

The Procurement Process and Freedom of Information – Trowers and Hamlins

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CONFIDENTIALITY OF INFORMATION

REGULATION 43

Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential

In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

Guidance of FOI & Procurement

- http://www.ogc.gov.uk/documents/OGC_FOI_and_Civil_Procurement_guidance.pdf
Note in particular worked examples and guidance.
- http://www.ogc.gov.uk/documents/Model_FOIA_confidentiality_clauses.doc
- http://www.ogc.gov.uk/documents/PPN13_08_Data_Handling.pdf
- [http://www.ogc.gov.uk/documents/PPN_Update_Dec_08\(1\).pdf](http://www.ogc.gov.uk/documents/PPN_Update_Dec_08(1).pdf)

REGULATORY REQUIREMENTS

- PCR Reg. 32(4) – requirement to inform economic operator of “the characteristics and relative advantages of the successful tender”.
- PCR Reg. 32(9) – inform operator of the **reasons** why unsuccessful and inform who won contract.
- PCR Reg. 32(13) – can withhold information for four reasons including prejudice to the legitimate interests of any economic operator and/or prejudice fair competition between economic operators.

Srabag Benelux v Council of the EU
2003 ECR Vol 2 135

- *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 persons 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 (para 55)*

Pre-action disclosure

- CPR 31.16
- Is disclosure desirable to dispose fairly of anticipated proceedings, assist in resolution without proceedings or save costs?
- normally be sufficient for the substantive claim pursued in the proceedings to be properly arguable and to have a real prospect of success.
- Need for speedy action – unlikely to be time?

DISCLOSURE IN PROCEEDINGS

- VAREC V ETAT BELGE C-450/06, 2008 2 CMLR 687.

Disclosure not automatic, Court will balance right to a fair trial against right to disclosure.

“Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them”

DISCLOSURE IN PROCEEDINGS

- *The Court of Justice has, moreover, acknowledged that the protection of business secrets is a general principle*
- *Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators.*
- Confidentiality rings?

DISCLOSURE IN PROCEEDINGS

- *LETTINGS INTERNATIONAL LTD V LB NEWHAM* [2008] EWHC 1583, para 19. Successful tenders were ordered to be disclosed in an interlocutory application subject to redaction/restrictions upon further disclosure. Hearing in camera when considering evidence in relation to those bids.

USE OF DOCUMENTS

- CPR 31.22: If not read to or by the court or referred to in a public hearing then only for the purpose of proceedings. Even if has been made public can still be restricted.

Freedom of Information – the law now

- Two regimes apply to disclosure of contract or tender details:
 - Freedom of Information Act 2000
 - Environmental Information Regulations 2004

Which regime applies depends on the information concerned.

EIR have wider scope than often understood.

Basic rule of disclosure - FOI

- A public authority, in response to a written request, must:
 - a) confirm whether it holds information; and
 - b) if so, disclose it
- within 20 working days (normally)
- unless an exemption applies and (if applicable) the balance of the public interest favours maintaining the exemption (see below)
- sections 1(1), 2(1) and (2), 10(1), FOIA

Basic rule of disclosure - EIR

- On request to make available information held
 - within 20 working days (normally)
 - unless an exception applies and the balance of the public interest favours maintaining the exception [Reg 5, EIR]
- NB. No requirement for written request

Scope of EIR disclosure duty

- Applies to a body or person, under control of Govt dept or public authority, which has:
 - public responsibilities relating to env.
 - exercises functions of public nature relating to env; or
 - provides public services relating to env.
- ie the duty itself can apply to contractors as well as to public authorities [Reg 2(2)]
- NB FOI could be expanded to this scope in future

Public interest test

- Whether, in all the circumstances of the case, the public interest in maintaining the exemption/exception outweighs the public interest in disclosure

What is environmental information?

- Information in any form “on”:
 - (a) state of the elements (eg air, landscape, biological diversity) and their interaction
 - (b) factors affecting/likely to affect, elements (eg waste, emissions)
 - (c) measures affecting/likely to affect (or designed to protect) elements and factors (eg policies, plans, activities)

Environmental information (cont)

(d) reports on implementation of environmental legislation

- (e) cost/benefit or other economic analyses
- (f) state of human health & safety (inc. food contamination), conditions of human life, cultural sites and built structures (as affected by elements, factors or measures)

EIR: remoteness test

- Remoteness test – *Glawischnig* case, 2003, ECJ
- Whether or not the information requested has a sufficient, or a direct, connection to the environment
- Examples of contracts covered (whole or part) by EIR: regeneration, construction, transport, waste disposal, scientific research, energy efficiency, food processing, maintenance of cultural sites, manufacturing processes.

