

# What must be disclosed in response to FOIA requests?

**Fionnuala McCredie Q.C.**

- Relevant FOI provisions and Directive 2014/24/EU
- Exemptions: Confidential and commercially sensitive information
- The types of documents/stages of competition
- Practical tips

# Introduction



- Obtaining information is critical to challenger; CA holds all the cards
- Directive 2014/24/EU Regs. 50/55 Debrief – characteristics and relative advantages of the winning tenderer (CRAST), scores of winner and loser
- CRAST includes price, see *Veloss v European Parliament* T-667/11 (2015)

**No** requirement for CA to provide on a debrief

- detailed summary of how tender evaluated
- detailed comparative analysis of tenders,
- copy of evaluation report

*see European Dynamics v European Union  
Intellectual Property Office Case T-556/11  
(27.4.16)*

- S. 13 decision **as soon as may be but not later than 4 weeks**
- S.14 may be extended
- If S.38 invoked, even longer
- 
- S.19 failure to respond is a deemed decision

# FOIA Time limits and challenges



## (1)

A time limit of 28 days (and possibly much longer if an extension is sought or S.38 is invoked for third party consultation) means that it is unlikely that a challenger will obtain information within

- The standstill period (**10 days**) or
- The limitation period (**30 days**)

# FOIA Time limits and challenges



## (2)

BUT

- FOI is a means of getting early discovery of documents **and**
- Inconsistencies between the debrief and the FOI information can uncover further breaches, create new limitation periods and make the CA look shifty, increasing suspicion
- Also useful post-contract, after an abandonment and before a re-run, or just before a re-tender of a long running contract

# S. 10 Reasons: a Nuclear weapon?



- S.10 A person who is **affected by act of the body** and has a **material interest** may apply to be given a **statement of the reasons** for the act and any **findings on any material issues of fact** made for the purposes of the act (subject to the exemptions)
- Material interest if the consequence of the act may be to confer upon, or withhold, a benefit from the person

# New Directive: Procurement Reports



- Mandatory written reports which **shall** include
  - Name and address of CA, subject matter and value of contract, framework etc
  - Results of qualitative selection and/or reduction of numbers
  - Reasons for rejection of ALTs
  - Justification to use competitive negotiations/dialogue/negotiation without prior publication
  - Reasons CA decided not to award
  - Conflicts of interest detected and measures taken
- Communicated to Commission or National Courts on request (84 3.) *Directive 2014/24/EU Article 84*



- CAs shall **document the progress** of all procurement procedures, whether or not conducted by electronic means
- They shall ensure that they **keep sufficient documentation to justify decisions taken in all stages of the procurement procedure**

*Directive 2014/24/EU Article 84 2.*

## Includes

- Documentation on **communications with EOs**
  - **Internal deliberations** (evaluator's comments)
  - **Preparation of procurement documents** (drafts)
  - **Dialogue or negotiation** if any
  - **Selection and award of contract**
- 
- Keep for 3 years (84 3.)

## Right to reasons in FOIA Reg 10 dovetails with Article 84 2.; heaven sent for challenger seeking reasons

- 84 2. “documenting progress” contemporary records justifying decisions at all stages –
- 84 1. Report of the procurement

### Traps for CAs:

- Inconsistencies between report and 84 2 documents
- Inadequate documents evidencing decisions along the way

# S.35 Confidential information (1)



(1)(a) A request SHALL be refused that concerns information:

- given to an FOI body in confidence and
- on the understanding that it would be treated as confidential and
- disclosure would be likely to prejudice the giving to the body of similar information and it is of importance to the body that such information should continue to be given **or**



(1) (b) Disclosure would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment or otherwise by law

# S.36 Trade secrets (1)



- 36(1) Head shall refuse to grant a FOI request if it concerns
  - **Trade secrets**
  - **Financial, commercial scientific or technical** or other information disclosure of which could reasonably be expected to result in a **material financial loss or gain** to the person to whom the information relates, or could **prejudice the competitive position of that person** in the conduct of his or her profession
  - Information which could **prejudice the conduct or outcome of contractual negotiations**
- Subject to a **public interest** test

# S.36 Trade secrets (2)



- 36(2) Shall grant if
- The person that the record concerns consents
- Info is available to the public
- Record relates only to the requestor
- It was given to the FOI body by the person to whom it relates and the person was informed by the FOI body before it was given that it would or might be made available to the public

# S.36 Trade secrets (3)



- S 36(3) Subject to S.38 obligation to permit submissions from originator of the information or subject of the information, section 36(1) does not apply if
- The public interest would be better served by granting the request
- Competing public interests in
  - transparency
  - protecting commercially sensitive information
  - contracting with CA without suffering commercially

# S 41(1) Disclosure Prohibited by EU law



- A head shall refuse to grant a request if disclosure is prohibited by EU law or any enactment or
- The non-disclosure of the record is authorised by an enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record



## Confidentiality

Unless otherwise provided in the Directive or in national law, in particular legislation concerning access to information, and without prejudice to ... Arts. 50 and 55, **the CA shall not disclose information forwarded to it by EOs which they have designated as confidential, including technical or trade secrets and the confidential aspects of tenders**

Directive 2014/24/EU Art 21



## Contract Award Notices/Informing candidates and tenderers

- Information may be withheld from publication where its release would
  - **impede law enforcement** or
  - **be contrary to the public interest,**
  - **harm the legitimate commercial interests** of a particular EO or
    - might prejudice fair competition between EOs.

