

# White Paper

## Awarding public contracts skillfully and lawfully

Transparency: are there any limits to transparency and full disclosure from the outset, including possible breaches of confidence or prejudicing retenders?

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# Agenda

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## Refresh

- Rules on transparency
- Obligations on contracting authorities

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## Limits to transparency and full disclosure

- Rules on confidentiality
- Current attitude of the Courts
- The balance to be struck
- Impact on tenders





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**Refresh**

# Transparency: fundamental principle of procurement

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Fundamental principle of procurement

“Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner”

*Reg 18*

# Transparency

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Focus on transparency at all stages of the tender process

## **PPN 01/17**

“presumption in favour of disclosure of contract and related information, that may previously have been withheld on grounds of commercial confidentiality”

## **Requirements throughout the regulations:**

From pre-market engagement to award and beyond

***NB*** Public Procurement Bill

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## Limits to transparency and full disclosure

# Confidentiality

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“ A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders”

*Reg 21*

# Confidentiality

In practice: some examples

## Open and restricted procedure

Contracting authorities must ensure that in the exchange and storage of information:

“the integrity of data and the confidentiality of tenders and requests to participate are preserved”

## Competitive dialogue

Contracting authorities:

- shall not reveal to other participants confidential information communicated by the tenderer participating in the negotiations without its agreement
- any such agreement will not be a general waiver of confidentiality
- precluded from requiring a waiver of confidentiality as a condition of participating in the competitive dialogue procedure

## Guidance

- Recognises the importance of protecting bidders' IP and commercially sensitive information
- CA's must consider appropriate procedures and protections to be put in place
- Lack of clarity on what constitutes “confidential information” requiring protection

# Balance between transparency/confidentiality

When must confidential information be protected? When is disclosure required?

## Appendix H TCC Guide: procurement cases raise

“singular procedural issues and difficulties”

“serious difficulties in connection with confidentiality, particularly where there is a real risk that there will have to be a re-tendering process”

“need to protect confidential information needs to be balanced by the basic principle of open justice”

- **The problem:** information disparity/early specific disclosure/short time limits/automatic suspension/role of the winning bidder/live competition
- **The solution:** marked as confidential/coloured paper/order restricting inspection of file/redactions/confi rings and undertakings

# Balance between transparency/confidentiality

confidential information vs open justice

Confidentiality rings: the solution  
BUT  
time consuming, difficult to  
administer and limit to open justice

Who can be in the ring

- Coulson J Geodesign v EA [2015] EWHC 1211
- SRCL v NHS [2018] EWHC 1985 (TCC)

Risk of inadvertent disclosure

- Marine Specialised Technology v SoS for Defence [2019] EWHC 2727 (TCC)

Confidentiality: not a bar to  
disclosure  
BUT  
in practice acts as a barrier

CPR 31, TCC guide Section 11, Appendix H

- Science Research Council v Nasse [1980] AC 1028
- Marston Holdings Ltd v Ministry of Justice (HM Courts & Tribunal Service) [2018] EWHC 3168 (TCC)

Attitude of the Court:  
increased emphasis on earlier, more  
fulsome disclosure  
BUT  
not full disclosure upfront

*Early disclosure*

Roche Diagnostics Limited v the Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933

*Access to court file: no reason procurement cases labelled as private*

- Bombardier Transportation UK Ltd v Merseytravel [2017] EWHC 726 (TCC)

*Indemnity costs for approach to disclosure*

- CAF v HS2 [2018] EWHC 311 (TCC)
- Serco v SoS for Defence [2019] EWHC 515 (TCC)

# When does disclosure prejudice retender?

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- Balance between transparency, open justice and confidentiality particularly challenging in “live” procurements
  - The authority is strongly encouraged to disclose the key decision materials at an early stage where relevant to the complaint made
  - BUT what about the competition
- Key case remains:
  - Croft House V Durham CC [2010] EWHC 909 (TCC)
  - Local authority's interests in having an effective competition for the provision of services had to be balanced with the need for there to be fair competition and the need for Claimant to be able to pursue a remedy
  - Ramsey J “What is not acceptable is that a party should be precluded from an effective remedy because of concerns that, if the remedy is granted, there may be difficulties in re-running the procurement process”

# Thank you

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