Main exemptions/exceptions

- FOI:
 - Trade secret, prejudice to commercial interests (s 43)
 - Confidentiality (s41)
- EIR
 - Confidentiality of commercial or industrial information (Reg 12(5)(e))

FOI exemptions: section 43

- Information exempt if trade secret – s43(1)
- Or if disclosure likely to prejudice commercial interests of any person (inc PA holding it) – s43(2)
- Duty to confirm or deny does not arise if compliance likely to prejudice commercial interests of any person – s43(3)
- Qualified exemption = PI test

S 43(1) - Trade secret

- No definition. Includes secret know-how or formula. Also names of customers, goods they are known to buy, or pricing information
- Tests: is it generally known? Trading advantage?
- May be linked to confidentiality, but no requirement for disclosure to be actionable, and info needs to have commercial value
- No need to consider harm (but PI test remains)
- Trade secrets likely also to be covered by s43(2)

S 43(2) – commercial interests

Commercial interest = relates to ability to compete in commercial activity (ie buying/selling of G&S)

- Includes profit-making, but also charging (eg by PA) to cover costs
- But does not cover prejudice to financial ints

Is there prejudice?

- Depends on circumstances (eg price will be sensitive during tendering but “less likely” once contract awarded).
- Other factors: Is there a competitive env?
- Real risk of damage to reputation or confidence?
- Need to identify whose comm. interests
- And what is comm. sensitive (eg not price itself, but how it is achieved for a given quality)

Likelihood of prejudice: John Connor case (IT)

- EA/2005/0005, 25th January 2006
- Commercial sensitivity of art contract.
- “Likely to prejudice” = real and significant risk, significant and weighty chance, or where there “may very well be” prejudice. But not more probable than not.
- Re-affirmed in *Dept of Health* case, Nov 2008 (below)

Derry CC case (s 43)

- EA/2006/0014, 11th Dec 2006, (IT)
- Airport agreement re landing charges, promotion
- No evidence from airline, so IT unwilling to speculate on commercial prejudice to it
- Now established that prejudice to third party contractor very unlikely to be upheld without evidence of their view.

Dept of Health case

- *Dept of Health v IC*, EA/2008/0018, 18th Nov 08
- Not reasonable in 2003 to have expected entirety of contract lasting into FOI period to remain confidential
- Partial disclosure ordered of contract for electronic recruitment website for NHS
- IT relied on *OGC (Civil Procurement) Policy and Guidance, version 1.1* (now version 2.0)

Confidentiality: s 41

- Information is exempt if
 - obtained by PA from any other person &
 - disclosure would otherwise constitute an actionable breach of confidence

Derry CC case (s 41)

- S 41(1), FOIA requires info to be obtained by the PA from another person (on terms making disclosure actionable)
- Exemption does not cover terms generated/agreed between parties
- Whole of any contract with a PA is disclosable:
 - unless another exemption applies (eg s 43); or
 - save for technical information imparted by one party to the other

Confidentiality: lessons

- Confidentiality clauses: may relate to confidential information, or helpfully identify where comm prejudice would occur, or outline redress
- But cannot use blanket clauses
- Information intended to remain confidential must have been provided by the third party, or fall within s 43 prejudice to commercial interests
- Parties cannot contract out of FOIA
- Lord Chancellor's s 45 Code

EIR: Commercial or industrial information

- Disclosure would adversely affect confidentiality of commercial or industrial information, where provided by law to protect a legitimate economic interest – Reg 12(5)(e).
- Covered by Common Law or statutory confidentiality (*Brighton* case)
- Subject to Public interest
- Further exception where info volunteered – Reg 12(5)(f)

Brighton and Hove case

- *B&HCC*, FER0073984, 14th Nov 2008 (IC)
- First case on local waste contracts.
- Proprietary, technical and financial information
- Full disclosure rejected.
- IC accepted that agreement was that info remain confidential to both parties (cf s41, FOIA).
- FOI rule in *Derry* did not apply to Reg 12(5)(e)

Brighton case (cont)

- Clear evidence required in case of each clause that exception applied, and as to PI balance
- Inherent expectation of confidentiality in tenders
- Obligation of confidence may be inferred (under EIR) from a confidentiality clause

Brighton case (cont)

- *Excepted:*
- A) Systems/technical info (not emissions & by-products)
- B) Costs and profits of contractor
- C) Clawback of costs from sale of by-products
- D) Quality management manual

Brighton case (cont)

- *To be disclosed:*
- A) Info on pricing (not specific costs or profits of contractor)
- B) Operational info (other than names of preferred sub-contractors)
- C) Info about emissions (or likely levels)
- D) Planning and development info (other than systems and technical info – above)

Conclusion

- Contractors need to be aware of FOI & EIR
- Consider what info PA needs to hold
- S 43: demonstrate prejudice (NB role of third party), has to be real and significant risk, rely on OGC guidance at successive contract stages
- S 41: apply only to info from 3P; use conf. clauses to show what is confidential, or comm. sensitive.
- EIR: *Brighton* case (EIR) has shown greater sensitivity to expectation of confidentiality