*Directive 2014/24/EU Art 50/55*

# A separate exemption?



- National legislation provides that shall not disclose contrary to EU law (41(1))
- Directive, while expressly subject to domestic FOI legislation, prohibits disclosure of material designated as confidential
- Art 21 pretty wide – confidential aspects of tenders much wider than trade secrets

*S41(1) and Arts 21 and 50/55*

## Office of the Information Commissioner

- Guidance Notes
- Section 35 particularly section 7 on confidentiality and tender documentation (March 2016)
- Section 36 (Feb 2016)

## Freedom of Information Central Policy Unit

- Notice no 5 *“FOI & Public Procurement”*

“4.3.5

*Where records relate to **the expenditure of public money ... there is a strong public interest in openness and accountability in the use of public funds**”*

“4.3.8

*...the FOI Act was designed to increase **openness and transparency in the way in which FOI bodies conduct their operations** and, in general terms, it was **not designed as a means by which the operations of private enterprises were to be opened up to public scrutiny**”*

# What decisions are made?



- Fact dependent
- Commercial sensitivity usually decreases over time
- Price is not confidential after contract award decision (*Veloss*)
- Trade secrets generally protected (see *Varec v Belgian State* Case C-450/06)
- Unsuccessful bidders' information protected
- Commercial aspects of tenders can be protected
- NB note impact of *Rotunda* case [2011] IESC 26 on previous IC decisions

# PQQ stage



FOI request for disclosure the PQQ submissions of the successful bidder. Refused by Cavan CC on basis of confidentiality and commercial sensitivity.

IC held that although the PQQ had been submitted in confidence, the material sought was not sensitive or liable to have obligations of confidence attached.

*Mr X of Company X v Cavan CC [2015] IEIC 140052 (19.3.15)*

Disclosure of tenders, contracts and evaluator's assessments of advisors appointed for sale of ICC Bank.

- Pricing information released – 4 years old.
- Contract rates disclosed – strong public interest in disclosure given sums at stake and nature of the sale
- Internal memos re low ranked tenders withheld (negative comments could damage reputation), but memos re high ranked tenders released (comments positive)

*McKeever Rowan solicitors v Dept of Finance [2003] IEIC 99183*

Applicant unsuccessful tenderer for supply of electronic recording equipment seeking tender evaluation information

- Contract procured by DoJ for An Garda Síochána (AGS). DoJ claimed information held by AGS, an exempted body
- Held DoJ took no part in tender evaluation. DoJ had a legal power to compel production but documents not in its control; access not equated with control. *Av Niche Ltd v DoJ* [2006] IEIC 010355

Appn for disclosure of OPW's order for vehicles for armed forces. OPW proposed to disclose order forms showing tenderer's names, unit prices, unit volumes and models

- Held tender prices ceased to be trade secrets after contract award
- IC held that the public interest mandated disclosure. Information was historic and no evidence that harm identified was likely

*Henry Ford v OPW* [1999] IEIC 98049, *Henry v OPW* [2001] IEIC 98188

Claim for copy of a tender for a weed control contract.

- Information included clients and contracts of the winning bidder, methodology of delivery, equipment specifications, analysis of contract requirements, means of meeting them and innovations
- Held by IC applicant's interest essentially private. Public interest lay in allowing commercial transactions with State without suffering commercially

*Mr X v Dublin CC Case no 140225 15.7.15*

Claim for *inter alia* source code of a Lion Intoxilyser 6000 IRL Machine

- Held that the source code was a high level code, the disclosure of which would allow the development of competing products and was a trade secret. There was also a duty of confidence.

*W v Medical Bureau of Road Safety* Case No 080260  
15.7.10

- See also *Varec* (above)

# Managing risk (1)



- Prevention is better than cure - make your debrief letter a really good one; compliant, accurate, consistent with the tender documents
  
- If you do get an FOI request, make sure your **FOI department talks to your procurement department**
  - Challengers are **highly motivated** by **conflicting disclosure**
  - Understanding what the procurement department is doing does not mean a derogation from the FOI function; it means an informed decision about confidentiality and commercially sensitive information

# Managing risk (2)



- Disclosure outside the FOI process gives CA more control **over what is disclosed**
- Consider whether it is worth giving the challenger a lot of information immediately so that any limitation periods are triggered and they have to “put up or shut up”
- Make sure tenderers understand they must designate material as confidential and **give reasons**

# Managing risk (3)



- In UK FOI applications are run in parallel with discovery applications to the Court
- FOI likely cheaper for CA and EO than discovery application (see *BAM PPP PGGM v NTMA* [2015] IEHC 370)
- Make sure you have complied with Art. 84 2. – document progress of the procurement at every stage. Assign a team member to the task.

# What must be disclosed in response to FOIA requests?

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