

Awarding Public Contracts Skilfully and Lawfully within the Procurement Rules

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The Question(s)

- When facing up to FOI requests, what are the unwritten conventions on:
 - what records to release; and
 - what to withhold?
- How does the stage of the tender process you are at affect this?
- Is it sensible to keep more or less records (such as taped meetings for example)?

What records are you obliged to retain?

- Regulation 82
 - Applies to supplies / services over £1m, works over £10m
 - Retain copy for at least for duration of contract
 - Contracting authority must grant access to these contracts
 - Access to specific documents / items of information may be denied
 - Denial of access - to the extent and on the conditions provided for in the applicable EU or national rules on access to documents and data protection
- Procurement Reform (Scotland) Act S.35

What records are you obliged to retain?

- Regulation 83(1) - every contract / framework agreement / DPS must have a written report covering the matters specified in 1(a) -1(j)
- Regulation 83(7) Contracting authority must document progress of all procurements and ensure sufficient documentation is kept to justify decisions taken at all stages e.g.
 - communications with economic operators and internal deliberations;
 - preparation of the procurement documents;
 - dialogue or negotiation (if any);
 - selection and award of the contract.
- Documentation must be kept for a period of at least 3 years from the date of award of the contract.

Records and means of communication

- Rules in Regulation 23 requiring electronic communication come into effect on 18th October 2018 for contracting authorities other than central purchasing agencies (some parts of Regulation already in force)
- Limited grounds for departure and must be detailed in procurement report
- Oral communication may be used if documented, but not for essential elements of a procurement procedure
- Essential elements of a procurement procedure includes the procurement documents, requests for participation, confirmations of interest and tenders.
- If using oral communication a contracting authority must to a sufficient extent and by appropriate means, document communications with tenderers which could have a substantial impact on the content and assessment of the tenders, in particular, by preparing written or audio records or summaries of the main elements of the communication.
- See *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC)

Regulation 22 - Confidentiality

- 22.—(1) A contracting authority must not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.
- (2) Paragraph (1) is without prejudice to—
 - (a) any other provision of these Regulations, including the obligation relating to advertising of awarded contracts and to provision of information to candidates and tenderers set out in regulations 51 (contract award notices) and 56 (informing candidates and tenderers) ;
 - (b) the Freedom of Information (Scotland) Act 2002;
 - (c) the Environmental Information (Scotland) Regulations 2004; and
 - (d) any other enactment to which the contracting authority is subject relating to the disclosure of information.
- (3) A contracting authority may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the contracting authority makes available throughout the procurement procedure.

Why FoI?

- Unsuccessful bidders
 - Additional detail on why they lost
 - Current processes and future improvement
 - As part of a challenge strategy
- Successful bidders
 - Current processes and future improvement
- Other Economic Operators
 - Gathering market intelligence
 - As part of a potential challenge
- The general public, trade unions, political parties, campaigners....

Freedom of Information (Scotland) Act 2002

- **30 Prejudice to effective conduct of public affairs**
- Information is exempt information if its disclosure under this Act—
- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (b) would, or would be likely to, inhibit substantially—
- (i) the free and frank provision of advice; or
- (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

Freedom of Information (Scotland) Act 2002

- **33 Commercial interests and the economy**
- (1) Information is exempt information if—
 - (a) it constitutes a trade secret; or
 - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
 - (a) the economic interests of the whole or part of the United Kingdom; or
 - (b) the financial interests of an administration in the United Kingdom.

Freedom of Information (Scotland) Act 2002

- **36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if—
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

Applying the Exemptions in Practice

- Where can you get help?
- Scottish Public Sector Procurement & Freedom of Information Guidance
- Information Commissioner's Office - Public Contracts Regulations
- Decisions of the Scottish Information Commissioner / Information Commissioner
- You must think about the specifics of the request you are faced with and the information that is being requested

Examples from Decisions

- **Decision 234/2014 Shetland Line (1984) Ltd and Transport Scotland**
- Request related to assessment of freight demand
- Transport Scotland argued Section 30(c) applicable - prejudice to effective conduct of public affairs
 - "the Commissioner is not persuaded that disclosure of the remaining withheld information would be capable of harming the administration of justice, to the extent required for there to be substantial prejudice to the effective conduct of public affairs. In effect, she has been asked to conclude that this would (by definition) be the outcome of any disclosure of information relating to the award of a contract, where that contract was subject to legal challenge or where such challenge was reasonably apprehended. It should be clear from the nature of this exemption, as narrated above and as considered by the Commissioner in numerous decisions, that she cannot do this."
- Commissioner accepted disclosure could affect similar tendering exercises in the next year and upheld withholding some information

Examples from Decisions

- **Decision 180/2006 Mr Alfred Weir and Fife Council**
- Refers to Irish Information Commissioner decisions and English court judgments
- Concerned tenders for IT services from 2003. Request in 2005.
 - The methodologies involved in working out pricing were sensitive but not the pricing itself.
 - *"In my opinion, pricing structures submitted...in 2003 would not be any guide to their submissions for any similar tender, or for any unrelated tendering business, in future."*
 - No harm to commercial interests - S.33
 - Diminished commercial sensitivity meant information supplied in tendering process no longer possesses the required quality of confidence - S.36

Examples from Decisions

- **Decision 015/2009 Lightways (Contractors) Limited and North Lanarkshire Council**
- Gap of fifteen months between contract award and request
- Commercial sensitivity adjudged to have "significantly diminished in the intervening period"
- Methodologies / computational processes were of value rather than actual pricing
- As regards confidentiality, Commissioner could not identify any obvious detriment

Examples from Decisions

- **Decision 005/2010 Leckie and Leckie Limited and the Scottish Qualifications Authority**
- Contract to publish past examination papers
- Request for tender submission and PQQ
- Contract awarded December 2008 with work starting February 2009. Request made in January 2009.
- Information contained strategies of successful bidder
- Detrimental to consortium's ability to generate income from product and could be used by competitor to adopt similar marketing
- S.33 refusal to disclose upheld

Examples from Decisions

- **Decision 031/2018 Mr Edward Rattray and Renfrewshire Council**
- Request for names of all tenderers and anonymised list of rates submitted for different property types. Council supplied names but not the rates
- Framework commenced May 2017 - pricing data "*extremely current*"
- Commissioner accepted that disclosure would prevent Council from achieving best value - suppliers would know how to price
- This would apply for duration of the first generation framework
- Effect on mini-competitions under the framework
- Public interest in ensuring framework viable prevailed. Debrief information had adequately ensured scrutiny of process.
- See also ***Ministry of Justice v ICO and Clive Palmer*** GIA/2548/2015

Conclusions

- **What to release / withhold?**

- Do not apply a blanket approach
- Take the view of affected third parties into account
- Think about the process, contract and the market - what's the effect?

- **What records should you keep?**

- Everything you are obliged to.
- In a format / level of detail appropriate to the tender process.
- Failure to do so can count against you.

- **Does timing matter?**

- Yes. So does the process you are using and the nature of contract. All linked.
- Potentially applicable well after the tender process too.