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White Paper Conference

Procurement: FOI Requests

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20th May 2016

Introduction

- Freedom of Information Act 2000
- Why might procurement info be requested during a tender process?
- What must be disclosed?
- When can information be exempt from disclosure?

Common scenarios

- Unsuccessful bidders wanting to understand decision
- Unsuccessful bidders seeking to challenge
- Other interested competitors, customers, suppliers
- Transparency and public accountability

PCR 2015 – rights to information

- Informing candidates and tenderers (Reg 55)
- Access to copies of all contracts concluded for works (EUR 10m+) or goods/services (EUR 1m+) (Reg 83)
- Standstill letters (Reg 86)
- Contract award notice (Reg 50)
- Reports for contracts/frameworks awarded (Reg 84(1))
- Documentation of progress and decisions (Reg 84(7) and (8))

PCR 2015 - Confidentiality

- Publication of contract award notice (Reg 50) / Debriefing (Reg 55) – may withhold information where release:
 - Would prejudice legitimate commercial interests of a particular economic operator
 - Would impede law enforcement or be contrary to public interest
 - Might prejudice fair competition
- Non-disclosure of information designated as confidential by economic operator (Reg 21) – but “without prejudice to FOIA 2000”

Section 41 FOIA – Information provided in confidence

- Information was obtained from another person
- Disclosure would constitute an actionable breach of confidence:
 - must have the necessary quality of confidence
 - must be communicated in circumstances importing an obligation of confidence
 - the disclosure must be unauthorised
 - must be “detriment” to the confider
- Absolute exemption

Section 43 FOIA - Commercial Interests

- Trade secrets
- Information which if disclosed would, or would be likely to, prejudice the **commercial interests** of any person
 - e.g. ability to participate competitively in a commercial activity
- Qualified exemption, subject to the public interest test

Disclosure during tender process

Guildford Borough Council (FS50070214), July 2006

- The public interest is best satisfied during a tender process by maintaining confidentiality, ensuring the integrity of the process.
- Following contract award, the public interest in maintaining the exemption is unlikely to outweigh the need for public assurance that the contract has been awarded correctly and VfM achieved.

Contracts

Derry City Council v Information Commissioner
(EA/2006/0014)

- ‘Heads of Agreement’ not information provided by another person and so not within s41
- Whole contract may be disclosed, no matter how confidential, unless another exemption applies (eg s43) or contract records more than the parties’ mutual intentions
- S43 engaged re DCC’s commercial interests but public interest in disclosure outweighed any harm

Contract terms and financial models

DWP v ICO, 20 September 2010 (EA/2010/0073)

- DWP objected to disclosure of certain contract information
- Atos' financial model:
 - Trade secret / would prejudice Atos' commercial interests
 - Strong public interest in financial models being protected for life of contract – disclosure could harm Atos' competitiveness and willingness to offer financial models in future tenders
- Country where Atos' data centre located to be disclosed
- Other contract terms:
 - S 43(2) exemption engaged but public interest favoured disclosure

Price

Camden Primary Care Trust (FS50214920), January 2010

- Pricing information was within s43(2)
- No prejudice to contractor:
 - price not broken down and a wide range of factors influence price
 - prices 12 months old, and highly competitive market
- No prejudice to PCT as:
 - not clear that other future tenders would be sufficiently similar
 - Lucrative market so disclosure would not put bidders off for contracts of this type

Winning tender documents (1)

Mid Suffolk District Council (FS50131138), June 2008

- Withheld price per task and total price per section
- Request 18 months post award and when work almost finished
- S 43(2) did not apply:
 - No evidence that arguments on prejudice to contractor's commercial interests were genuine concerns of the contractor
 - Council's arguments re obtaining best value in future projects and additional works not accepted

Winning tender documents (2)

Ballan v Information Commissioner (EA/2015/0021), July 2015

- Request for winning tender (excluding pricing information)
- Disclosure would likely prejudice Council and/or affected bidders' commercial interests:
 - may reduce competitiveness of future similar procurements or put bidders at a commercial disadvantage
 - Commercial sensitivity unaffected by time left on contract
 - Irrelevant that tenders were two years old
 - Requests related to desire to make successful future bid, to direct disadvantage of other bidders

Winning tender documents (3)

- Public interest weighed very strongly against disclosure:
 - “example successful tender” in isolation would not enhance accountability or transparency
 - extensive feedback had been given to unsuccessful tenderers
 - Information likely to remain relevant to future tenders in short to medium term

Tips

- Make sure tenders and contracts set out clearly the position on confidentiality and FOIA requests, and need for bidders to be clear about what is confidential and why
- Importance of consulting other party as to whether info (still) confidential and why
- Disclosure to requesting party is disclosure to the world (make sure they understand that too!)
- FOI and procurement teams must ensure consistent approach to disclosure
- FOI useful for early litigation disclosure (cheaper than discovery) and can run alongside discovery applications

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Thank you

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