

Whitepaper Conference

4 October 2023

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Question:

To minimise the risk of a challenge, what information should you divulge on the winning bid's relative advantages in your feedback, and what should you withhold, supported by caselaw and practical examples?

Answered by:

Elaine McLean, Legal Director, Pinsent Masons LLP

Agenda

- 1 What is the legal basis for disclosure of relative advantages?**
- 2 What factors influence the required level of information?**
- 3 Nature of the obligations re disclosure of relative advantages**
- 4 Restrictions on what we can disclose**

What is the requirement?

- **Reg 85 (2)(d)(ii) PC(S)R** - in the case of an unsuccessful tenderer...

the characteristics and relative advantages of the successful tender

On request:

- **Reg 56(3) PC(S)R** –

in respect of any tenderer that has made an admissible tender the characteristics and relative advantages of the tender selected ...

- **Section 33(4)(b)(ii) PR(S)A**

the characteristics and relative advantages of the successful tender

Why might you seek to withhold?

- Avoids giving a bidder unnecessary information
- Avoids unnecessary administrative burden
- For protection of commercial interests, public interest, fair competition etc

What factors influence the required level of information?

What factors influence the answer?

*The requirement to state reasons must be assessed by reference to the **circumstances of the case**, in particular the **content of the measure in question**, the **nature of the reasons given** and the **interest** which the addressees of the measure or other persons of direct and individual concern to the measure may have in obtaining explanations*

(Case T-652/14 – AF Steelcase, SA v European Intellectual Property Office, para 44)

What factors influence the answer?

- Does the award turn on quality (qualitative) or price (quantitative) criteria?

In this regard Humphreys J confirmed

Where the award turns on quantitative criteria such as price ... it may be sufficient to give the scores alone in relation to such ... criteria

*Where the award turns on **qualitative criteria**, there is a **heightened obligation to give reasons**, particularly where the unsuccessful tenderer offered a more competitive price*

RPS Consulting Engineers Ltd v Kildare County Council [2017] 3 I.R. 61

- What level of discretion is afforded by evaluation criteria?

Greater discretion, greater obligations around disclosure

Patersons of Greenoakhill Limited v South Lanarkshire Council [2014] CSOH 21 and European Dynamics C-629/11

What factors influence the answer?

- Does it matter how close the scores are?

Yes - Smaller difference, greater interest.

(Ricoh Belgium v Council T-691/13, para 63); (European Dynamics Luxembourg and Evropaiki Dynamiki v Parliament (T-164/15) at para 50)

Nature of the obligations re disclosure of relative advantages

Purpose of feedback (inc relative advantages)

The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the person concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory jurisdiction.

Supreme Court *Healthcare at Home v The Common Services Agency*

Content of feedback on relative advantages

What an authority is required to do?

Authorities must provide sufficient feedback to enable direct comparison of technical scores (*European Dynamics v EASA T-297/09 para 150*)

How the preferred tender was advantageous by reference to particular matters (*RPS*)

State some advantages for higher scores (*European Dynamics v European Commission T340/09*).

What an authority is not required to do?

Provide a full copy of the evaluation report (*European Dynamics v European Commission C-629/11*)

Provide copy of winning tender (*European Dynamics v OHIM T-299/11*)

To undertake a detailed comparative analysis of the successful tender and of the unsuccessful tender (*EUIPO v European Dynamics C-376/16, para 57*)

Provide feedback by reference to the award criteria (*Sanofi Aventis Ireland Ltd v HSE*)

What restrictions apply?

What restrictions apply?

- Reg 85 – information may be withheld where release would:
 - (a) *Impede law enforcement or would otherwise be contrary to public interest*
 - (b) *Would prejudice the legitimate commercial interests of a particular economic operator...*
 - (c) *Might prejudice fair competition between economic operators*

Equivalent provisions apply in respect of Reg 56 (see Reg 56(4)) and the PR(S)A (see s34)

What restrictions apply?

- The EU Case law has clarified the following:
 - the protection of business secrets is a general legal principle (*AKZO v EC C-53/85, para 28*) and *SEP v EC Case C-36/92 P, para 37*)
 - the adversarial principle does not mean that an unsuccessful bidder is entitled to unlimited/ absolute access to all information relating to a procurement process as part of debrief (*C-451/06, para 51*)

What restrictions apply?

Where does this leave us?

A balance is to be struck.

Accordingly, if [the right to feedback] is not to be infringed, the contracting authority must not only state the reasons for its decision to treat certain data as confidential but must also communicate in a neutral form – to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis – the essential content of that data to such a tenderer which requests it, and in particular the content of the data concerning the decisive aspects of its decision and of the successful tender

(Klaipėdos Regiono Atlieku Tvarkymo Centras UAB C-927/19, para 123)

Conclusion

- What should you disclose of the relative advantages?
 - Sufficient information set out in a clear and unequivocal manner
 - Backed up by facts and specific references to the content of the winning tender, including the positive attributes
 - Level of required feedback will be influenced by facts and circumstances
 - Where there is qualitative criteria, scores alone will not be sufficient

- What should you withhold of the relative advantages?
 - Withhold specific details which would compromise the confidentiality or intellectual property of the successful tenderer
 - Avoid a blanked non disclosure position
 - Provide neutral information where possible

Final Thoughts

*At para. 91 Humphreys J indicated that a reasonably intelligent person brought in off the street, handed the scores and the tender criteria, and tasked with manufacturing reasons why the loser was inferior to the winner, could have come up with bland and uninformative but plausible statements along the lines furnished in that case. The Court was satisfied that almost by definition the score of the successful tender was higher it is possible to plausibly assert that the successful tenderer provided more detail, relevant or specific information. **Such a bland, anodyne, bureaucratic, uninformative formula provides virtually nothing of value to its recipient, still less to the Court.** In para. 92 it was noted that there were no specific respects, facts or matters identified by reference to which sufficient specific detail was lacking.”*

W J Duggan v Minister for Culture, Heritage and the Gaeltacht 11 Jul 2023

Questions?



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