situations in which distortion of competition might occur. These situations can be set out in a matrix. Each situation describes a convergence of involvement on the part of the contracting party with involvement on the part of the tender.

In the Fabricom case, the European Court of Justice noted that such convergence may result in:

- inside information (legal ground 29); and
- a conflict of interests in the sense that the person involved in the preparation – even without intending to (!) – may affect the terms and conditions for the public contract in a manner that will benefit him/her (legal ground 30).

The Court subsequently notes (legal ground 31) that the contracting party is not obliged to treat a tenderer involved in the preparation of the tendering process in the same way as other tenderers. The Court considers that *certain* preparatory activities do not endanger the competition between the tenderers. However, the Court pronounces no further on the nature of that *certain preparatory work*. The matrix continues on from where the Court stops.

In columns 1, 2 and 3 the matrix distinguishes the various types of activities that precede the awarding process: 1) project preparation, 2) preparation of the tendering process and 3) assessment of the tenders.

In rows A, B and C the matrix distinguished three degrees of involvement of the company, which wishes to tender, with the person who was or is involved in the three kinds of activities in columns 1, 2 and 3. The

¹⁰ Although the common rule provided by tendering law does apply, which provides that a contract must offer tenderers equal access. Compare Article 23 (2) Directive 2004/18/EC.

item by item listing for each of the three kinds of activities is indicative and can be made more specific on implementation.

The nine cells A1 through C3 indicate whether the involvement in the preparation blocks tendering for that company, or whether such tendering is nevertheless possible under certain conditions.

Relationships		A WAS OR IS INVOLVED IN ...		
<pre> graph TD G --- X G --- Y X --- A X --- B Y --- C </pre>		1 the preparation of the project: - research - testing - study - development	2 the preparation of the tendering process: - cost estimate - financial models - risk analyses - choice of the manner of market approach - critical factors for success	3 the assessment of the tenders - selection and assessment systems - tendering procedure - assessment of the tenders
TENDERS for the CONTRACT	A <u>1st degree connection</u> Company X will tender deploying A.	A1 Suspicion of distortion of competition <u>Tender allowed</u> <i>on condition that X shows that tendering cannot distort competition (sharing knowledge)</i>	A2 Distortion of competition <u>Exclusion</u>	A3 Distortion of competition (conflict of interests) <u>Exclusion</u>
	B <u>2nd degree connection</u> Company X wants to tender deploying B.	B1 Suspicion of distortion of competition <u>Tender allowed</u> <i>on condition that X shows that tendering cannot distort competition (sharing knowledge)</i>	B2 Suspicion of distortion of competition <u>Exclusion</u> <i>unless X shows that tendering cannot distort competition (Interest protection plan)</i>	B3 Distortion of competition (conflict of interests)! <u>Exclusion</u>
	C <u>3rd degree connection</u> Company Y wants to tender deploying C.	C1 Suspicion of distortion of competition <u>Tender allowed</u> <i>on condition that X, Y and G show that tendering cannot distort competition (sharing knowledge)</i>	C2 Suspicion of distortion of competition <u>Exclusion</u> <i>unless X, Y and G show that tendering cannot distort competition (Interest protection plan)</i>	C3 Distortion of competition (conflict of interests) <u>Exclusion</u>

Matrix: nine situations of possible distortion of competition

The **dark grey cells (A2, A3, B3 and C3)** indicate situations that by definition result in exclusion from the tendering process. They will irrefutably lead to distortion of competition so that exclusion of the tender in question, on account of inside information and/or conflict, is unavoidable.

The **green cells (A1, B1 and C1)** provide situations in which active transparency on the part of the preparer may prevent distortion of competition. In this situation, the preparer can prevent being excluded from the tendering process by RWS by sharing his knowledge completely and in timely and accessible fashion with RWS and the other tenderers. On commencement of its participation in the preparation, the company in question should indicate whether it intends to take part in the tendering process, so that the extent and manner of knowledge sharing can be determined in advance.

