

Transparency

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- Where are the limits to transparency and full disclosure from the outset including possible breaches of confidence and prejudicing re-tenders

Is there transparency / full disclosure at the outset?



The current position

- Standstill letters require - the criteria for the award of the contract, the reasons for the decision, including the CRAST, the score (winner and loser) and reasons for decisions that EO did not meet the technical specifications (Reg 86(1) and (3))
- Information can be withheld where would impede law enforcement, be otherwise contrary to the public interest, would prejudice legitimate commercial interests of an EO or might prejudice fair competition between EOs (Reg 86(6))

- CA shall not disclose information which has been forwarded to it by an EO and designated by that EO as confidential including but not limited to technical or trade secrets and the confidential aspects of tenders (Reg 21)

- Principles of early disclosure have been developed in England: *Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust* (2013)
 - Challenger should be provided promptly with the essential information and documentation re evaluation process actually carried out so that an informed view can be taken of its fairness and legality
 - But distinction between (a) where a prima facie case has been made out by the claimant (but further information or documentation is required) and (b) where losing EO is aggrieved at result but appears to have little or no grounds to dispute it
 - Requests must be tightly drawn and properly focused
 - Need to balance claimant's lack of knowledge with need to guard against fishing

- Courts have been critical of failure to provide essential documents at an early stage and penalised litigants in costs e.g.:
 - *Construcciones Y Auxiliar De Ferrocarriles v HS2* (2018) – disclosure exercise out of the norm
 - *Serco v Secretary of State for Defence* (2019) – very lengthy delay in provision of documents

Future position – greater transparency?

- Green Paper proposed greater transparency
 - Including need to publish basic disclosure information with contract award notice, including basis of award decision, basic disclosure of tenders submitted, evaluation reports and basic evaluation disclosure information

- Procurement Bill:
 - Requires assessment summaries and contract award notices (section 48)
 - And transparency notices for direct awards (other than to protect life) (section 43)
 - Assessment summary – information about assessment of tender and, if different, MAT
 - CAN and transparency notice – information to be specified in regulations under section 86

- Exemptions from publishing / disclosing information (section 85) if CA satisfied that
 - Withholding the information is necessary for the purpose of safeguarding national security or
 - Information is sensitive commercial information and there is an overriding public interest in its being withheld
- Sensitive commercial information – information which constitutes a trade secret or would be likely to prejudice the commercial interests of any person if it were published or otherwise disclosed

- Transforming Public Procurement – Our transparency ambition (July 2022):
 - *“there is already a high level of transparency of UK public procurement”*
 - New “noticing” regime
 - Central digital platform
 - More disclosure at the 5 stages of procurement – planning, tender, award, contract, implementation

Risks of transparency/ full disclosure?



➤ Risks include:

- Disclosure of bidders' confidential information (*Marine Specialised Technology v MOD* (2019))
- Making it impossible to level the playing field
- Making it likely that all future bids will be (almost) indistinguishable

- Solutions include:
 - Reliance on exemptions from disclosure (as above)
 - Confidentiality rings



- Problems with confidentiality rings:
 - Difficult to agree terms and client membership
 - Complex – single tier, two tier, multiple rings
 - Slow to use – need to seek views of winning bidders (or regulators) on above and on individual documents

- Client membership is crucial:
 - Open justice
 - Lawyers are no substitute for advising clients and obtaining their instructions
 - General principles – *Libyan Investment Authority v Société Générale SA* (2015) (not a procurement case)
 - Amplified in procurement cases in *SRCL v NHS* (2018)

Examples of difficulties:

- *Croft House v Durham County Council* (2010) – disclosure ordered, no ring, small family businesses
- *Geodesign v Environment Agency* (2015) – lawyers' only ring unsatisfactory, expert included
- *SRCL v NHS* (2018) – unsatisfactory for solicitor to have to give evidence of facts, should have been a client in the ring
- *Cemex UK v Network Rail* (2017) – need for adequate undertakings

Solutions to problems with confidentiality rings:

- Template confidentiality ring agreements/orders
- Careful choice of client representatives
- Adequate undertakings

Where are the limits?



- Not a question of limits but of mitigating measures?
- Withholding information initially on the basis of exemptions?
- Then sensible / clear/ straightforward confidentiality rings?