

11KBW

Handling Information Requests in a Procurement Exercise

Akhlaq Choudhury QC

November 2016

Information Requests- Overview

- **Obligations to disclose**
- **FOIA obligations**
- **Exemptions**
- **Conclusions**

Why is information requested?

Losing bidders want to know:

- Why they lost and whether they can claim
- What they can do about it for next time
- Competitor's commercial information

Members of the public may want to know:

- Why an 'undesirable' EO won;
- Whether the selection process was fair;
- Whether the exercise represents good value for money

Obligations to disclose

Bidders already entitled to a good deal of information:

- Reg 50, PCR 2015 – Contract Award Notice. This must include value /scores of highest and lowest tenders.
- Reg 55 – Must provide **on request and within 15 days**
 - Reasons for rejection; and
 - “characteristics and relative advantages of the tender selected as well as the name of the successful tenderer”. Includes **price**.

Obligations to disclose (2)

This does not mean that the CA is required to provide:

- **The details of how each tender was evaluated;**
- **A detailed comparative analysis of the winning and losing bids; or**
- **A full copy of the evaluation report.**

European Dynamics Luxembourg SA v EUIPO Case T-556/11 at [244]

Obligations to disclose (3)

However, under both Reg 50 and 55, **certain information may be withheld if release:**

- (a) Would impede law enforcement or would be contrary to the public interest;
- (b) Would prejudice the legitimate commercial interests of a particular EO; or
- (c) Might prejudice fair competition between EOs

Obligations to disclose (4)

Note also **Reg 21 and Confidentiality:**

- (1) A contracting authority **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.

Obligations to disclose (5)

But Reg 21(1) is without prejudice to:

- other parts of PCR including Regs 50 and 55;
- **FOIA**; and
- any other disclosure requirements.

Specific Disclosure

CPR 31.12

Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 (TCC):

- Potential challenger in a “uniquely difficult position”
- Reasons for failure within peculiar knowledge of CA;
- Generally, challenger ought to be provided promptly with the essential information and documentation re evaluation process

Transparency

Reg 84: Written Procurement Reports

- These must include information as to matters set out in Reg 84(1)
- If Contract Award Notice contains this information, CA may refer to that;
- Must be provided to Commission or Cabinet Office on request;
- **Sufficient documentation to justify decisions taken at all stages of the procurement must be kept for 3 years.**

Transparency (2)

Local Government Transparency Code 2015

- Mandatory to publish certain information on a **quarterly** basis. This includes;
 - Expenditure > £500
 - **Procurement** and contracts
- Procurement information to be published includes:
 - Details of every ITT >£5k
 - Details of every contract, FA > £5k
- Recommended that LAs go further than minimum requirements for procurement.

Transparency (3)

Consultation on changes to the LGTC 2015

- Closed on 8 July 2016
- Proposes:
 - National Reporting Mechanism
 - Publishing to a **central repository** to enable interrogation of data for the purposes of **detecting fraud, bribery and corruption**.
 - Prescribed format for publication to **enhance comparability**
- **Response to consultation is awaited.**

FOIA 2000

What role can FOIA play?

- Not fast – 20 working days. FOIA request unlikely to assist in meeting time limits if request made after contract award notice;
- However, it is cheaper;
- And requests can extend beyond information relevant to a claim;
- Transparency, accountability.

FOIA – Right of Access

s.1 – General right of access to information held by public authorities.

Right is subject to:

- **Exemptions – Absolute and qualified**
 - Qualified exemption applies where public interest in maintaining the exemption outweighs the public interest in disclosure
 - E.g. Confidentiality (s.41), Commercial Interests (s.43).

FOIA – Exemptions

Exemption is also available where:

- **The cost of compliance would exceed the appropriate limit (s.12).**
- Can take account of aggregated costs where requests “relate to any extent to the same or similar information”:
IPCC v ICO (EA/2011/0222)

FOIA – Exemptions (2)

No obligation to disclose where:

- The requests are **vexatious (s.14)**
 - ***Dransfield* [2015] EWCA Civ 454 – Vexatious request** is one where there is:
“No reasonable foundation for thinking that the information sought would be of value to the requester or to the public or to any section of the public”: per Arden LJ at [68]
 - See also ***Colin Parker v IC* [2016] UKUT 0427 (AAC)**

FOIA – Exemptions (3)

No obligation to disclose where:

- Information requested is **reasonably accessible by other means** (s.21).E.g:
 - Award Notice;
 - Written Procurement Report;
 - Publication pursuant to quarterly reports to comply with Transparency Code;
 - Audit.