The degree of involvement in the project preparation will be taken into account. If A was involved in only a minor part of the preparation for the contract, the involvement of A itself or of B or C in the tender for that contract will not readily evoke a risk of distortion of competition. The tenderer will be able to rebut any suspicion of distortion of competition by sharing the result of the part prepared by him.

The **red cells (B2 and C2)** show situations in which the internal separation of preparation and tendering phases in the company or group involved may leave space for RWS to accept a tender from this company or group. In particular situations B2 and C2 require further consideration for tenders.

Interest protection plan

The options to separate preparation and tender may differ from company to company, or, as the case may be, from group to group. Accordingly, RWS gives companies the opportunity to submit an *Interest protection plan*, tailor-made for their own organisation, to it for its approval. If the company that wants to take part in the preparation for the tendering process requests and obtains such approval in timely fashion, this will reassure it that RWS will not exclude it from the actual tendering process.

However, this possibility leaves unprejudiced the chance that competitors of the company in question will successfully argue in law that, in spite of the approved *Interest protection plan*, there is nevertheless distortion of competition and that accordingly, RWS should exclude the company in question. In that case, the company in question will not be entitled to compensation.

Possible ingredients of the Interest protection plan

The *Interest protection plan* may comprise different ingredients, such as nondisclosure agreements, 'Chinese walls', internal conduct codes, the appointment of compliance officers and periodic checks of the various measures by independent auditors¹¹.

In **situation B2**, X can take *inter alia* the following measures to ensure that competition cannot be distorted:

- A and B sign nondisclosure agreements;
- the nondisclosure agreements of A and B also contain clauses in case they leave their employment;
- the director of X signs a statement that reads that X will fully respect and support the nondisclosure obligations of A and B;
- A and B are separated in the organisational sense, where necessary up to the level of the management (i.e. so that they do not report to the same director);
- A and B do not work at the same location and do not use the same ICT network;
- X conducts an active policy to prevent conflicts of interests;
- an independent third party periodically tests the active policy of X for the prevention of conflicts of interests;
- the test is reported in the annual report;
- this third party also reports to the contracting party.

¹¹ Compare consideration 24, Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 concerning insider trading and market manipulation (market abuse); Official Journal of the European Union 2003, L 96/16.

In **situation C2**, X, Y and G can argue the same things in regard to C, with the following additions:

- X, Y and G all sign a statement that they will not mutually exchange any information about the project;
- X, Y and G declare that they will fully respect and support the nondisclosure obligations of A and C;
- X and Y are physically separated (own locations and ICT networks).

In the event of collaboration with the market, on assessing the *Interest protection plan* and in analogy to Article 6 (3) Dutch Competition Act, RWS can take into account whether the collaboration contributes to an improvement in the production or distribution, or promotes technical or economic progress. A condition in this regard is that collaboration advantages must benefit the entire market. The collaboration should not result in any essential exclusion of the competition.

8.4 Sanction: serious professional error

Naturally, an approved *Interest protection plan* must be meticulously complied with by the company. RWS and competing tenderers must be able to rely on this. Since it concerns internal measures by the company in question, checks by RWS and competing tenderers are difficult to realise. Where trust plays such a major role, betrayal of that trust should be severely sanctioned.

Accordingly, RWS will consider conduct in breach of the approved *Interest protection plan* a grave professional misconduct in the sense of Article 45 (2) Directive 2004/18/EC (on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) or, as the case may be, of Article 2.87 (1c) of the Dutch Public Procurement Act (Tendering Rules) (*Aanbestedingswet 2012*). This means that RWS will exclude the company in question from this and subsequent tendering process(es). Exclusion or, as the case may be, the period of exclusion will be proportionate.

8.5 Occupational mobility and other changes in the relationships

Also in cases of occupational mobility of employees, this policy line will be applied. RWS also applies it in respect to other changes in the relationships, e.g. as resulting from mergers or takeovers, during the preparation of the project, the preparation of the tendering process or the assessment of the tenders.