

# Transparency

**Fionnuala McCredie K.C.**  
**Keating Chambers**

How will enhanced transparency obligations affect bidder behaviour and impact disputes, with contract details, modifications, and performance to be published?

# 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))

# Withholding information



# Withholding information



- Information can be withheld where it 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)

# *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 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
- Balance claimant's lack of knowledge with need to guard against fishing

# Sanctions for breaches of early disclosure duties



- Courts have been critical of failure to provide essential documents at an early stage and penalised CAs with indemnity 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

# Green Paper proposed greater transparency



## Green Paper promised

- Notices covering the procurement cycle planning, tender, award, contract, implementation
- A “tell us once” registration system for suppliers
- A digital platform to display all this information publicly

***“embedding transparency by default throughout the commercial lifecycle from planning through to procurement, contract award, performance and completion.”***

# Procurement Bill 1



- CAN and assessment summary– information about the CA assessment of the tender and if different the MAT [S47]
- Procurement termination notices [S52]
- Transparency notices for direct awards [S42]
- Contract Change notices where change increases or decreases by 10% (good or services) 15% (works) [S70]
- All roads lead to Regulation 88

# Procurement Bill 2 [S88] Regulations



- (1) An appropriate authority may by regulations make provision about—
  - (a) the form and content of notices, documents or other information to be published or provided under this Act;
  - (b) how such notices or documents are, or information is, to be published, provided or revised
- (2) Regulations under subsection (1) may for example—
  - (a) require a notice or document to contain specified information;
  - (b) require publication on a specified online system.
- (3) Regulations under subsection (1) may—
  - (a) make different provision for different kinds of notice, document or information;
  - (b) make different provision for the same kind of notice, document or information for different purposes.

- In carrying out a procurement a CA must have regard to the importance of ...sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions [S11]
- Information about a procurement – a **CA must keep records of any communication between the authority and a supplier that is made for the purposes of, or in connection with, a procurement** [90]

# Withholding information



- Exemptions from publishing/disclosing:
  - 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 [S85]



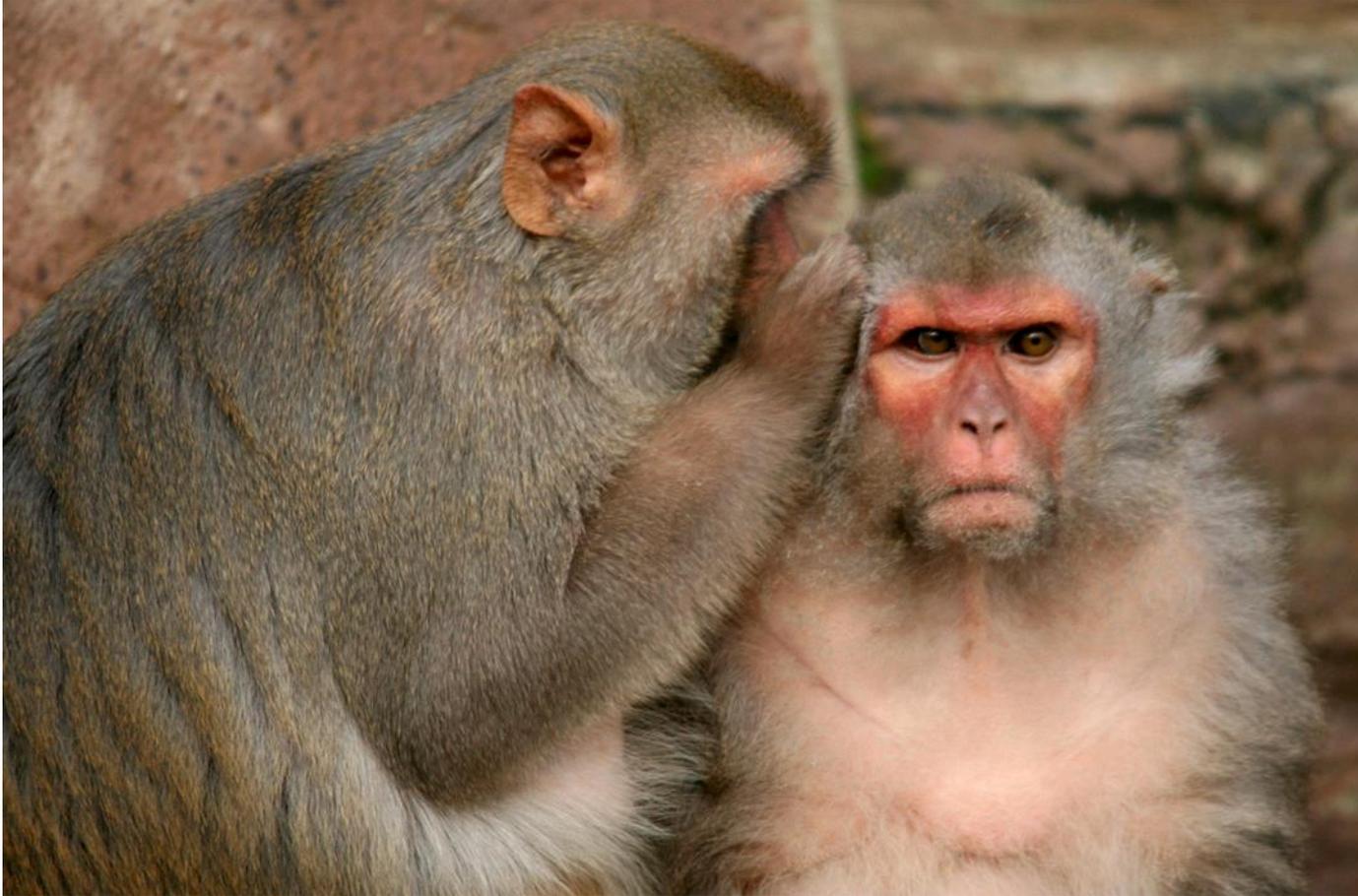
# Risks of transparency/ full disclosure?



- Disclosure of bidders' confidential information (*Marine Specialised Technology v MOD (2019)*)
- Making it impossible to level the playing field
- Making all future bids (almost) indistinguishable
- Chilling effect on bidding innovation

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

# Confidentiality Rings



## ➤ Problems

- Difficult to agree terms and client membership
- Complex – single tier, two tier, multiple rings
- Slow and expensive 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)

- *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



- Template confidentiality ring agreements/orders (this is may be happening)
- Careful choice of client representatives/experts
- Adequate and proportionate undertakings
- Court guidance with standard templates for rings, terms and duration of undertakings

# Striking the balance



- Require bidders to indicate when bidding what is confidential in their bid by reference to [S87] and warn that blanket claims will not be effective (save in cases of national security etc)
- Disclose where permitted, reliance upon exemptions where not
- Early clear and straightforward confidentiality rings

# Thank you for listening