FOIA – Exemptions (4)

Other exemptions to bear in mind:

- **s.39. Information disclosable under EIR.** What is environmental information? *DECC v Henney & ICO* [2015] UKUT 672 (AAC)
- **s.40. Request is for Personal Data** and disclosure would contravene DPPs or s.10 right to prevent processing likely to cause damage or distress
 - E.g. Identities of evaluating team, individual contacts in the EO.

FOIA – Confidentiality

Reg 21, PCR (Confidentiality) is subject to FOIA.

S.41, FOIA: Information is exempt if:

- Obtained from another; and
- Disclosure would give rise to an actionable breach of confidence.

Exemption is absolute.

FOIA – Commercial Interests

s.43. Information is exempt if:

- It is a **trade secret**; or
- Disclosure **would or would be likely to prejudice the commercial interests** of any person (including the public authority holding it)

Qualified Exemption – If engaged then public interest in maintaining the exemption must outweigh public interest in disclosure

- Public interest in former likely to be greater during tender / life of contract.

FOIA – Commercial Interests (2)

Commercial interests which engage s.43(2):

- Prices;
- Tender documentation showing details of bid: *Ballan v IC* (EA/2015/0021)
- Proprietary financial models: e.g. Atos' financial model in *DWP v ICO* (EA/2010/0073)

Likely to prejudice: Does not mean more probable than not. Sufficient if there “**may very well be**” prejudice to commercial interests: *R(Lord) v SSHD* [2003] EWHC (Admin) at [99] to [100] (See also *DWP v ICO* & *Zola* [2016] EWCA Civ 758 at [22] and [27]).

FOIA – Commercial Interests (3)

MoJ v ICO & Palmer (GIA/2548/2015), March 2016

- Contract for transportation to and from prisons.
- Electronic Reverse Auction. Winner won by £12.
- Losing bidder (incumbent) made FOIA request for details of all taxi journeys for 3-month period
- MoJ provided some details but not prices for each journey.
- MoJ relied upon s.43.

FOIA – Commercial Interests (4)

MoJ v ICO & Palmer (GIA/2548/2015), March 2016

- MoJ **claimed prejudice** to commercial interests of winner and MoJ on grounds that:
 - Disclosing prices would reveal winner's unique pricing structure.
 - Contract to be retendered and disclosure would reduce competitiveness of bids.
 - These factors outweighed PI in disclosure.

FOIA – Commercial Interests (5)

MoJ v ICO & Palmer

- **UT rejected** MoJ's arguments:
 - Winner made aware of FOIA obligations;
 - Knowledge of prices is likely to lead to cheaper bids;
 - Electronic auction diminished significance of pricing structure;
 - Pricing structure subject to numerous variables which means prejudice is limited.
 - Loser put his pricing structure in the public domain so there was no competitive advantage.
 - Only two bidders in realistic contention and very small price difference.

FOIA – Commercial Interests (6)

MoJ v ICO & Palmer

- Decision demonstrates **fact-sensitive** nature of analysis;
- Pricing models in other cases are likely to engage s.43(2) even though it did not do so in this case;
 - Unique facts here – e-auction, two bidders, small price difference - which reduced significance of unique pricing structure.

FOIA – Conclusions

s.43 exemption:

- Highly fact-sensitive;
- Public interest in maintaining exemption will diminish over time;
- EO's financial models should usually engage protection, but **evidence** must demonstrate likelihood of prejudice.
- Assertion of prejudice will not suffice;
- CA's analytical tools likely to be disclosable.

FOIA – Conclusions (2)

To counter requests:

- Ensure that EOs clearly designate confidential information;
- Publish as much as you can via notices, reports etc;
- Consider whether arguments as to cost, vexatiousness or accessibility elsewhere may be deployed;
- Coordinate with information department at all stages of exercise.

11KBW

11KBW is renowned for the outstanding quality of its advice, advocacy and client service. Our barristers are experts in Public, Employment and Commercial Law and lead the field in a number of specialist areas.

“barristers of the very highest quality” Legal 500

Please get in touch with our team to discuss what you need:

Joint Senior Clerks – Lucy Barbet & Mark Dann
Director of Business Development – Andrea Kennedy
Director of Finance & Administration – Claire Halas

Tel: +44 (0) 20 7632 8500

Email: clerksteam@11kbw.com

Address: 11 King’s Bench Walk, London EC4Y 7EQ

Web: www.11kbw.com

